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COMMON PLEAS

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**CASES ARGUED and DETERMINED in the COURT
of COMMON PLEAS. By JAMES MANNING,
Serjeant at Law, and T. C. GRANGER, of the
Inner Temple, Esquire, Barrister at Law. Vol. IV.
From Easter Term, 1842, to Michaelmas Term,
1842, both inclusive. London, 1844.**

[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS,
IN EASTER TERM, IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were, Tindal C. J., Colt-
man J., Erskine J., Cresswell J.

PRICE *v.* BIRCH. April 18, 1842.

[S. C. 1 D. N. S. 720; 11 L. J. C. P. 193.]

By an indenture between the plaintiff and defendant, it was covenanted that the defendant should obtain a licence from the lord of the manor, and should grant a lease to the plaintiff, and that such lease should contain a covenant that the defendant would, during the term, repair the premises demised, and that till such licence was obtained and such lease granted, the plaintiff should hold the premises as tenant from year to year, subject to the terms and conditions thereinbefore specified.—In an action of covenant upon the indenture, the plaintiff, in his declaration, set out the covenant that the defendant should obtain the licence and grant the lease, and the proposed covenant to repair, and then alleged that the parties further covenanted that till the licence should be obtained and the lease granted, the plaintiff should be considered as tenant from year to year, &c., and that whilst the plaintiff should be possessed of the premises as tenant from year to year under the provisions of the indenture, the defendant should repair the said premises: Held, no variance.

Covenant. The declaration stated that, by a certain indenture, bearing date on, &c., made between the defendant of the one part and the plaintiff [2] of the other part, &c., the defendant did covenant, &c. that he, the defendant, would (inter alia) procure from the lord or lady of the manor of Tettenhall Regis, a licence to demise to the plaintiff a certain messuage, &c. for the term of ten years, and would make a good and sufficient lease unto the plaintiff of the said messuage, &c. for ten years; and it was thereby covenanted that the intended lease should contain (inter alia) a covenant on the part of the defendant that the defendant, his heirs, &c., during the term so to be granted, should, at his or their own expense, repair, uphold, support and keep in repair the external parts of the outer doors and window frames, and the tiles, slates, &c., and all other the external parts of the said messuage in good and tenantable order and condition, and would paint the outside wood, stone and iron work once in every third year of the said term; and each of the parties did further covenant that in the mean time and until the said licence should be obtained and the said lease granted, the plaintiff should be considered as tenant of the said premises from year to year, at the rent and subject to the terms and conditions thereinbefore specified; and that, whilst the plaintiff, his executors, &c., should be possessed of the

premises as tenant thereof from year to year under the provisions of the indenture, the defendant, his heirs, &c., would, at his and their own expense, repair, uphold, support and keep in repair the external parts of the outer doors and window-frames, and the tiles, slates, &c., and all other the external parts of the said messuage, &c. in good and tenant-like order and condition, and would paint the outside wood, stone and iron work of the premises once in every third year; (prout patet). Averment: that, by virtue of the indenture,—the licence not being obtained and the lease not being granted,—the plaintiff entered and became possessed as tenant from year to year, at the rent and subject to the [3] terms and conditions aforesaid, and continued so possessed, &c. and had performed all covenants, &c. Breach: that the defendant did not repair, &c.

Plea: non est factum.

At the trial, before Patteson J., at the last Staffordshire assizes, the indenture in question was given in evidence. It contained covenants, as stated in the declaration, that the defendant would obtain the licence and make the lease, and that such lease should contain (inter alia) the covenant by the defendant to repair, and concluded as follows:—

“And each of the said parties hereto doth hereby further covenant with the other of them, that in the mean time and until the said licence shall be obtained and the said lease granted, the said Richard Hope Price (the plaintiff), his executors and administrators, shall be, and be considered as, tenant of the said premises from year to year, at the rent, and subject to the terms and conditions, hereinbefore specified. In witness,” &c.

The counsel for the defendant applied for a nonsuit upon the ground of a variance between the declaration and the deed produced, no express covenant being contained in the latter that the defendant should execute the repairs during the tenancy from year to year, as alleged in the declaration.

The learned judge thought there was no variance, and refused to nonsuit the plaintiff; but gave the defendant leave to move to enter a nonsuit in case the court should think that there was a variance, and should refuse to amend, which, by agreement, they were to have the power to do. The plaintiff having obtained a verdict,

Channell Serjt. now moved to enter a nonsuit, pursuant to the leave reserved; and renewed the objection taken at the trial. It may be admitted that all the [4] covenants proposed to be inserted in the intended lease must, during the tenancy from year to year, be considered as amounting to agreements; but the objection is, that the declaration alleges a covenant to be contained in the deed, which, in fact, is not to be found there. [Tindal C. J. It would appear that the maxim—*verba relata inesse videntur* (a)—would apply in this case.] There is no doubt that a covenant may be stated according to its legal effect (b); but here it is professed to be set out in express words, and also according to its legal effect, and it is not competent to a party to take both courses. The indenture is set out in terms, and then the plaintiff has superadded certain terms which are not in the deed.

TINDAL C. J. The deed contains a covenant that until a lease be granted, the plaintiff shall hold the premises on the same terms as thereinbefore specified, that is, on the terms stated in the proposed lease; the plaintiff then sets out those terms. I think this is clearly no variance.

The other judges concurred.

Rule refused.

[5] GOLDSMITH v. MARTIN. April 19, 1842.

[S. C. 4 Scott, N. R. 620; 11 L. J. C. P. 201.]

A. entered his horse for a race and paid the subscription money; the horse won, but it turned out that by the rules of the race he was not entitled to run. Notice of

(a) For the application of this maxim, see Co. Litt. 9 a., 1 Tho. Co. Litt. 500, 10 Vin. Abr. 235, tit. Estate (K. 2), pl. 5.

(b) Vide Com. Dig. tit. Pleader (C. 37); 5 Mann. & Ryl. 451; ante, vol. i. p. 281; post, 9, n. (b).

the objection had been given to A. before the race: Held, that he was not entitled to recover his subscription money.

Assumpsit, for money had and received, and upon an account stated. Plea: non assumpsit.

The particulars of demand were as follows:—

"To the account of the hack stakes at the Cambridge Coronation Races, after deducting the stake of second horse	£14 0
To the account of the hurdle race sweepstakes at the Cambridge Coronation Races, deducting the stake of the second horse	30 0
To cash received by defendant of plaintiff,—entrance money to said races, and fees obtained as clerk of the course	3 10"

At the trial before Tindal C. J., at the last Cambridgeshire assizes, it was proved that the defendant was clerk of the course and stakeholder at the Cambridge "Coronation Races," which took place on the 30th June 1841. There were two sweepstakes, in respect of which the action was brought, one of which was called the hack stakes, and the other the hurdle stakes. By the printed rules of the races, thorough-bred horses in the hack stakes were to carry seven pounds extra, and in the hurdle stakes they were not to run at all. The plaintiff entered his horse, Cavallo, as "not a thorough-bred" horse, for both stakes, and paid the defendant as clerk of the course, 1l. entrance money for the hack stakes, 2l. for the hurdle stakes, and 10s. fee. An objection to Cavallo, as a thorough-bred horse, was delivered to the plaintiff before the race. The horse, however ran, and won both races. The question had been referred to the stewards; who decided that Cavallo was a thorough-bred horse, [6] and, therefore, that the plaintiff was not entitled to either of the stakes.

On behalf of the plaintiff it was contended, that at any rate he was entitled to recover the 3l. 10s. entrance money; but the Lord Chief Justice, on the authority of *Marryat v. Broderick* (Murph. & Hurlst. 96, S. C. 2 M. & W. 369), directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for that amount.

Channell Serjt. now moved accordingly, and contended that, either there was no satisfactory proof of the objection having been properly made before the race, or the entrance money had been paid without consideration; and that, either way, the plaintiff was entitled to recover the 3l. 10s.

TINDAL C. J. This is not like the case of an insurance; where a party paying the premium may recover it back before the risk has commenced (*b*). It is more like the case of money paid by a party in his own wrong. It is clear from the evidence in the cause, that the entrance money was to form part of the stakes.

COLTMAN J. Suppose after the money had been paid, that the horse had not run, or had died,—would the plaintiff have been entitled to recover the money back?

ERSKINE J. If we were to hold that the plaintiff had a right to recover his subscription money, it would be offering a premium to a man to enter a horse under a wrong description. If no objection were taken, he might win the race; and if an objection were taken, he would have his money back.

[7] CRESSWELL J. It is like the case of a joint fund. Each person contributes his share, and takes his chance of winning.

Rule refused (*a*).

BLAKE v. BEAUMONT. April 18, 1842.

[S. C. 4 Scott, N. R. 617; 1 D. N. S. 697; 11 L. J. C. P. 222.]

A. the drawee of a bill, accepts it payable at a particular place, without stating it to be payable there only or not elsewhere: Held: that such bill may, in an action

(*b*) Vide dict. per Lord Mansfield C. J. in *Tyrie v. Fletcher*, Cowp. 668; *Penson v. Lee*, 2 B. & P. 330.

(*a*) That the action, supposing any action to be maintainable, was properly brought against the stakeholder, see *Ker v. Osborne*, 9 East, 378; *Robson v. Hall*, Peake, N. P. C. 127, 128; *Munk v. Clarke*, 2 N. C. 299, 2 Scott, 475.

against A., be declared upon as made payable at that place, although since the 1 & 2 G. 4, c. 78, such an acceptance amounts to a general acceptance (post, 10 (c)).

Assumpsit, by the indorsee against the acceptor of a bill of exchange. The second count, (upon another bill,) stated that the drawers made their bill directed to the defendant, &c., "and the defendant then accepted the last-mentioned bill, payable at a certain place in London, to wit, at the banking house of W. D. and Co. London;" averment of presentment to the defendant at W. D. and Co. and non-payment. The third count was upon another bill, accepted in a similar manner to that of the bill mentioned in the second count.

Pleas: to the first count, first, that the alleged drawers did not draw, and secondly, that the defendant did not accept; to the second and third counts, non acceptavit (a)¹ only; upon all which pleas issue was joined.

At the trial before Gurney B. at the last assizes for the county of Surrey, the plaintiff gave in evidence bills accepted by the defendant, which corresponded literally with those set out in the second and third counts, and the jury found a verdict in his favour; leave being [8] however reserved to move to enter the verdict for the defendant on the issues upon the last two pleas.

Shee Serjt. now moved for a rule accordingly, upon the ground of variance. The declaration, though agreeing literally with the bills produced, is framed as upon an acceptance at a particular place. By the 1 & 2 G. 4, c. 78, s. 1, it is enacted, "that the acceptance of a bill of exchange payable at the house of a banker or other place, without further expression in the acceptance, shall be deemed to be, to all intents and purposes, a general acceptance; but that if the acceptor in his acceptance express that he accepted the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed to be a qualified acceptance." The acceptance, therefore, in this case not purporting that the bill was payable at the banking house of Messrs. W. D. and Co. only, was in law a general acceptance and should have been so declared upon. [Tindal C. J. No doubt in point of law this is a general acceptance, but the question is, whether there is any variance. At most the statement of the place where the bills were made payable was unnecessary, and the rule, utile per inutile non vitiatur, would seem to apply.] The declaration states that the bills "were payable at a certain place," but in law they were not so, for they were payable any where. The plaintiff has treated the bills in his declaration as though they were payable only at that particular place; for he has averred a presentment there and nowhere else. In *Exon v. Russell* (a)², which was an action by the indorsee against the maker of a promissory note, the plaintiff declared that the defendant made the note payable at the house of Messrs. B. and Co. London. Upon production of the note at the trial, it appeared that the address at [9] the house of Messrs. B. and Co. was written at the foot of the note. This was held to be a variance. Lord Ellenborough C. J. in giving judgment, said "The plaintiff had taken upon himself to aver that such is the import of the note; he has therefore not truly stated the note; for he has stated that it is made payable at a particular place. Therefore he ought to have been nonsuited, upon the ground that he has misdescribed the note as payable at a particular place, which it is not; the address being no part of the contract, but a memorandum." That case was decided before the passing of the 1 & 2 G. 4, c. 78; but the principle is applicable to the present case; for that act declares that such an acceptance as the present shall be considered as a general acceptance. The statement of the place where the bill was made payable must, therefore, be considered only as a memorandum and not as any part of the contract. [Erskine J. These bills are so far payable at the particular place mentioned, that in an action against the drawer, presentment to the acceptor at that place must have been proved; *Gibb v. Mather* (a)³.

(a)¹ Vide 1 Mann. & Ryl. 395 (a), 398 (a), 399 (d).

(a)² 4 M. & S. 505. See also *Williams v. Waring*, 5 Mann. & Ryl. 9. S. C. 10 B. & C. 2.

(a)³ 8 Bingh. 214. S. C. 2 Moo. & Sc. 387; 2 Cro. & Jerv. 254. And see *Saunderson v. Bowes*, 14 East, 500; *Roche v. Campbell*, 3 Campb. 247; Bayley on Bills, 220; *Lyon v. Holt*, 5 M. & W. 250. In *Higgins v. Nichols*, 7 Dowl. P. C. 551, the argument and judgment appear to have proceeded upon the assumption that the 1 & 2 G. 4, c. 78, applied to all actions upon acceptances, even those against drawers and indorsers.

Tindal C. J. A party may either follow the words of a contract literally or state its legal effect.] Here, the statement in the declaration is different from the legal effect of the contract. In *Chitty on Pleading* (b)¹, it is laid down as a principle, "that a contract or written instrument should [10] be stated according to its legal effect," and the author adds, "indeed in some cases it has been held proper, and indeed absolutely necessary to depart from the terms of the contract; and a party has been defeated on the ground of variance where he has used the precise words of the contract, but mis-stated its legal operation." Thus if a deed be by the words *dedi et concessi*, &c., yet if it operate as a bargain and sale, it ought to be so pleaded (a). *Barker v. Lade* (b)² is to the same purport. The acceptance, therefore, ought to have been pleaded according to its legal effect, that is, as a general acceptance.

TINDAL C. J. I think the effect of the statute is to relieve a plaintiff from the difficulty under which he previously laboured, and to enable him to treat an acceptance as general, which, before the act, was a particular one. But although in this case there was, in law, a general acceptance—that is, an engagement to pay any where—such general acceptance would include, amongst others, the particular place mentioned in the declaration; and it does not lie in the defendant's mouth to say that the bill was not payable at that place, when he has himself referred the parties there for payment.

The rest of the court concurred.

Rule refused (c).

[11] BELL, Public Officer, &c., v. GARDINER. April 21, 1842.

[S. C. 4 Scott, N. R. 621; 1 D. N. S. 683; 11 L. J. C. P. 195. Applied, *Townsend v. Crowley*, 1860, 8 C. B. (N. S.) 495. Approved, *Brownlie v. Campbell*, 1880, 5 App. Cas. 952.]

A negotiable security given by a party in satisfaction of a liability from which he was discharged in law,—in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the means of knowing those facts.—Therefore, where a bill of exchange indorsed by A. for the accommodation of the drawer, was afterwards altered in a material point, with the consent of the drawer, and when the bill was at maturity, B., the then holder, made a demand upon A., who, ignorant of the alteration, though he had ample means of knowing

(b)¹ Vol. i. p. 305, 6th ed. See also *Stephen on Pleading*, p. 417, 4th ed. In *Wicks v. Gordon*, 1 Chitt. Rep. 67, Holroyd J. says, "The most correct way of pleading is, to plead the words according to their legal effect, instead of adopting the words used, which is not always safe." And see *Com. Dig. Pleader* (C. 37); *Wms. Saund.* vol. i. p. 235 b. (1); vol. ii. p. 97 b. (2); *Howell v. Richards*, 11 East, 633; *Tempest v. Rawling*, 13 East, 18, 20; *Latham v. Ruiley*, 2 B. & C. 20; 3 D. & R. 211; *Saunderson v. Griffiths*, 5 B. & C. 909; 8 D. & R. 643; 5 Mann. & Ryl. 451; *Bac. Abr. Pleas & Pleading* (L. 7), vol. v. 421, 6th & 7th ed.; ante, vol. i. p. 305, 306 (a). For the reason, vide ante, vol. i. p. 281 (d).

(a) Vide *Taylor v. Vale*, Cro. Eliz. 166.

(b)² 4 Mod. 149. S. C. 3 Lev. 291. See also 2 *Wms. Saund.* 96 b. (1).

(c) See *Selby v. Eden*, 3 Bingh. 611; *Fayle v. Bird*, 6 B. & C. 531. The objection taken in the principal case appears to have been,—not that [11] the plaintiff had shewn an insufficient presentment, but that having alleged a conditional and limited contract, he had proved an unconditional and general contract. If the defendant had traversed the presentment stated in the declaration, such traverse would have been material in respect of the contract declared upon, which would have been admitted by the traverse to be the true contract; but it would, for the reason pointed out in the judgment, have been immaterial with reference to the real contract between the parties, according to the provisions of the 1 & 2 G. 4, c. 78. In *Alsop v. Claydon* the declaration was upon a promise to pay the plaintiff 5l. when the defendant should be required. The jury found that the defendant promised to pay the plaintiff 5l., but said nothing as to the request; judgment quod querens nihil capiat per breve. Sir F. Moore, 406. S. P. *Peeter v. Carter*, 2 Roll. Abr. 719, 21 Vin. Abr. 463; and see *Barker v. Rowle*, ib.; *Küchenman v. Evèque de Osorie in Ireland*, 2 Roll. Abr. 720, 21 Vin. 464.

it, gave B. a promissory note for the amount of the bill and expenses: Held, that it was a good defence to the action on the note by B., that at the time A. gave it, he was not, in fact, aware of the alteration in the bill.

Assumpsit, by one of the public officers of a co-partnership, styled "The National Provincial Bank of England," upon a promissory note made by the defendant in favour of the bank, on the 22d August 1840, for 203l. 5s. 6d., at two months after date.

Second plea: that before the making of the note, to wit, on the 11th April 1840, one William Martin drew his bill of exchange directed to one Samuel Shirley, and thereby requested Shirley three months after the date thereof, to pay to the order of Martin 200l.; that Martin then delivered the bill to Shirley, and requested Shirley to accept the same for Martin's accommodation; [12] that Shirley then accepted the bill for the accommodation of Martin, and then redelivered the same, so accepted, to Martin; that Martin indorsed the bill with his own name, and then delivered the same to the defendant, and then requested the defendant to indorse the bill for the accommodation of him, Martin; that the defendant then, in compliance with such request, indorsed the bill for the accommodation of Martin, and then redelivered the same to Martin; that he, the defendant, so indorsed the bill for the accommodation of Martin merely, and without having received any consideration or value for such indorsement, and that he had not since received any consideration or value for the same; that at the time he, defendant, so indorsed the bill, the same bore a certain date, to wit, the 11th of April 1840, and that after the indorsement by the defendant, and after the bill had been redelivered by defendant to Martin as aforesaid, and before the same was paid and delivered to the said copartnership as hereinafter mentioned, to wit, on the day and year last aforesaid, the date of the bill was altered to a certain other date, to wit, the 21st April 1840, and that such alteration was made without the knowledge or consent of the defendant, and that the defendant was and remained ignorant of such alteration having been made from thence until after the making by him, the defendant, of the said promissory note, and until after the delivery of the same to the said copartnership, as in the said declaration mentioned, to wit, until and upon the 1st day of September 1840; that after the making of the alteration in the date of the bill as aforesaid, to wit, on the 21st of April in the year last aforesaid, the said bill with the date thereof so altered was paid and delivered to the said co-partnership, who held the same from thence until afterwards, to wit, on the 22d of August in the [13] year last aforesaid; that on the day and year last aforesaid the said co-partnership, applied to the defendant for payment to them of the amount of the bill; and thereupon the defendant believing that the bill was in the same state in which it had been when he, the defendant, so indorsed it as aforesaid, and being ignorant of the said alteration in the date thereof, and never having assented or agreed thereto, agreed with the said copartnership to make and deliver to them the said promissory note in consideration of his said supposed liability to the said co-partnership upon the bill, and for no other consideration whatever; that the defendant, in pursuance of such agreement, did make the said promissory note, and did deliver the same to the said co-partnership as in the said declaration is mentioned, in consideration of his supposed liability upon the bill, and for no other consideration whatsoever. And so the defendant saith that he made the said promissory note, and delivered the same to the said co-partnership in the mistaken belief that he was liable to pay to them the amount of the said bill; and that he, the defendant, never received any consideration or value for making the said promissory note, or for delivering the same to the said co-partnership, or for the payment thereof. Verification.

Replication: *de injuriâ* (a).

At the trial before Tindal C. J., at Guildhall, at the sittings after last Trinity term, it was proved, on the part of the defendant, that he had indorsed the bill for the accommodation of Martin, and that the bill then bore date the 11th of April; that the date was afterwards altered to the 21st, with Martin's consent, but without the privity of either the acceptor or the defendant; that the defendant had made a memorandum [14] of the time when the bill would fall due, viz. on the 14th July; that notice of the dishonour of the bill, stating it to be due on the 24th of July, was given to the defendant, and the amount was demanded from him; that on two

(a) Vide ante, vol. i. pp. 235, 720 (b); ii. 171, 298, 348.

occasions after this notice the defendant saw the bill, and that he gave the note, on which the action was brought, for the amount of the bill and the expenses.

The Lord Chief Justice left it to the jury to say whether, at the time of giving the note, the defendant had any knowledge of the alteration in the bill; and that the question was not, whether he had the means of knowledge, of which there could be no doubt. The jury having found that the defendant had no knowledge of the alteration when he gave the note, the verdict was entered in his favour on the issue on the second plea.

Channell Serjt., in last Michaelmas term, obtained a rule nisi for judgment for the plaintiff non obstante veredicto, or for a new trial, on the ground, either that the plea was no answer to the action, inasmuch as it should have also alleged that the defendant, at the time he gave the note, had no means of knowing that the bill had been altered; or that, if the plea might be considered as also negating the means of knowledge, then the direction of the Lord Chief Justice was incorrect. He put the case as standing upon the same ground as if the defendant had paid the note, and was seeking to recover back the amount in an action for money had and received; *Bilbie v. Lumley* (2 East, 469), *Milnes v. Duncan* (6 B. & C. 671, 9 D. & R. 731).

Talfourd Serjt. (with whom was Gray) now shewed cause. The question is, whether the note was given by the defendant under a mistake as to the real facts; for, if so, although that mistake may have arisen from his own [15] negligence, payment cannot be enforced. This case has been put by the other side on the same footing as an action for money had and received. It may be so considered; and none of the decided authorities, from *Bilbie v. Lumley* downwards, militate against the proposition contended for on the part of the defendant. But the question may be considered as set at rest by the recent case of *Kelly v. Solari* (9 M. & W. 54), where it was held, that if a party pay money under a forgetfulness of facts at the time of payment, he is entitled to recover it back, though he had full means of knowledge at the time. That was an action by one of the directors of an insurance company to recover money paid to the defendant on an insurance upon the life of her deceased husband. The policy had, in fact, lapsed just before the death of the party, by non-payment of the last quarterly premium. The actuary of the office had informed two of the directors of this fact, and one of them had written the word "lapsed," in pencil, on the policy. Some months afterwards the defendant, as executrix of her late husband, applied to the office for the payment of the policy in question, and of two other policies. The directors drew a cheque for the amount, having, as they stated at the trial, entirely forgotten that the policy had lapsed. Lord Abinger C. B., before whom the cause was tried, was at that time of opinion, that if the directors had had knowledge, or the means of knowledge, that the policy had lapsed, the plaintiffs were not entitled to recover; and that their subsequently forgetting it would make no difference; and the plaintiff was accordingly nonsuited. A rule nisi was obtained, on the part of the plaintiff, to set aside this nonsuit, and enter a verdict for the plaintiff, or for a new trial; and, after argument, in which the various authorities were brought under the consideration of the court, Lord Abinger C. J. thus expressed himself:—[16] "I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question, whether, in reality, the directors had a knowledge of the facts, and, therefore, that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say, that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say, with precision, what it amounts to; for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of *Bilbie v. Lumley*, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question, that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule, however, is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might, by investigation, learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case,—and the most difficult one,—where the party had once a full

knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them, that if the directors once knew the facts, they must be taken still to know them, and could not recover, by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the [17] mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe they would have brought the action; but as Mr. Platt (a) certainly has a right to have that question submitted to the jury, there must be a new trial." The other barons concurring, the rule was made absolute. That case, therefore, is a decisive authority in favour of the defendant. In *Bilbie v. Lumley* (2 East, 469) it appeared not only that the party who made the payment had the means of knowledge, but also that he had the actual knowledge, of all the material facts. In every case where the plaintiff has been held entitled to recover money paid under a mistake of the facts, the means of knowledge existed, if they had been exercised. Thus, in *Bize v. Dickason* (1 T. R. 285), where a bankrupt had underwritten a policy to a broker acting under a commission del credere, and losses on the policy happened before the bankruptcy and were adjusted by the bankrupt, it was held that, as the broker might have deducted the amount of the loss from the debt which he owed to the estate of the bankrupt, but had, by mistake, paid all that was due, to the assignees, without deducting such money, he might recover it from them, as money had and received to his use (d). In that [18] case there is no doubt that the broker might have known all the circumstances. So, in *Cox v. Prentice* (3 M. & S. 344), where the defendant had received from his principal abroad a bar of silver, and took it to the plaintiffs, who melted it, and sent a piece to an assayer to be assayed at the defendant's expense, and paid a price for the bar to the defendant, as for the number of ounces of silver which, by the assay, it was calculated to contain, which number was afterwards discovered to exceed the true quantity; it was held, that the plaintiffs might, after having offered to return the bar, maintain an action for money had and received against the defendant for the price thus paid to him under a mistake. There, also, the plaintiffs might, by inquiry, have ascertained the exact quantity of the silver before they paid the money over to the defendant. The principle upon which all these cases have been decided, has, in truth, nothing to do with the fact of the party having or not having the means of knowledge. If, indeed, a payment be made voluntarily, either with a full knowledge of the facts, or under a determination not to inquire into them, the money so paid cannot be recovered: but that is not the present case; for it is obvious that this defendant always considered [19] himself liable upon the bill, and was so treated by the other parties, when, in fact, he was discharged from his liability by the alteration

(a) Counsel for the defendant.

(d) *Bize v. Dickason* would seem to be the case of a payment made rather under a mistake of law than of fact. It does not appear from the report that the plaintiff was in ignorance of any of the facts. The rule laid down by Lord Mansfield is very broad.—"Where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." (P. 287.) Gibbs J., in commenting upon this case in his judgment in *Brisbane v. Dacres* (5 Taunt. 154), says, "It is most certain that the only question under the consideration of the court was, whether the right of the broker,—who had a del credere commission,—to make the deduction, ranged itself under the case of *Grove v. Dubois*, 1 T. R. 112, and Mingay declined all argument, and gave up the case. It was taken for granted without argument, that if the plaintiff would have had a right to make the deduction before payment, he might recover back the amount after payment." And afterwards, observing upon the passage from Lord Mansfield's judgment above cited, he adds, "Mistake may be a mistake of law or of fact; but I cannot think Lord Mansfield said 'mistake of law,' for Lord Mansfield had, six years before, in *Lowry v. Bourdieu* (2 Dougl. 467), heard it said, 'money paid in ignorance of the law could not be recovered back,' and had not dissented from the doctrine, and Buller J. sat by him, who had expressly stated the distinction six years before, in *Lowry v. Bourdieu*, and would not have sat by and heard the contrary stated without noticing it."

Upon the point that money paid under a mistake of law, but with knowledge of the facts, cannot be recovered, *Brisbane v. Dacres*, 5 Taunt. 143, is a leading authority. And see post, 26 (a).

that had been made in the bill. The note, therefore, was given by the defendant under a belief that he was discharging a legal liability; there was a mistake in fact, and not in law; consequently the note cannot be enforced against him. [Tindal C. J. It appears that at one time the defendant must have known the bill had been altered; as the memorandum, in his own writing, shews the time when it was originally due.] The fact was not in his mind at the time he gave the note: the jury have so found, and that amounts to want of knowledge on his part.

Independently of the want of knowledge there is, moreover, enough upon the face of the plea to afford a good defence. It is stated, that the note was given without consideration; and that would be sufficient after verdict. In *Easton v. Pratchett* (1 C. M. & R. 798, 4 Tyrwh. 472, affirmed upon a writ of error, 2 C. M. & R. 542), in assumpsit on a bill of exchange by indorsee against indorser, the defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of his said indorsement, and that he had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. It was held that the plea was sufficient after verdict, although on special demurrer it might have been bad, for not setting forth the circumstances under which the bill was sought to be impeached. On the authority therefore of that case, the present plea would be sufficient, as alleging want of consideration; even should the court be disposed to think that the defendant, having had the means of knowledge, could not resist the payment of the note; for having been given without consideration, it would amount to [20] a mere present, and would afford no ground of action (a).

Channell Serjt. in support of the rule. The decision in *Kelly v. Solari* (9 M. & W. 54), which had not been reported when the present rule was moved for, is undoubtedly adverse to the plaintiff; but still that case is to be distinguished from the present. The circumstances of this case are strong to shew that the defendant had actual knowledge of the alteration of the bill at the time he gave the note; but as the jury have found the other way, it must be so taken. Still there can be no doubt that he had the amplest means of knowing the fact. The previous authorities certainly seem to bear out the proposition, that it is not enough for a party to have made a payment in ignorance of the facts, but that if he had full means of knowledge he cannot recover the money paid. And this rule appears to be consonant with common sense. Suppose a party to make a payment in ignorance of facts, which by using the most ordinary diligence he might have ascertained, it seems hard upon the party receiving the money that he should be obliged to refund it, after a long period has elapsed, and when the situation of the parties may have been entirely changed; for if the rule contended for is strictly adopted, it would follow that the party paying under such circumstances might recover the money at any time within six years. In *Milnes v. Duncan* (6 B. & C. 671, 9 D. & R. 731), a bill of exchange had been drawn in Ireland, upon the stamp required [21] by law, which was less in amount than the stamp required on a bill drawn for the same sum in England; but there was nothing on the face of the bill to shew that it had been drawn in Ireland. The holder in England neglected to present it for payment, and held it a month after it was due. The acceptor having become bankrupt, the holder applied for payment to the indorser who had paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened to sue him, alleging that the bill was void on the ground that it was drawn on an improper stamp. The indorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in England, but ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder. It was held that the money, being paid in ignorance of the fact, and there being no laches imputable to the party who paid the money, he might recover it back in an action for money had and received. The want of laches was strongly relied upon in that case. Bayley J. in giving his judgment said, "There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of the

(a) Vide Pothier, *Traité du Contrat de Change*, No. 225. "Des Rescriptions." No. 234, 235. "Des Rescriptions pour cause de Pret ou de Donation," as to orders for the payment of money made by way of gift to the payees.

And see ante, vol. ii. 691 (a), as to the general rules by which donations inter vivos and donations mortis causâ, are governed.

law, he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches is imputable to him, (in respect of his omitting to avail himself of the means of knowledge within his power), he may recover back such money" (6 B. & C. 677). And Littledale J. added, "whether the bill was valid or not, depended on a fact of which the plaintiff was at that time ignorant, viz., whether it was drawn in England or Ireland. It is said, that he had means of knowing that, for he might have inquired of the prior indorser; but there being nothing on the face of the [22] bill to lead him to suppose that it was drawn in Ireland, he was not bound to make any inquiry" (6 B. & C. 680). In the present case there was that on the face of the bill which ought to have induced a man of ordinary caution and prudence to make inquiries concerning the matter; the alteration was plain enough, and the defendant having had previous knowledge of the original date, ought to have had his attention alive to the fact. *Bilbie v. Lumley* (2 East, 469), is also in favour of the plaintiff. *Kelly v. Solari*, though apparently an authority against him, may be supported upon a ground which is not applicable to this case. The passage cited from Lord Abinger's judgment is most strongly in favour of the defendant; but a passage from the judgment of Parke B. shews the true ground of the decision. His lordship says, "I think that where money is paid to another under the influence of a mistake; that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back; and it is against conscience to retain it" (9 M. & W. 58). In that case it would undoubtedly have been most unconscientious in the defendant to keep the money when the policy had lapsed. But supposing the note had been paid in this case, and the defendant were seeking to recover back the amount, there would be nothing unconscientious on the part of the bank in retaining it; for it does not appear, they had any more knowledge of the alteration in the bill than the defendant. It might have been different if there had been any misrepresentation on their part; or if they had known of the alteration and that they had lost their remedy, and had not shewn the bill to the defendant.

[23] As to the other point, the authority of *Easton v. Pratchett* is not disputed. A plea which distinctly alleges that a bill or note was given without consideration, is sufficient after verdict; but in this case there is no distinct statement of want of consideration. The plea says that the defendant, believing he was liable on the bill, and being ignorant of the alteration in the date, agreed to deliver the note "in consideration of his supposed liability, and for no other consideration whatever," and in pursuance of such agreement did deliver the same "in consideration of his said supposed liability upon the said bill, and for no other consideration whatsoever;" and then it concludes thus: "and so the defendant saith" that he made the note in the mistaken belief that he was liable upon the bill; "and that he, the defendant, never received any consideration or value for making the said promissory note." This is only a qualified statement of want of consideration; the words "and so," in the latter sentence, connecting both its branches with the former statement.

TINDAL C. J. The question before the court arises upon a plea in answer to a declaration against the maker of a promissory note; in which plea the defendant alleges that the note was given under a mistake as to the facts, and, in effect, states that the defendant having indorsed a bill of exchange for the accommodation of the drawer, the bill was afterwards, without the defendant's knowledge, altered in a material point, so as to relieve him from his liability; that a demand being made upon him in respect of the bill, he gave the note in satisfaction of that demand, being ignorant at the time that he had been discharged from liability by the alteration of the bill. That is the general substance of the plea. Then the question is, whether this plea is sufficient without further alleging that the defendant, at the time he gave the note, was [24] also without the means of knowledge of the alteration of the bill. Whatever doubts might have been created by the dicta in *Bilbie v. Lumley* (2 East, 469) and other cases, it appears to me that the late case of *Kelly v. Solari* (9 M. & W. 54; supra, 19, 21) is decisive upon the point, and establishes that it is not necessary to the validity of such a plea that it should negative the existence of the means of knowledge as well as actual knowledge. We can, in fact, regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the

knowledge itself. There is no ground, therefore, for a rule for judgment non obstante veredicto.

There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge; but I think, as the jury have found that the defendant had not knowledge, in fact, when he gave the note, that this rule must be discharged. I may add, however, that the case of the present defendant is, in my opinion, stronger in his favor than if the money had been actually paid over and was sought to be recovered back; for here the defendant stands upon the invalidity of the document which he is called upon to pay (c).

COLTMAN J. The case of *Kelly v. Solari* (9 M. & W. 54; supra, 19, 21) has certainly modified an impression which previously existed in the profession, that a party, in order to recover back money paid under a mistake of facts, should also shew that he had no means of knowing them. The inconvenience that has been pointed out in argument may [25] undoubtedly exist; but it is not sufficient to induce us to differ from that case, which must decide this question. I agree also, that this is a stronger case than the recovering back of money actually paid; for this is no more than a promise to pay.

ERSKINE J. I am of the same opinion. It appears that the late case of *Kelly v. Solari* has overruled the dicta in the other cases cited at the bar; and it must now be taken that it is no answer in an action for money had and received, brought to recover back money paid by mistake, to say that the party had the means of knowing the facts, if he had not the knowledge in reality. But I think this case does not wholly depend upon that point. This is not an action to recover back money. If a party has paid money with a full knowledge of all the circumstances, he cannot recover it back; it is like a gift or a present (a); but this is an action brought on a note, for which the defendant says there was no consideration. He says, in effect, "I thought I was liable upon the bill at the time I gave the note; but I was ignorant of a fact that had freed me from my liability, and therefore there was no consideration for my signing the note." The jury have found that the note was given in ignorance of that fact; there was therefore no consideration for it. It is a much stronger case than *Kelly v. Solari*; and there is nothing unconscientious in the defendant's resisting the claim.

CRESSWELL J. I also am of opinion that this rule must be discharged. It has hardly been contended that the direction of the Lord Chief Justice was incorrect. The question left to the jury was, whether the note had been given in ignorance of the alteration of [26] the bill. They have found it was so given, and no attempt is made to disturb their verdict in that respect. But a point is now raised, whether it was sufficient for the defendant to negative knowledge of the alteration, or whether it was not necessary for him to negative also the possession of the means of knowledge. The case has been argued upon analogy to an action for money had and received; and in that view I should consider we were bound by the late case of *Kelly v. Solari* (9 M. & W. 54), which does not appear to me to be at variance with the decisions in former cases. Where a party has the means of knowledge, it may be evidence of actual knowledge; but no case has been decided that means of knowledge are equivalent, as a matter of law, to actual knowledge. In *Milnes v. Duncan* (6 B. & C. 671, 9 D. & R. 731), a party who had paid money in ignorance of the real facts, though he had the means of knowledge, was held entitled to recover. But, supposing the means of knowledge to be equivalent to actual knowledge, I do not see how the absence of laches could make any difference.

On the second point the case in the Exchequer is strongly in favour of the defendant. This is not an action to recover money. If money be paid without consideration, and with a full knowledge of the facts, it cannot be recovered back; but a party who makes a promise without consideration, in ignorance of the true state of the facts, may certainly say he is not bound to the performance of it. Suppose, in this case, the defendant, omitting the latter part of the plea, had only stated that there was no consideration for the note by reason of his want of knowledge of the facts, and the plaintiff had replied, "you had the means of knowledge," would that replication have

(c) And see *Coles v. The Bank of England*, 10 A. & E. 437, 2 P. & D. 521.

(a) Vide ante, 20 (a).

been sufficient? I [27] apprehend clearly not. On the authority, therefore, of *Kelly v. Solari* I think the rule must be discharged.

Rule discharged (a)¹.

THOMAS WEBSTER AND ELIZABETH his Wife TO RICHARD CARLINE. April 21, 1842.

[S. C. 4 Scott, N. R. 636; 1 D. N. S. 678. Not followed, *Blackmur v. Blackmur*, 1876, 3 Ch. D. 634.]

The two commissioners who take the acknowledgment in England of a married woman under sects. 79 & 81 of 3 & 4 W. 4, c. 74, must both be appointed for the county in which the acknowledgment is taken.

Talfourd Serjt. moved that an acknowledgment by a married woman taken at Worksop in the county of Nottingham, where the property lay, might be filed of record, under the 85th section of the 3 & 4 W. 4, c. 74 (the fines and recoveries act) (a)². A difficulty [28] had been raised in the master's office because it appeared that one only of the commissioners before whom the acknowledgment had been taken had been appointed for the county of Nottingham, the other being a commissioner for the county of Lincoln. The eighty-second section, it was submitted, had provided for such a case, having enacted, "that any person appointed commissioner for any particular county, riding, &c., shall be competent to take the acknowledgment of any married woman, wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be."

TINDAL C. J. That cannot mean that the commissioners are to act except in the county for which they are appointed. Otherwise what would be the use of appointing them for separate counties?

The learned serjeant consequently

Took nothing.

DOE DEM. NOTTIGE v. ROE. April 21, 1842.

Where judgment against the casual ejector is sought to be obtained upon service on the agent of the tenant, the tenant being abroad, the agency must be distinctly sworn to; and it is not sufficient that the party serving the declaration has been informed by the party served, and believes, that such party is agent.

Channell Serjt. moved for judgment against the casual ejector. It appeared from the affidavits that information had been obtained from certain parties,—who stated

(a)¹ See *Hornbuckle v. Hornbury*, 2 Stark. N. P. C. 177; *Williams v. Bartholomew*, 1 Bos. & P. 326; *Stevens v. Lynch*, 12 East, 38. S. C. 2 Campb. 332; *East India Company v. Tritton*, 3 B. & C. 280, 290. S. C. 5 D. & R. 214; Dig. lib. 22, tit. 6; *Doctor and Student*, Dial. 2, cap. 46, 47; *Pothier, Traité de l'Action Condictio indebiti*, part 2, sect. 3, art. 3; 2 Nev. & M. 711; 6 N. & M. 87 (a); *Chatfield v. Paxton*, 2 East, 471, n., more fully stated by Gibbs C. J. in 5 Taunt. 155.

In *Lucas v. Worswick*, in the court of Common Pleas of the county palatine of Lancaster, 1 Moo. & Rob. 293, Lord Denman C. J. and Bolland B. held that money had and received lies to recover back the amount of a payment made under a forgetfulness of facts.

(a)² Sect. 79 enacts, "That every deed executed by a married woman shall be acknowledged by her before a judge, a master in chancery, or two commissioners."

Sect. 80 enacts, "That the judge, &c., before receiving such acknowledgment, shall examine her apart from her husband."

Sect. 81 enacts, "That the Lord Chief Justice of the Common Pleas shall from time to time appoint persons for every county, riding, division, soke or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments."

By sect. 85 the certificate of the acknowledgment, signed by the judge or commissioners, with an affidavit verifying the same, is to be lodged with some officer of the court of Common Pleas, who shall cause the same to be filed of record in the court.

themselves to be the agents of Paine, the tenant in possession, for the purpose of letting the premises (which information the deponent swore he believed to be true),—that Paine was abroad; the declaration had been served on these parties, and had also been affixed on the door of the premises. He [29] cited *Doe dem. Dickens v. Roe* (7 Dowl. P. C. 121, 6 Scott, 754), where, in ejectment to recover possession of a chapel, the tenant in possession having quitted the country and not being likely to return, service had been effected on the person in whose custody the keys of the chapel were placed, on the wife of the tenant, and on his servant; and the court granted a rule absolute in the first instance; and *Doe dem. Scott v. Roe* (6 New Ca. 207, 8 Dowl. P. C. 254), where the tenant in possession having absconded, leaving the key of his house in the hands of a broker, with instructions to let the house; it was held that service of a declaration in ejectment, by delivering a copy to the broker, and fixing a copy on the door of the house, was a sufficient service.

TINDAL C. J. In the case last referred to, it distinctly appeared that the broker, on whom the service was effected, was the agent of the tenant. Here, the fact of agency is only stated upon the authority of the agent himself; and it is the interest of the lessor of the plaintiff to believe the statement so made.

Rule refused (c).

[30] *DOE DEM. STANWAY v. ROCK.* April 19, 1842.

[S. C. 11 L. J. C. P. 194; 6 Jun. 266: at Nisi Prius, Car. & M. 549. Discussed, *Drummond to Sant*, 1871, L. R. 6 Q. B. 768. Applied, *Sands to Thompson*, 1883, 22 Ch. D. 618.]

In 1816 A. let B. into possession of lands under an agreement for purchase, which was never completed. B. continued in possession till his death in 1822, without having paid rent. He devised all his real estate to C., his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not.—In ejectment for the premises brought in 1842 by parties claiming under A., it was left to the jury to say whether a tenancy at will had been created between A. and C.,—the action being otherwise barred by the 3 & 4 W. 4, c. 27, s. 7: Held, a proper direction.

Ejectment, for certain shambles in the market place of the town of Wednesbury.

At the trial before Patteeson J., at the last assizes for the county of Stafford, the only question was, whether the lessor of the plaintiff was barred by the limitation of actions act (3 & 4 W. 4, c. 27). The following facts were proved.

About the year 1816, one Richard Woolrich entered into an agreement for purchasing the piece of land in question from Sir Joseph Scott, Bart. and Mr. Foley, lords of the manor of Wednesbury, for the sum of 30l.; and under this agreement Woolrich was let into possession. In January 1817, Woolrich entered into a written contract with one Thomas Butler for the sale of his equitable interest in the premises for 100l. This contract recited the former agreement, and that Woolrich had got no conveyance of the land, and was unable to pay the purchase-money; and that he had erected shambles on the land in question. Woolrich, however, continued in possession till his death, the exact date of which did not appear, but he was buried on the 8th of January 1822. By his will he devised all his real estate (generally) to his widow; and she received the rents of the shambles in question down to her death in 1837. There was no evidence of any payment of rent by Woolrich or his widow to Scott and Foley; but it was proved, that in the year 1827 the latter held a rent day, and sent a message to Mrs. Woolrich, desiring her to come over and pay the rent for the shambles, and that she sent back word that she would come, or send over, presently; [31] but it was not proved that she either went or paid the rent. Mrs. Woolrich made a general devise of all her real estate, equally, among her children by a former marriage with one Rock. After her death the defendant, one of these children, received the rents of the shambles. No rent was ever paid by him to Scott and Foley.

In 1836 Butler died, having appointed the lessor of the plaintiff one of his

(c) And see *Doe dem. Richard Barrow v. Roe*, ante, vol. i. 238, and cases there collected.

executors, and devised and bequeathed to him considerable interests both in his real and personal estates.

In 1839 (after previous negotiations) the representatives of Scott and Foley conveyed the premises in question, in fee, to the lessor of the plaintiff; but no notice was taken in the conveyance of the original contract for sale to Woolrich.

The declaration in the present ejectment was served on the 8th of January 1842, exactly twenty years after the day of Woolrich's burial.

It was contended on the part of the plaintiff that, even supposing the evidence was not satisfactory as to a fresh tenancy having been created between the lords of the manor and Mrs. Woolrich, still, Woolrich having been let into possession under a contract for purchase before the conveyance, the lords of the manor were mere trustees for him; that his widow, claiming under him, was in the same situation; and that the case consequently fell within the provision of the seventh section of the stat. 3 & 4 W. 4, c. 27 (a).

[32] On the part of the defendant it was contended, that Mrs. Woolrich never was tenant to the lords of the manor; that Woolrich, under the circumstances, was merely a tenant at will under them; that his tenancy was determined, at the latest, by his death; and that consequently the action was not brought in time: and also that the proviso of the seventh section did not apply. Patteson J. (after consulting Cresswell J.) was of opinion that the proviso applied only to cases of express trusts; and the only question left to the jury was, whether Mrs. Woolrich had become tenant at will to Scott and Foley. The jury found in the negative, and returned a verdict for the defendant.

Talfourd Serjt. now moved for a new trial, on the ground of misdirection. He renewed the objection taken at the trial, and contended that the right of the lessor of the plaintiff was preserved under the proviso of the seventh section of the act. In Sugden on Vendors and Purchasers, the rule is laid down that "when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor" (vol. i. p. 273, 10th ed.). In the present case, therefore, the lessor of the plaintiff, claiming under the original vendors, is in the situation of trustee for the purchaser and those who claim under him; for, although there was no express trust, there was an implied one, which brings the case sufficiently within the terms of the statute. If the lessor of the plaintiff can avail himself of the equitable relation of trustee and cestui que trust, there has been no adverse possession. In *Hall v. Doe dem. Surtees* (5 B. & Ald. 687, 1 D. & R. 340), where premises were mortgaged in [33] fee with a proviso for reconveyance if the principal were paid on a given day, and in the mean time that the mortgagor should continue in possession: upon special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor; and it was held that, upon the finding, it must be taken that the occupation was by the permission of the mortgagee; and consequently that, although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations. [Coltman J. referred to *Howard v. Shaw* (8 M. & W. 118).]

At any rate, supposing Woolrich to have been tenant at will when he died, his widow must be taken to be in the same situation, as she claimed under him; she was in by permission of the lords of the manor, under a similar relation. In *Doe dem. Bennett v. Turner* (7 M. & W. 226), the lessor of the plaintiff, had, in the year 1817, let the defendant into possession of lands as tenant at will, and in 1827 had determined such tenancy by entry upon the land, and cutting and carrying away stone without

(a) Which enacts "That when any person shall be in possession, or in receipt of the profits, of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

the tenant's consent; and the court held, that if the tenant was in afterwards by sufferance only, then the twenty years must be calculated from the expiration of the first year after the commencement of the original tenancy at will, viz. in the year 1818; but that, if a new tenancy at will was created between the parties, then the twenty years should be calculated from the expiration of the first year of such new tenancy, viz. in the year 1828. The determination of the first tenancy at will was, in that case, effected by the act of the landlord; here, by the death of the tenant; but if a new tenancy at will [34] was created, then the statute would not begin to run till the end of a year from the commencement thereof, viz. in 1823; and if that were so, the present ejectment was brought in time.

TINDAL C. J. In order to constitute a tenancy at will something must be done by the lessor. It appears to me that it was properly left by the learned judge to the jury to say, whether a tenancy at will had been created between the lords of the manor and Mrs. Woolrich, that being the only fact on which there could be any question in the case.

ERSKINE J. There appears to have been no evidence to shew that Mrs. Woolrich claimed under her husband.

COLTMAN and CRESSWELL JJ. concurring—
Rule refused.

[35] WARD v. KIRKMAN. April 30, 1842.

The plaintiff issued a distringas, which was served on the defendant, together with the usual notice, stating that his goods had been distrained, though in fact he had no goods to distrain upon (a)¹; and the sheriff afterwards returned nulla bona.—Held, that the plaintiff was entitled to enter an appearance.

Channell Serjt. moved on behalf of the plaintiff for leave to enter an appearance for the defendant pursuant to the 2 & 3 W. 4, c. 39, s. 3 (b).

It appeared from the affidavits that a writ of distringas [36] to compel an appearance, had issued and been delivered on the 30th of March to a sheriff's officer. On the 16th of April search was made for the return to the writ, and it was found that the sheriff had returned nulla bona. On the 2nd of April a copy of the distringas, with the usual notice at the foot (a)², had been served on the defendant personally, and that there were no goods of the defendant's which the sheriff could distrain.

(a)¹ It is sometimes necessary to pursue an established form, where its terms are not strictly applicable to the particular case. Thus, "If a man has judgment to be hanged, his land escheats to the lord, though he die before execution; and the writ of escheat should say,—*quia suspensus*." F. N. B. 144, H.

(b) This section authorizes the court or a judge to order a writ of distringas to be issued, directed to the sheriff, &c., which writ is to be in the form, and with the notice subscribed thereto, mentioned in the schedule (as above) "which writ of distringas and notice, or a copy thereof shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such distringas shall be executed; and a true copy of such writ and notice shall be delivered together therewith to the sheriff, &c. to whom such writ shall be directed," and if the writ shall be returned non est inventus and nulla bona, and the plaintiff does not intend to proceed to outlawry, and the defendant does not appear, and the court, &c. shall be satisfied that due and proper means were taken to serve and execute the writ, the court, &c. may authorize the plaintiff to enter an appearance for the defendant, &c.

It is not very easy to follow the course of proceeding pointed out by the legislature in this section. It would rather appear that the service of the writ and notice upon the defendant, if he can be met with, is to precede the delivery of the writ to the sheriff: but the notice states, that the defendant's goods have already been distrained by the sheriff. The power to order an appearance to be entered would also seem to be limited to cases where there has been a return of non est inventus and nulla bona; it having been perhaps thought that, if the defendant could be served with the writ of distringas, he might also have been served with the writ of summons.

(a)² The form of the notice given in the schedule (No. 3) to the act (2 & 3 W. 4, c. 39) is as follows:—

"Mr. C. D.—Take notice that I have this day distrained upon your goods and

TINDAL C. J. Although the notice at the foot of the writ states what, in the particular case, is not strictly true, namely, that the sheriff had distrained upon the defendant's goods, the defendant himself must have been fully aware of the real state of the facts. The notice is sufficiently intelligible to relieve the case from any difficulty.

The other judges concurring—
Rule granted.

[37] SHARP v. LETHBRIDGE. SAME v. N. FORD. SAME v. J. FORD. SAME v. SHERWELL. SAME v. BOON. April 30, 1842.

Where five separate actions were brought on five distinct guarantees of 50l. each, given by five several parties for the payment of 250l., the proceedings, in four of the actions, were ordered by a judge at chambers, to be stayed, the defendants consenting to be bound by the verdict in one, provided that such verdict were to the satisfaction of the judge who tried the cause, the plaintiff to be at liberty to apply to open the order after plea, on the ground that the issue would not decide the merits in the other actions:—Held, that this was a proper order.

In the above actions Maule J. at chambers had made the following order, at the instance of the defendants:—

“Upon hearing the attorneys, &c., I do order, that all further proceedings in the four last-mentioned actions be stayed until after the trial of the first-mentioned action; the defendants in such four last-mentioned actions hereby consenting to be bound and concluded by such verdict as shall be given in the first-mentioned action; provided the same shall be to the satisfaction of the judge before whom the same shall be tried. The plaintiff to be at liberty, when the defendant in the first-mentioned action has pleaded, to apply to open this order on the ground that the issue in the first-mentioned action will not decide the merits of the others.”

It appeared from the affidavits upon which the order was obtained, that the five actions were brought in respect of five separate guarantees for the amount of 50l. each, given by the defendants respectively to insure the payment of the sum of 250l. by one Mason to the National Provincial Bank of England (of which the plaintiff was a public registered officer); that the guarantees were not dated or signed on the same day; and that Mason had become bankrupt, and owed the bank 500l.

[38] Bompas Serjt., on behalf of the plaintiff, applied to rescind the learned judge's order, which, he contended, was of a perfectly novel kind. [Erskine J. Is it not like the ordinary case of consolidating actions brought against different underwriters on a policy of insurance (vide post, p. 39 (b))?] There the different actions are brought upon the same instrument: here they are all upon different instruments. [Erskine J. Is there no instance of the consolidation of actions brought upon different policies where the risk was the same (b)?] But in the present instance, the causes of action are as much separate as if they had arisen upon separate promissory notes (c).

chattels in the sum of 40s., in consequence of your not having appeared in the said court to answer to the said A. B. according to the exigency of a writ of summons, bearing date the —— day of ——, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution.”

(b) The rule is stated in Archbold's Prac. (p. 830, 4th ed.) to apply to cases “where several actions are brought upon the same policy.”

(c) See *Mussenden v. O'Hara* (Runnington Serjt. Tidd's Pr. 614, 9th ed.), where three actions having been necessarily brought by the same plaintiff against the same defendant, upon three notes of hand, which became due at three different times, the court of K. B. refused to consolidate them. But in *Oldershaw v. Tregwell* (3 C. & P. 58), where two actions had been brought on two bills of exchange, payable at different times, the action on the first bill having been brought before the second bill was due; Lord Tenterden C. J. said, “These parties need not in this case have been at the expense of two trials. If an application had been made to a judge at chambers, an order might have been obtained to consolidate the actions.” In *Cunnach v. Gundry*

In the books of practice one instance is certainly mentioned where actions brought against different [39] persons for the same assault were ordered to be consolidated; but that does not appear to have been done a second time (a). In the present case, the fact of Mason having become bankrupt may give rise to great difficulties.

TINDAL C. J. If these guarantees were on one piece of paper, and the defendants were severally liable for 50l. each, there could have been no doubt as to the application of the principle of the usual practice in actions on policies of insurance; in which, where several parties are liable on the same policy, it has been the established practice that a consolidation rule should be granted (b). The courts, to avoid unnecessary expense both to the plaintiff and defendant in these cases, have been in the habit of staying the actions brought against the different underwriters till one of such actions is decided. And this is not only a most equitable rule, but one that is highly beneficial for the plaintiff; inasmuch [40] as he has the option of selecting the most favourable case to try.

Then the question here is, whether there is any real and substantial difference, because the guarantees are written upon separate pieces of paper. In fact the same question and the same liability arise in each case. The different defendants might have opposed the present order, on the ground that they would possibly have different defences to set up; but it is not easy to see why the plaintiff should do so.

COLTMAN J. This is in fact an order to stay the proceedings in various actions that have been brought upon the same liability, the object being that all should abide the result of one, the plaintiff having the liberty reserved of selecting any one case. I cannot see why he should object to such an arrangement, as no particular inconvenience can result to him from its being carried into effect. It is objected that Mason has become a bankrupt; but the plaintiff may still prove his debt under the fiat, and receive his dividend. The only purpose for which he can object to the course proposed, must be to increase the costs.

ERSKINE J. There is no doubt as to the rule, that where there are several parties jointly and severally liable on the same instrument, and separate actions are brought against them, the court will consolidate the actions in order to prevent such a vexatious proceeding. And this is not the only case. It appears to me that the same principle applies where there are separate instruments, and a separate liability in respect thereof,

(1 Chitt. R. 709, very shortly reported, as *Cormack v. Gundry*, 3 B. & Ald. 272) the court of K. B. refused to consolidate into one count ninety-eight counts in a declaration, upon as many promissory notes of a country banker, for 1l. each; but they made a rule (by consent) that all the counts should be struck out except one, and that the ninety-seven other notes might be given in evidence under the account stated. In *Lane v. Smith* (W. E. Taunton, Tidd, Pr. 617, 9th ed., 3 Smith, 113), where the declaration contained 286 counts on similar notes, the court had refused to strike out the counts on the notes. It appears from the reports of that case, that, besides the counts on the notes, the declaration contained counts for money lent and money had and received, but it does not appear whether there was also a count upon an account stated.

(a) See *Harper v. Woodhouse*, Prac. Reg. C. P. 151; *Anon.* 1 Chitt. Rep. 709 a., where a rule was made to consolidate two actions of trespass for foxhunting over the plaintiff's premises, situate in the same parish, though committed at different times. In *Jones v. Enderup*, Prac. Reg. C. P. 150, however, where the declaration contained thirty counts for assaults, the court, upon an affidavit that the defendant had assaulted the plaintiff sixty several times, refused to strike out any of the counts. And in *Bayley v. Raby*, 1 Stra. 420, the court refused an application, that four several declarations in trespass against four different persons might be put into one, upon an affidavit that the trespass, if any, was committed by all jointly; and observed, "We never went so far as the case of different persons, but only where the declarations are between the same parties. The plaintiff may have the benefit of the others' evidence in his action against either; but this will be to deprive him of that." If the rule had been shaped as in the principal case, that objection, it seems, would not have been applicable.

(b) As to the origin and establishment of this rule,—introduced by Lord Mansfield C. J.,—see Park on Insurance, Introd. vol. i. pp. xlv. xlv. Tidd, Pr. 614, 615, 9th ed.

but where no difference exists as to such liability. In actions on policies of insurance, where the underwriters are separately liable, the same course is adopted, not on the ground that the actions were improperly brought [41] in the first instance, but in order to save useless expense to the parties. In these cases the defendants agree to be concluded by the decision in the action tried. The plaintiff always has it in his power to try whichever case he likes. The learned judge's order, indeed, directs that the other cases shall abide the event of the case of *Sharp v. Lethbridge*; but the plaintiff might have selected any of the other cases if a reason had been suggested for his so doing. It appears to me, therefore, that the only object in opposing this application must be to put costs in the pocket of the plaintiff's attorney.

CRESSWELL J. concurred.

Rule refused (a)¹.

[42] NORTON v. POWELL. April 20, 1842.

[S. C. 11 L. J. C. P. 202.]

A plea, that the contract declared upon,—being a contract which, under the statute of frauds, required the defendant's signature—was entered into with the plaintiff on a Sunday, in the way of the plaintiff's ordinary business, is not supported by evidence that the contract was signed and delivered by the defendant to C. on a Sunday, and delivered by C. to the plaintiff on a subsequent day.—A guarantee given by B. a tradesman, to A. another tradesman, for the faithful services of C., a traveller, to be employed by A., is not an act done in the way of the ordinary business of B., within the meaning of the 29 Car. 2, c. 7 (a)².—A declaration by A. against B. upon a guarantee, is supported by proof of a document drawn up in the plural number, and concluding "as witness our hands," but signed by B. alone.—The declaration stated the consideration to be, that A. "would then engage" C. as traveller, and averred that A. "did then engage C.:" it was proved that A. had previously employed him in that capacity on one occasion:—Held, that this proof was sufficient.—Quære, whether A. (before 6 & 7 Vict. c. 85) was an admissible witness on behalf of B., to prove that he had paid over money to C. on account of B.

Assumpsit. The declaration stated, that the plaintiff, before and at the time of the making of the promise, &c., was, and from thence had been and still was, a button factor; and that in consideration that the plaintiff, at the request of the defendant (b), would then engage one Edward Tarrand as traveller and salesman to the plaintiff, in his business of button factor aforesaid, the defendant then promised the plaintiff to

(a)¹ In *The Royal Exchange Company v. —*, 1 Chitt. Rep. 709, n., this court refused to consolidate two actions brought on two bonds, although they were precisely similar to each other. But in *Kay v. Hill*, 2 B. & A. 598, the assignee of a bail bond having brought actions against each of the bail, the court of King's Bench, upon payment of the costs of one action only, stayed the proceedings in all. In *Cecil v. Briggs*, 2 T. R. 639, two actions in assumpsit, between the same parties, were consolidated, where the causes of action arose in the same county, and the defendant had been held to bail in each. Consolidation was refused in two actions between the same parties to try a right of way in different parts of the same town; *Mynot v. Bridge*, 2 Stra. 1178. In ejectment, where ten separate declarations were delivered for ten separate houses upon the same title, the court refused an application to put them all into one issue. *Smith v. Crabbe*, *ibid.* 1149; but where different causes in ejectment depend on the same title, it is now the practice to consolidate. See 2 Sellen's Prac. 144; *Doe d. Pulteney v. Cavan*, Imp. K. B. 731; *Grimstone v. Burgers*, Barnes, 176.

(a)² The defendant, by his plea, appears to have sought to raise the question whether A.'s acceptance of the guarantee was an act in the way of his ordinary business as a button maker, or, in other words, whether it was the usual course of business for manufacturers and wholesale dealers, who employ travellers, to take security for the faithful discharge of the travellers' duties. No acceptance of the guarantee being shewn to have taken place on a Sunday, it became unnecessary, in fact, to consider whether the act of such acceptance on a Sunday would have been within the statute.

(b) These words, though mere surplusage here, would have been necessary in a declaration on an executed consideration, *vide post*, 46 (a).

indemnify him for any loss he might be called upon to sustain through the immoral or dishonest conduct of the said E. T., whilst the said E. T. [43] should continue in the plaintiff's employment as such traveller and salesman. Averment: that the plaintiff confiding, &c., did then engage the said E. T., as his traveller and salesman as aforesaid, and that the said E. T., as such traveller and salesman, received of and from divers persons, to wit, John Howell, &c., divers sums of money, and divers goods and chattels of great value, in the whole amounting to a large sum of money, to wit, &c.; which sums, &c., the said several persons owed to the plaintiff, and which money and goods the said E. T., as such traveller and salesman, then, and on the said other days and times, received from the said persons, for and on account of the plaintiff, and in satisfaction and discharge of the money so owing from the said persons to the plaintiff; and the said persons did then, and on the other days and times, pay and deliver unto the said E. T., as such traveller and salesman as aforesaid, the said several sums of money, and goods and chattels, for and on account of the plaintiff, and in such satisfaction and discharge as aforesaid. And, thereupon, it then became and was the duty of the said E. T., as such traveller and salesman as aforesaid, as a moral and honest servant of the plaintiff, well and faithfully to account with the plaintiff for the said sums of money and goods and chattels so received by him as aforesaid, and to pay and deliver to the plaintiff the said sums of money, and the said goods and chattels on request. Yet the said E. T. did not, nor would, although he was, to wit, on, &c., requested by the plaintiff so to do, well and faithfully or otherwise account with the plaintiff for the said sums of money or any part thereof, or pay or deliver to the plaintiff the said sums of money or any part thereof, or the said goods and chattels or any part thereof; but on the contrary thereof, the said E. T. then wholly refused so to do, and did then, immorally and dishonestly, convert the said sums of money and [44] the said goods and chattels to his own use; of all which several premises the plaintiff afterwards, to wit, on, &c., duly gave notice to the defendant, and then requested the defendant to indemnify him from the said loss which he had sustained through the said immoral and dishonest conduct of the said E. T. Yet the defendant did not, nor would when he was so requested, or at any other time, indemnify, &c. The declaration contained also a count upon an account stated.

Pleas: First, non assumpsit. Secondly, (to the first count), that the supposed promise therein mentioned was made by the defendant to the plaintiff on a certain Lord's Day, commonly called Sunday, to wit, on, &c., in the way of the plaintiff's said trade and business, and in his ordinary calling as such button factor, and in the course and exercise thereof, and that the same promise was not a work of necessity or charity, and was and is contrary to the statute in such case made and provided. Verification. Thirdly, (to the same count), that the said E. T., as servant to the plaintiff, did not receive the said moneys and goods therein in that behalf mentioned, or any of them, from the said persons in the said first count also mentioned, or any, &c., for or on account of the plaintiff, or in satisfaction or discharge of the said money so owing from the said persons to the plaintiff, as in the said first count, &c.; nor did the said persons pay or deliver unto the said E. T., as such traveller and salesman as aforesaid, the said several sums of money, and goods and chattels, or any of them, for or on account of the plaintiff, or in such satisfaction and discharge as aforesaid, modo et formâ. The fourth plea, (to the same count), traversed the notice, and the request to indemnify the plaintiff.

The replication joined issue upon the first, third, and fourth pleas, and traversed the allegation in the second plea that the promise was made on the said Sunday, in [45] that behalf mentioned, modo et formâ; upon which issue was joined.

At the trial before Lord Abinger C. B., at the last assizes for the county of Derby, the following guarantee was proved.

"Mr. R. J. Norton.

"Sir,—In consideration of your engaging Mr. Edward Tarrand as traveller, we, the undersigned, do hereby agree to indemnify you against any loss or damage you may be called upon to sustain through his immoral or dishonest conduct. As witness our hands.

"(Signed) THOMAS W. POWELL,
"19 Haymarket

"Witness, to the signature of Mr. Powell,
"Robert Mereweather."

The guarantee, though drawn up in the plural number, was signed by the defendant only; and it was signed by him on a Sunday, and then delivered to Tarrand, who, on a subsequent day, handed it to the plaintiff.

It appeared also, that Tarrand had been employed on one occasion, as traveller for the plaintiff, before the guarantee was given.

John Howell (one of the debtors mentioned in the declaration) was called as a witness for the plaintiff, and was objected to on behalf of the defendant as being interested in the event of the suit; his evidence was however admitted (a)¹. He proved, that, in the month of August 1839, Tarrand called upon him and said, that if Howell would do business with the plaintiff, he, Tarrand, would give him an order for clothes; on which Howell ordered some buttons, and Tarrand gave an order for some clothes, which were afterwards delivered to him by Howell. A similar transaction took place in October. The [46] amount of the clothes supplied to Tarrand, was 8l. 16s. It was also proved, that moneys had been paid to Tarrand by debtors of the plaintiff, which had not been paid over to the latter. It was objected for the defendant, that the consideration for the guarantee was not truly stated in the declaration, the engagement being prior, not subsequent, to the promise (a)². This objection was overruled by the Lord Chief Baron, who also held, that there was not sufficient evidence to support the second plea, inasmuch as there was no promise, till the delivery of the paper to the plaintiff; the mere signing thereof by the defendant not being sufficient. The plaintiff recovered a verdict for 15l. 12s. 6d.

Goulburn Serjt., now moved for a new trial on the ground of variance and of misdirection, or to reduce the verdict to the sum of 8l. 16s., on the ground that Howell's evidence was inadmissible.

First: there was a variance between the declaration and the contract proved. In the first place it was alleged to be the promise by the defendant alone, but though signed by him only, it was drawn up in the plural number. [Tindal C. J. It is like a joint and several promissory note. A note may be good, if drawn up in the plural number, though signed by one person only. [47] Besides the point is not raised on the record (a)³.] Then, the consideration is not truly stated; it is alleged in the declaration that the consideration was, that the plaintiff "would then engage" Tarrand, whereas in fact he had been previously engaged by him, and the real consideration was, that he would continue him in his service, and should have been so stated; *Wain v. Warlters* (5 East, 10; 1 J. P. Smith, 299), *Saunders v. Wakefield* (4 B. & Ald. 595). [Cresswell J. The plaintiff avers that he did afterwards engage Tarrand in service; why did not the defendant traverse that allegation if it was incorrect. By not doing so he has admitted it? Coltman J. The defendant is seeking to vary the written contract by parol.]

Secondly, as to the second plea, the evidence sufficiently shewed that the contract was in fact made on a Sunday. [Cresswell J. If a man write to his creditor on a Sunday admitting the debt, and promising to pay it, can this be said to be a void contract under the statute of Charles? Tindal C. J. I cannot say that I think that this was a contract, which, if made on a Sunday, was in the ordinary way of business. In the case of partnership, there is an implied authority, that one partner may enter

(a)¹ See *Russell v. Blake*, ante, vol. ii. 374, 6 & 7 Vict. c. 85.

(a)² If the evidence had shewn a continuous engagement, subsisting at the time of the promise, a question might have arisen whether the word "engaging," in the guarantee, must not be understood as meaning "having engaged," in which case the guarantee would be void for not shewing that such bygone employment had been at the request of the defendant. The proper mode of raising the defence would appear to be, to plead non-assumpsit, and also that the plaintiff did not engage E. T. modo et formâ. Then, upon shewing the prior and subsisting engagement, the defendant would be entitled to a verdict upon the former plea, if "engaging" were read as "having engaged," and upon the latter, if "engaging" were understood to refer to a future engagement, and no dissolution of the prior engagement were shewn.

(a)³ If the intended co-promisor had actually signed the guarantee, the non-joinder would have been pleadable only in abatement. It might also be contended, that the words "we the undersigned" and "witness our hands" shewed that the party first signing did not mean to enter into the engagement alone, and that until both had signed, the contract was conditional and incomplete.

into ordinary contracts, and thereby bind the firm ; but he cannot bind them by giving guarantees (d).

Per curiam. Rule refused on first and second points.

[48] Upon the third point, as to the reduction of damages, the court granted a rule nisi ; which on a subsequent day (8th May), was made absolute by consent.

M'LAUGHLIN v. PRYOR. April 26, 1842.

[S. C. 4 Scott, N. R. 655 ; 11 L. J. C. P. 169 : at Nisi Prius, Car. & M. 354. Adopted, *Pidgeon v. Legge*, 1857, 5 W. R. 650 ; *Holmes v. Mather*, 1875, L. R. 10 Ex. 269. See *Jones v. Liverpool Corporation*, 1885, 14 Q. B. D. 890.]

A party, consisting of the defendant and others, hired for a day's excursion a carriage and post horses, driven by postilions, who were the servants of the owner of the horses. The defendant rode upon the box. The postilions, in endeavouring to force their way into a line of carriages, overturned a gig, and seriously injured the plaintiff, who was in the gig. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions shewing that he had a control over the postilions at the time it happened :—Held, that he was liable in trespass.

Trespass. The declaration stated that the defendant heretofore, to wit, on, &c., with force and arms forced and drove a certain carriage and certain harness attached thereto, and with which the same was then being drawn, upon and against a certain carriage, to wit, a gig, in which the plaintiff was then riding in and along a certain public and common highway, and thereby pulled over and upset the said gig, and thereby the plaintiff was then cast and thrown with great force and violence from and out of the said gig, to and upon the ground there, and was there greatly bruised, hurt, and wounded, &c. (with special damage in loss of business as a newspaper editor, and in the employment of other persons to publish the same).

Pleas : first, not guilty ; on which issue was joined ; secondly, that at the time when, &c. the plaintiff was being driven in the said carriage called a gig, by a person whose name is to the defendant unknown, in and along the said highway, and at the said time when, &c. the same was so carelessly and negligently and improperly driven, stopped and managed by the said person in the said highway, near to the said carriage and harness so forced and driven by the defendants as in the declar-[49]-ation mentioned, that by reason thereof the said carriage and harness, without any default or wrong on the part of the defendant, was forced and driven by the defendant upon and against the said carriage called a gig, and thereby pulled over and upset the same, and occasioned the said injuries and damages in the said declaration mentioned ; and so the defendant says that if any hurt or damage then happened to the plaintiff, the same was caused and occasioned by the said negligent, careless, and improper driving of the said carriage called a gig, and not by any default of the defendant, which is the said supposed trespass in the said declaration mentioned.

Replication to this plea, de injuriâ.

At the trial before Tindal C. J., at the sittings in London after last Trinity term, the following facts were given in evidence on the part of the plaintiff.

On the 3d of June 1840, the plaintiff was proceeding to Epsom races in a pony gig, belonging to and driven by one Mason. The defendant, who, together with a party of friends, had hired a carriage and four post-horses, driven by two postilions in the service of the owner of the horses, was on his way to the same place. The defendant and another person rode on the box of this carriage. At the toll-bar at Sutton a line of carriages had formed, and Mason's gig was in that line. The carriage in which the defendant and his friends were driving came up to the toll-bar about the same time with Mason's gig, but the carriage was out of the line. Mason's gig was advancing at the time slowly in the line (there being a stoppage for the purpose of taking toll at the gate), when the postilion on the wheel-horse of the carriage in

(d) See *Duncan v. Lowndes*, 3 Campb. 478 ; ante, 42 (a).

which the defendant was seated, called out to the postilion on the leader, "go in there." The latter immediately turned his horses' heads before Mason's gig. Mason endeavoured to keep his pony in [50] the line, when the man on the wheel-horse of the carriage again called out, "Go on, you are all right there." The postilion on the leader again pushed his horses forward, and the trace of the wheel horse caught the wheel of Mason's gig and pulled it over, and both the plaintiff and Mason fell out. Some one in the carriage called out, "Go on, go on!" but Mason got up, and laying hold of the horses' heads, stopped them; telling the party in the carriage that they should not move on; for he was determined to take the horses back to the Cock at Sutton, until he knew to whom they belonged. Several of the parties then got out of the carriage, and the defendant said to Mason, "If you do that, in what an awkward predicament you will place us—we can neither get to the races nor get home." After some further discussion, he added, "I will settle it with you here now; I will give you money to any amount; tell me what you want, you shall have it." Mason refused to settle the matter then, and at last the defendant gave his card to him, saying that he would be answerable for all that had occurred, if he would allow him to proceed. The carriage then drove on. Some days afterwards Mason called on the defendant at his chambers, and told him he came about the damage done to the chaise. The plaintiff said it should be repaired; he was in duty bound to repair it, and that he would send a man to look at it. He did not do so however, and Mason, having got it repaired, called again upon the defendant with the account, who said he would pay it, and was about to do so, when he added, "I shall not pay it now, for if I pay you this amount, Mr. M'Laughlin will expect me to pay whatever demand he may make upon me; you shall be paid it, but I shall not pay it now; I will settle Mr. M'Laughlin's affair before I settle yours." Some dispute then arose between the parties as to the accident, and the defend-[51]-ant said, "If you had quietly gone out of the line it would not have happened; If you had done that, I had intended to have pulled up and let you in again, in the front." He added, that the general way of going to races was to cut out and cut in, and get on in the best way one could. Mason then said to the defendant, "If you will give me up the proprietor of the horses and carriage, I will exonerate you from the repair of the chaise altogether;" but the defendant said he should give up no names,—he had made himself liable for the damage that had occurred. The plaintiff was very seriously injured by the upsetting of the gig, and had become permanently lame.

It was contended on the part of the defendant, on the authority of *Laugher v. Pointer* (5 B. & C. 547; 8 D. & R. 556), and *Quarman v. Burnett* (6 M. & W. 499), that, not being the owner of the carriage and horses, he was not liable to the action. The Lord Chief Justice however ruled that those cases did not apply to an action of trespass, but reserved leave to the defendant to move to enter a nonsuit.

Evidence was called, on the part of the defendant, to shew that the defendant had called out to the postboys to let Mason's gig drive on before them; and that the gig had been driven against the horses of the carriage. The post-boy who rode the leaders on the occasion (the other one being absent from the country), stated that they had no orders to break into the line, that "nobody said any thing to them."

The Lord Chief Justice told the jury, that in order to find a verdict for the plaintiff, they must be satisfied that the accident arose from the carriage driving against the gig, and not from the gig driving against the carriage. The jury found a verdict for the plaintiff, damages 600l.

[52] Channell Serjt., having in Michaelmas term last, obtained a rule nisi to enter a nonsuit, pursuant to the leave reserved;

Talfourd Serjt. now shewed cause. It is submitted that the defendant is responsible for the injury done to the plaintiff. The defendant being on the box of the carriage, and having the opportunity of seeing what was passing, and possessing the power of controlling the postilions, must be held to have sanctioned them in their attempt to break the line of carriages; and if so, such sanction made him a trespasser. In point of fact, the evidence at the trial shewed that the parties on the box were exercising a control over the post-boys, and giving them directions. In *Gregory v. Piper* (9 B. & C. 591, 4 Mann. & Ryl. 500), a master ordered a servant to lay down rubbish near his neighbours' wall, but so as not to touch it. The servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall. It was held that trespass might be maintained against the master, he being liable in that

action for any act done by his servant in the course of executing his orders (b). So here, assuming that the defendant sanctioned the act of the postilions in attempting to break the line of carriages, the upsetting of the gig containing the plaintiff was the natural consequence of such attempt, and the defendant is responsible to the plaintiff for the accident which occurred.

The case of *Chandler v. Broughton* (3 Tyrwh. 220, 1 C. & M. 29), shews that a party may be liable in trespass, although he may have taken no direct part in the act which is complained of. There, the defendant was sitting by the side of his servant, and the latter was driving. That case [53] is in substance the same as the present. In considering the question of liability, the defendant's conduct must not be overlooked. After what passed subsequently to the accident, the defendant cannot say that he did not sanction the post-boys in what they did. When an individual comes forward and gives his card, and screens other parties, the court has a right to infer that what took place was with his sanction, if the facts of the case will bear that construction. The defendant, both from the control he was evidently exercising over the postilions at the time of the accident and from his subsequent conduct, is clearly liable in the present action.

Channell Serjt., in support of the rule. The plaintiff here charges the defendant as an actor in driving the carriage against the gig; and the question raised by the plea of not guilty is, whether he was so. The defendant has also pleaded that there was negligence on the part of the plaintiff, and if that were so the defendant is not liable in trespass (a). It is not disputed that the carriage was hired; that the horses were post-horses; and that the plaintiff was not actually driving, though he was sitting on the box. The case, therefore, falls within the principle of *Laugher v. Pointer* (5 B. & C. 547; 8 D. & R. 556) and *Quarman v. Burnett* (6 M. & W. 499). It is true that those actions were in case; but the main point for consideration is the degree of responsibility which attaches to the hirer of a carriage or horses under circumstances like the present; and as to that, it can make no difference whether the form of the action be trespass or case. The facts in *Quarman v. Burnett* (6 M. & W. 499) were peculiarly strong to raise the inference that the coachman, by whose negligence the accident hap-[54]-pened, was the servant of the defendants; he was the party regularly employed; he was paid a regular sum for each drive, according to express agreement; he was sometimes taken by the defendants into the country for weeks together, and was then paid a regular sum per week; and he wore a livery of theirs, for which he had been measured; but he was held not to be their servant so as to render them liable for his negligence. The facts in the present case are not nearly so strong to shew that the postilions were in this defendant's service. In *Stables v. Eley* (1 C. & P. 614), the defendant had been in partnership with the person who was the actual owner of the cart at the time the accident happened, and he allowed his name still to remain on the cart; and Abbott C. J. ruled that by reason of his then holding himself out to the world as the owner of the cart, and the master of the driver of it, he was responsible for the negligence of such driver. It may be doubted, perhaps, whether that case is quite reconcilable with *Quarman v. Burnett*; but at any rate it is very distinguishable from the present case; for there was nothing done here which held out to the world that the postilions were the servants of the party in the carriage any more than in any other case of persons hiring post-horses. In *Chandler v. Broughton* (1 C. & M. 29; 3 Tyrwh. 220), the horse and gig were the defendant's own property, and the driver is expressly stated to have been his servant. That case therefore stands upon a very different footing from the present, and is quite consistent with *Quarman v. Burnett*.

A trespass may either be wilful in fact, as where a party enters upon the land of another after notice, or wilful in law. In the former case it is easy to ascertain who are co-trespassers, being aiders and abettors of the principal. But in a case where the trespass arises from [55] negligence it is different. What is there here to make the acts of the postilions (which it is admitted must be taken as wilful in point of law, though merely negligent in point of fact), the acts of the defendant? The evidence of the post-boy, who was called, was most material,—that he acted without orders. It is true the defendant was on the box at the time, but that is not sufficient: mere non-interference will not make him responsible.

(b) Vide tamen *Reynolds v. Clarke*, 1 Stra. 634, Fortescue, 212, 8 Mod. 272, 4 M. & R. 502 (a).

(a) Vide *Marriott v Stanley*, ante, vol. i. p. 568.

Then as to the declarations used by the defendant at and after the accident, they do not carry the case any further, so as to make him a trespasser, unless they shew that at the time of the accident, he directed, or at least assented to, the act by which the collision occurred: but they cannot have that effect. They amount at most to a willingness on his part to repair the injuries that had been sustained by the plaintiff and his friend. Suppose the plaintiff had been killed by the accident, would this evidence have supported an indictment for manslaughter? In *Wilson v. Barker* (4 B. & Ad. 614; 1 Nev. & Man. 409) it was held that a person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a trespasser, unless the chattel was seized for his use. That is a strong authority to shew that a party cannot be a trespasser by relation.

TINDAL C. J. The leave to move to enter a nonsuit was reserved, for the purpose of examining whether the authorities that were cited at the trial were applicable to the present case, and whether the principles which regulate an action on the case could be applied to an action of trespass.

At the trial, I was desirous that the merits of the case should be inquired into, and I reserved, for the [56] opinion of the court, the question, whether the doctrine laid down in *Quarman v. Burnett* (6 M. & W. 499), where the principle of exemption was carried to a considerable extent, would apply to the circumstances of this case. It was intended that it should be determined upon the evidence, whether the defendant could properly be considered as a trespasser.

It appears to me, that the cases in which it has been decided that the hirer of a carriage and horses is exempted from responsibility for the acts of the driver—not being his servant—rest upon a very different ground from the present. In those cases, the party hiring had no power of selection as to the person employed in driving; and therefore it was held, that he was not responsible for the want of skill of the driver, who could not be considered as his servant; that the person who was really the master of the driver, was bound to select a proper person to be employed as driver.

But in this case the question is, whether the defendant was a joint trespasser with the postboys, and this question obviously rests upon a very different ground.

The general rule is, that all persons acting together at the time of the commission of a wrongful act, are presumed to assent thereto, and are considered in law as equally trespassers, and are all looked upon as principals. The inquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any inquiry into the intention of the party is quite unnecessary. That was decided in *Leame v. Bray* (3 East, 593; 5 Esp. N. P. C. 18), which was an action against the defendant, who had driven his carriage against another's, not wilfully, but by accident; and it was held that [57] the proper remedy was trespass; and the distinction laid down was, that where the injury was immediate from an act of force done by the defendant, the remedy was in trespass; but where the injury was only consequential to an act before done by the defendant, then an action on the case lay. Lord Ellenborough in giving judgment says, "The true criterion seems to be, according to what Lord Chief Justice De Grey says in *Scott v. Shephard* (a), whether the plaintiff received an injury, by force, from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass, *vi et armis*, by all the cases both ancient and modern. It is immaterial, whether the injury be wilful or not." Grose J., in giving his opinion (3 East, 600), says, "Looking into all the cases, from the Year-book in the T. 21 H. 7 (c) down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the

(a) 3 Wils. 403, 411, 2 W. Bla. 892, 899. And see ante vol. iii. 520.

(c) T. 21 H. 7, fo. 28, pl. 5, where Rede C. J. says, "Although the intent of the defendant was good (in carrying the plaintiff's tithes from the defendant's field, where they were secured, to the plaintiff's house); here, the intent cannot be construed; but it can be in felony; as, if a man shoots at the butts, and kills a man, it shall not be felony, because he had not the intention to kill; and so of a tiler from a house, who, without knowing it, kills a man with a stone, it is not felony; but where one shoots at the butts and wounds a man, although it were against his will, he shall be said to be a trespasser, against his intention."

immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And Lawrence and Le Blanc JJ. express the same opinions. Now in this case there can be no doubt, upon the finding of the jury, that the postboys, by reason of their [58] wrongful act, were trespassers. Then the question is, whether the defendant was jointly a trespasser with them; whether the part which he took in the proceeding was sufficient to make him equally liable with them; and whether there were circumstances in the case which would justify the jury in coming to that conclusion. It appears that he was riding on the box of the carriage when the accident occurred, and saw what was going on; that there was a line of carriages, into which the postboys were endeavouring to force themselves; and he must have known the object of the postboys in doing what they did. If he had remonstrated or expostulated with them at the time, I do not think he could have been held liable in this action, even upon the supposition that the postboys were his servants; for no servant can make his master a trespasser against his will; *Morley v. Gaisford* (2 H. Bl. 443), *M'Manus v. Crickett* (1 East, 106). Or if he had been inside the carriage, and had not seen what was going on, and the postboys, of their own will, had done the injury, I do not think the defendant would have been liable. But the fact of his being outside the carriage, with a full view of all that was taking place and not interfering, though I do not say it is strong evidence, is some evidence, to go to the jury that he assented to the act of the postboys. But the case does not stop there; for his subsequent conduct is to be taken into consideration. There is nothing to shew that he repudiated the act of the postboys; on the contrary, he professed throughout to hold himself responsible; he told the witness Mason, who was driving the gig in which the plaintiff was seated at the time the accident happened, that if he had succeeded in getting into the line, he should [59] have allowed Mason to return to his former position in the line. All this shews that he had a control over the postboys, and that he assented to their acts.

I think, therefore, that this is a case in which the defendant may be considered as the master, the dominus pro tempore, of the carriage and horses; he being present at the time when the accident happened, and assenting to the act by which it was caused; and that the present case falls within the principle of *Chandler v. Broughton* (1 Crompt. & M. 29; 3 Tyrwh. 210), and *Gregory v. Piper* (9 B. & C. 591; 4 Mann. & R. 500). It seems to me on the whole, that the jury justly came to the conclusion that the defendant was a co-trespasser with the postboys; and that the verdict ought not to be disturbed.

COLTMAN J. It seems to be agreed in this case that the court is to be considered in the situation of a jury; and the question for our determination is, whether at the time that the accident happened the defendant assented to the acts of the postilions. This fact depends in a great measure upon Mason's evidence; and I see no reason why credit should not be given to it. (His lordship recapitulated the facts of the case.)

It appears, then, that the defendant throughout said that he would be responsible for the damage. This certainly will not make him liable as a trespasser, unless he were so from the beginning; but I think it is evidence to shew his previous assent to the act that was done by the postilions. He never repudiates their act; he never says it was not his own act; and I think if the case had been left to the jury on the mere question of assent, they would have found in the affirmative.

[60] ERSKINE J. I am of the same opinion. The cases in which it has been decided that case will not lie against the hirer of a carriage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant.

The mere fact of the defendant being one of the persons who hired the carriage and horses, would not make him liable in this action; but it must be shewn that he was assenting to the act from which the injury occurred to the plaintiff. It is not necessary to shew that the defendant contemplated the injury that happened; for if the act of the post-boys in driving into the line was wrongful, and the defendant assented to it, or gave encouragement to its being done, he will be liable in this action. That the act was done wilfully by the postboys there can be no doubt. Now the defendant was on the box at the time, and it is in evidence that one of the post-boys called out to the other, "Go in there," which was an intimation, clearly given to those on the box, of

what was intended to be done ; the defendant, therefore, must have been conscious of what the postboys intended to do.

But the evidence does not stop there. After the misfortune, the defendant never suggests that it was the fault of the post-boys ; neither on the spot immediately after the accident, nor afterwards in his interviews with Mason, does he intimate that it was not his own fault. On the contrary, he makes a statement that shews he was aware of what the post-boys intended to do, and that he had a control over them. Under all the circumstances, therefore, I think the defendant is civilly responsible in this form of action ; and that the rule must be discharged.

[61] CRESSWELL J. I am also of opinion that this rule must be discharged. Some of the matters in the cause may be considered as finally disposed of by the jury ; namely, that a trespass was committed ; that the plaintiff received an injury therefrom, and not by any fault of his own. The plea, I may observe, is rather of a singular character in this form of action, but it is not material to dwell upon that.

It has been reserved to the court to say whether the defendant is liable in this action, not as a dry question of law, but as a mixed question of law and fact, under all the circumstances of the case. The present case is not, I think, affected by the cases of *Laugher v. Pointer* and *Quarman v. Burnett*, which turned on the liability of a party hiring a carriage or horses for the day, for the conduct of the driver. The great struggle in those cases was, whether the driver was to be considered as the servant of the party charged ; and it was not sought, as here, to make the defendant liable as sharing in the act by which the accident occurred, but as a master for the negligence of his servant. The principle of those cases, therefore, has no bearing on an action of trespass ; in which a party may be liable as a co-trespasser for the immediate act of another, though that other be not his servant. [His lordship stated the facts of the case.] Under all these circumstances, it seems impossible to suppose that the defendant did not know that the postboys were going to break into the line ; he had time enough to reflect on what was going on, and he might, if he had thought fit, have stopped the proceeding. This view is confirmed by what the defendant said not only at the time, but afterwards at his chambers, to Mason, that he had intended to let him into the line again. But in order to do so, it is clear he must have first shut him out. All the facts, therefore, tend to [62] shew that he sanctioned the act at the time that it was committed.

Rule discharged.

COBBOLD v. CHILVER. April 26, 1842.

[S. C. 4 Scott, N. R. 678 ; 1 D. N. S. 726 ; 11 L. J. C. P. 173 ; 6 Jur. 346.]

A warrant of attorney authorised judgment to be signed "as of a term : " held, that judgment signed thereon in vacation was irregular.—Semble, that such an irregularity would not entitle the defendant to costs.—The warrant of attorney authorised judgment to be signed for 500l. Judgment had been signed, but it did not distinctly appear for what amount : Held, that a fi. fa. directing the sheriff to cause to be made "269l. 9s. 4d., parcel of a certain debt of 500l.," was irregular, as not following the judgment, and that it was such an irregularity as entitled the defendant to costs.

Sir T. Wilde Serjt., in last Michaelmas term, obtained a rule calling upon the plaintiff to shew cause why the judgment signed in this cause and the execution issued thereon, should not be set aside for irregularity ; and why the plaintiff should not refund to the defendant or his attorney the sum of 269l. 9s. 4d. levied under the said execution, with costs ; upon the grounds that the judgment was signed in vacation, whereas the warrant of attorney only authorised a judgment "as of a term ; " and that the writ of execution did not follow the judgment (a).

The following facts appeared from the affidavits upon which the rule was obtained. The defendant had executed a warrant of attorney, dated the 15th of February 1840, whereby he authorised three attorneys by name, or any other attorney of the court of Common Pleas, to appear for him "as of last Hilary term, next Easter term, or any

(a) There were other points of objection, which were afterwards abandoned by the defendant.

subsequent term;" and to suffer judgment to be entered up against him at the suit of the plaintiff for 500l., with a defeasance upon payment of 250l., with interest. On the 8th of September 1841 judgment was [63] signed upon this warrant of attorney (it was not expressly stated for what sum the judgment was signed). On the next day a writ of fieri facias was issued, commanding the sheriff of Suffolk to "cause to be made as well a certain debt of 269l. 9s. 4d. parcel of a certain debt of 500l. which defendant J. C. Cobbold lately, &c. recovered against the said R. Chilver; as also 5l. 5s. which, &c. were awarded to the said J. C. C. for his damages, &c., whereof the said R. C. is convicted as appears to us of record, together with interest upon the said sums of 269l. 9s. 4d. and 5l. 5s., at the rate of 4l. per cent. from the 8th day of September 1841, &c." The writ was indorsed to "levy 269l. 9s. 4d. with interest as within mentioned, and 6l. 6s. besides, &c." The sheriff had levied under this writ.

Channell Serjt. now shewed cause. Although the judgment was actually signed in vacation, still the authority given by the warranty of attorney to sign judgment "as of a term," has been sufficiently complied with, and the court may consider that it was signed as of some term. By the general rules, H. 4 W. 4, s. 3, all judgments are "to be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day (a);" but if this were to be construed strictly such a warrant of attorney as the present would be nearly useless, as judgment could, in reality, only be signed upon it actually during term. It is obvious, however, [64] that it was the intention of the parties that judgment might be signed at any time.

As to the second point, it will be argued that the writ of execution was irregular, having been issued for a different sum than that for which the judgment was signed; and *Webber v. Hutchins* (8 M. & W. 319) will be relied upon, where it was decided such a variance constituted an irregularity. But in that case the sum for which the judgment had been signed distinctly appeared. A defendant in order to take advantage of such a technical objection, is bound to make the variance clearly out. In this case, although the affidavits state that the judgment was signed on the 8th of September 1841, the amount for which judgment was signed is not stated. Nor is there any variance on the face of the writ. It directs the sheriff to "cause to be made as well a certain debt of 269l. 9s. 4d., parcel of a certain debt of 500l. which J. C. C. lately recovered against R. C.;" the word "which" may be taken as referring, not to the clause immediately antecedent, "a certain debt of 500l.," but to the whole paragraph, "a certain debt of 269l. 9s. 4d.," reading the following words, "parcel of a certain debt of 500l." as in a parenthesis; and then the writ would properly follow the judgment as recited. The court will not conclude that the judgment must have been for the whole sum of 500l., because the plaintiff was authorised to sign judgment for that amount. It is clear that the real debt was only for 250l. and interest; and the plaintiff was at liberty to enter up judgment for a less sum than that mentioned in the warrant of attorney, as there may have been a remittitur for part.

Bompas Serjt. in support of the rule. First, the judgment is clearly irregular, as being signed and dated [65] in vacation, the warrant of attorney not authorising such a judgment. The power given by a warrant of attorney must be strictly followed. In *Todd v. Gompertz* (6 Dowl. P. C. 296) an objection was raised, that the warrant of attorney was, to sign judgment of a term generally, and therefore was not in conformity with R. H. 4 Will. 4, s. 3, though the judgment had been in fact entered up in term time. Patteson J. there says, "The second objection was, that the authority given by the warrant of attorney was to confess a judgment of Hilary term; and it was contended that such a judgment could not be signed now. It was said that, because it ought to be dated of a particular day,—as judgments could not be signed generally of a term,—such a judgment would be irregular, and therefore the warrant was an authority to sign an irregular judgment. I think the utmost limit to which that objection can be carried is, that it would not authorise a judgment to

(a) The same rule provides "that it shall be competent for the court, or a judge, to order a judgment to be entered nunc pro tunc;" but it has been decided that this proviso applies only, as formerly, to cases where the judgment is delayed by the act of the court; *Lanman v. Lord Audley*, 2 M. & W. 535; *Vaughan v. Wilson*, 4 New Ca. 116, 5 Scott, 404, 6 Dowl. P. C. 210; *Doe d. Taylor v. Crisp*, 7 Dowl. P. C. 584; see also *Blewitt v. Tregonning*, 4 A. & E. 1002.

be signed in vacation." So that the opinion of that learned judge is clearly in favour of the present objection. The rule of court, which has been referred to, expressly declares that judgments "shall not have relation to any other day" than that on which they are signed; how then can this judgment, signed in vacation, have relation to any day in term, or be said to be signed "as of" any term? It is possible that the plaintiff might have signed judgment expressly "as of" some term, upon the maxim, *conventio vincit legem* (b)¹; but it is enough to say that he has not done so.

TINDAL C. J. I think there is sufficient in this first point to entitle the defendant to have the rule made [66] absolute. The judgment was signed in vacation; but the authority given by the warrant of attorney was expressly to sign judgment as of some term, and not in vacation. If the plaintiff had followed the warrant of attorney, and signed the judgment as of a term, the court might perhaps have said, that it was sufficient; being within the terms of the agreement between the parties. The rule of court says, that a judgment shall be entered of record of the day when signed, and shall not have relation to any other day; but as this judgment was signed on the 8th of September, in vacation, we cannot give it relation to any term. There is no provision in the agreement to sign judgment in vacation; and as the plaintiff has not availed himself of the provision as to signing it as of a term, I think the rule must be made absolute. But as the objection is one *inter apices juris*, and rather against good faith, I think it must be without costs.

Bompas Serjt. pressing for costs, the court heard him upon the second objection.

In *Webber v. Hutchins* (8 M. & W. 319, 1 Dowl. N. S. 95) Parke B. says, "The writ must agree, in the mandatory part of it, with the judgment. If the plaintiff sues out execution for (i.e. intending to levy) a part only of the sum recovered by the judgment, he may direct the sheriff accordingly by a private memorandum; but if the judgment and writ do not agree, the reason of the variance ought to appear on the face of the writ" (8 M. & W. 320). If the writ in this case is read without the forced construction sought to be put upon it by the other side, it clearly imports that the judgment was signed for 500*l.*, which was the sum for which the plaintiff was authorized to sign judgment by the warrant of attorney. The proper course to have [67] been pursued by the plaintiff is suggested in the rule H. 3 Vict. (6 New Ca. 330, 11 A. & E. 602) containing forms of writs framed by all the judges, (pursuant to the stat. 1 & 2 Vict. c. 110, s. 20); which says, "that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back or at the foot of the writ, directing the sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered, and interest thereon at the rate of 4*l.* per cent. per annum, from the time when the judgment was entered up; and that in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty, and the damages and costs recovered, and the interest thereon calculated as aforesaid, it shall be stated in the body of the writ that the sheriff is to levy interest at the rate of 4*l.* per cent. per annum from the ——— day of ———; and on the back or at the foot of the writ there shall be a memorandum as above directed" (b)².

The judgment in this case must, therefore, be taken to have been for the sum for which it was authorized to be signed by the warrant of attorney; and if that be so, then the writ does not follow the judgment.

TINDAL C. J. I think that this is such an irregularity as entitles the defendant to costs.

The other judges concurring, (Coltman, Erskine, and Cresswell JJ.).

Rule absolute, with costs.

(b)¹ As to this maxim, vide Co. Litt. 180; *Colt v. Bishop of Coventry and Litchfield*, Hob. 140, 160; *Bonham v. Newcomb*, 1 Vern. 214, 215; *Berryman v. Bowden*, Hetley, 59; *Watson's Complete Incumbent*, 275, 276.

(b)² The forms of writs appended to the rule apply to writs of *capias* only; and the directions in the rule appear to have reference merely to cases where a plaintiff seeks to enforce a penalty, and the statute, under which the new rules are framed, deals with cases of arrest alone.

[68] CALLANDAR v. DITTRICH. April 27, 1842.

[S. C. 4 Scott, N. R. 682; 1 D. N. S. 730.]

Assumpsit. The first count was upon a contract to sell and deliver sound tares; breach, that the tares delivered were unsound. The second count was upon a promise properly to ship the tares; breach, that they were improperly shipped, and thereby damaged. Plea to these two counts, that the plaintiff had impleaded the defendant in a foreign court for not performing the identical promises in the first and second counts mentioned, and that the said court had adjudged that the plaintiff had no cause of action in respect of the non-performance of the said promises; and that such judgment was final and conclusive.—In support of this plea a judgment of the foreign court was produced, “that the plaintiff be barred of his claim against defendant, on account of a cargo of tares, received by the ship ‘M. S.’” From a statement of “reasons” appended to this judgment, and which was in fact a statement of the case, it appeared that part of the tares contracted for had reached the plaintiff; that he refused to accept them by reason of their unsound condition; that he had sold them under protest; and that he had instituted that suit to rescind the contract and recover back the money from the defendant; but that he was barred by lapse of time, having brought the suit too late by the law of the country (Prussia) in which the court sat, and in which the goods were shipped, and in which the defendant resided.—Held: first, that the judgment did not support the plea, inasmuch as it clearly was not applicable to the cause of action contained in the second count.—Secondly, that the plea could not be taken divisibly, so as to be considered as applicable to the first count only.—Thirdly, that, under the circumstances, the court, having the powers of a judge *at nisi prius*, ought not to amend the plea by stating that the judgment was in respect of the promise in the first count only.—*Quære*, whether the judgment was applicable even to the cause of action contained in the first count.

Assumpsit. First count, that on, &c. it was agreed between the plaintiff, then residing in London, and the defendant, then residing in parts beyond the seas, to wit, at Königsberg, in the kingdom of Prussia, that the plaintiff should purchase of the defendant, and that the defendant should sell and deliver to the plaintiff, for the purpose of being shipped and conveyed to London aforesaid, a certain large quantity, to wit, 100 lasts of seeds, to wit, tares, at a certain price then agreed upon between them, to wit, the price of 18s. per imperial quarter, free on board in the spring, the said tares to be large, sound, good Königsberg seed tares, of the growth of the year 1836, and of the [69] best quality. (The remainder of the agreement as set out in the declaration relative to the mode of payment, was not material to the point decided.)

Averment: that 100 lasts of tares are equal to a certain large quantity, to wit, 1050 imperial quarters, or thereabouts. Mutual promises. Averment of payment by the plaintiff in the manner stipulated, and performance of the agreement on his part, and that although the defendant did afterwards, to wit, on, &c., in part performance of the said agreement, ship and deliver on board a certain vessel provided by the defendant for the plaintiff, to wit, the “Mary Swan,” at a certain port, to wit, at Königsberg, in the kingdom of Prussia aforesaid, a certain large quantity, to wit, 917 quarters of tares, for the plaintiff; and although the tares so shipped as aforesaid, did afterwards, to wit, on, &c. arrive at London aforesaid; yet the defendant, disregarding his said promise, did not nor would ship the said tares free on board the last-mentioned vessel, and did not nor would sell and deliver to the plaintiff sound good seed tares of the growth of 1836, and of the best quality; but on the contrary thereof, the said tares, at the time of their said delivery and shipment in and on board the said vessel, and on their arrival in London aforesaid, to wit, on, &c. were,—as the defendant at the time of the said shipment and delivery well knew, but which the plaintiff did not discover until the day and year last aforesaid,—very soft, heated, discoloured, mouldy, rotten, decayed and wholly unfit to be used as and for seed tares, or for any other purpose, and were not of the growth of the year 1836, and thereby, and by means of the premises, the same became and were utterly useless to the plaintiff; contrary to the terms of the said agreement and of the promise of the defendant by him so made as aforesaid.

Averment: that in consequence of the defendant's said breach of his said agree-

ment, the plaintiff has not [70] only lost and been deprived of the advantage, profit and gain which he would and ought to have made, if the defendant had performed his said agreement, but hath been deprived of the use and interest of his said moneys, which, in pursuance of his part of the said agreement, he so paid to the defendant as aforesaid, and hath also been put to great charges and expense of his moneys, and been forced and obliged to lay out and expend a large sum of his money, to wit, 1000*l.*, in and about the insurance of the said tares, and in and about shipping the same on board the said vessel at Königsberg aforesaid, and conveying the same to England, and in and about the necessary surveying and ascertaining the state and condition of the said tares on their said arrival in London as aforesaid, and in landing and selling the same under protest, to wit, on, &c. Of all which premises the defendant has, at all times, had due notice.

Second count, that on, &c., in consideration that the plaintiff, at the request of the defendant (a), had agreed to become the purchaser of the said tares, as in the preceding count mentioned, he, the defendant, promised the plaintiff, that he, the defendant, would superintend the shipping and loading of the said tares, to wit, at Königsberg aforesaid, and would take and use every reasonable and proper precaution in seeing that the same were properly shipped and stowed in and on board a fit and proper vessel, or fit and proper vessels, in that behalf, for the conveyance of the said tares to London aforesaid; yet the plaintiff in fact saith, that although he, the plaintiff, in all things duly performed his said agreement as in the preceding count mentioned, and although a large quantity, to wit, 917 quarters of [71] the said tares, was afterwards, to wit, on the day and year aforesaid, under the several agreements in the preceding count mentioned, and with the privity, knowledge and sanction of the defendant, and at his instance, shipped and loaded for conveyance thereof to London, in and on board a certain vessel bound to London, which afterwards, to wit, on, &c. there arrived with the said quantity of tares on board thereof; yet the plaintiff in fact saith, that the defendant disregarded his last-mentioned promise in this, to wit, that he, the defendant, did not, in any manner, according to his said promise, superintend the shipping of the same tares, or take or use any precaution whatever in or towards seeing that the same were properly shipped or stowed in or on board a fit or proper vessel, or fit and proper vessels, in that behalf, but wholly neglected and failed so to do, and on the contrary thereof, the same vessel, in and on board of which the same 917 quarters of the said tares were so shipped and loaded as aforesaid, at the instance of the defendant, to wit, by reason of her having on board too great a cargo, and by reason of the state, size, condition and circumstances of the same vessel, was on the occasion aforesaid a very unfit and improper vessel wherein to ship or stow the same tares, as the defendant at the time well knew; and the plaintiff further saith, that the said 917 quarters of tares were, with the privity and at the instance of the defendant, shipped and stowed in and on board the same vessel in a very careless, negligent, improvident, unusual and unmerchantlike manner, and by means of the premises, the said 917 quarters of the said tares became and were so heated, mouldy, soft, rotten, discoloured and decayed, that the same and every part thereof became, were and was wholly useless and lost to the plaintiff; whereby the plaintiff not only has lost and been deprived of great gains and profits which he otherwise [72] might and would have derived and acquired by a resale of the same tares at high and advanced prices, but hath been deprived of the use and interest of the said purchase-money thereof, and hath been also put to great charges and expenses of his moneys, altogether amounting to a large sum of money, to wit, 1000*l.* in and about the shipping of the said tares, and in insuring the same against perils of the sea, and in and about the conveying of the same to England, and in and about the necessary surveying and ascertaining the state and condition of the same tares on their arrival at London aforesaid, and in landing and disposing of the same.

There were also counts for money paid, for money received, and on an account stated.

Pleas: first, non assumpsit.

Secondly, (to the first count,) traversing the bad condition of the tares.

Thirdly, (to the second count,) traversing the shipment in an improper vessel.

Fourthly, (to the first and second counts,) that before the commencement of this

(a) The request appears to be immaterial, as an agreement to purchase contains in itself sufficient consideration.

suit, and before the commencement of the proceedings next hereinafter mentioned, the defendant was resident in parts beyond the seas, to wit, at Königsberg, in the kingdom of Prussia, within the allegiance of the King of Prussia, and within the jurisdiction of a certain court of judicature called the Royal Prussian Court of Commerce and Admiralty of Königsberg; and that afterwards and whilst the defendant was resident at Königsberg aforesaid, and before the commencement of this suit, to wit, on, &c., the plaintiff impleaded the defendant in the said court of judicature for not performing the very same identical promises, and each and every of them, as are in the first and second counts of the declaration in this action mentioned, and for the damages alleged to have been sustained by the plaintiff thereby; the same court having jurisdiction [73] in the premises; and such proceedings were thereupon had in the said court, that afterwards and before the commencement of this suit, to wit, on the 31st of May 1839, a judgment or decree was pronounced by the said court, whereby it was adjudged and declared that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him the plaintiff through the non-performance of the said promises; and it was further ordered and decreed, by the said judgment or decree, that the plaintiff should pay the costs and expenses of the proceedings so had in the same court in that behalf: which judgment or decree was not in any way reversed or made void. And the defendant says that the said judgment or decree was and is final and conclusive between the parties to such suit, as to the said supposed cause of action, in the country where the same was pronounced, to wit, in the kingdom of Prussia aforesaid; and that the plaintiff is precluded from all further litigation in respect of the same, and ought not further to importune or molest him the defendant in respect of such supposed cause of action so adjudicated upon by the said judgment or decree as aforesaid. Verification.

The plaintiff after joining issue upon the first three pleas, replied to the fourth plea, that no such judgment or decree final and conclusive between the parties to the suit in that plea mentioned, in manner and form as therein alleged, ever was pronounced by the said court of judicature in that plea also mentioned, *modo et formà*; whereupon issue was joined.

At the trial before Tindal C. J., at the sittings in London, after last Trinity term, the following document, translated from the German, was given in evidence in support of the fourth plea (a).

[74] "Sentence.

"In the Matter of Alexander Burn Callandar, of London, Merchant and Corn-Factor, Plaintiff, versus R. M. Dittrich, of Königsberg, Merchant, Defendant.

"The Royal College of Commerce and Admiralty at Königsberg, in Prussia, have, in their session of the 31st of May 1839,—at which were present the Director, Mr. Privy-Councillor-of-Justice Steltter, and Becker, Henke, Burdach, Schrötter, Bittrich, Councillors of Commerce and of Admiralty, and Von Hippel, Referendary of the Supreme court, deputed as Commissary,—conformably to the proceedings in the cause, declared as follows;

"(1) That the plaintiff's claim of 780l. 10s. 1d. sterling, with interest thereon, from the 6th day of April 1838, which he formed against defendant on account of (*bezüglich auf*, relating to) a cargo of 917 quarters of tares received in the year 1837 by the ship 'Mary Swan,' commanded by 'G. Wright,' master, be registered.

"(2) That the agreement between the parties, that the plaintiff should abstain from recovering the 133 quarters of tares, which, according to the defendant's statement, were still lying here for the plaintiff, and that the defendant should be content to accept them, be hereby legally confirmed; and,

"(3) That plaintiff be condemned in the charges of the law proceedings."

"Judicial Reasons.

"A. B. Callandar, in London, in the beginning of 1837, ordered of R. M. Dittrich of this place, 100 lasts of large round Königsberg seed tares, best quality, which were to be free from any mixture of oats, pease and such objectionable grain and seed, at

(a) The translation has been compared with the original; but no correction has been made in anything which could affect the judgment or the court.

18s. sterling per quarter, free on board, to be shipped in spring. Dittrich [75] in his letter of the 18th of January in that year to Callandar, accepted his offer. Before the shipment took place Callandar recommended to Dittrich to have the tares shipped as early as possible, and in as small vessels as possible, to prevent heating. Next to this he ordered him to resell immediately half the quantity of the purchased tares,—about 500 quarters, if the cost price, clear of expenses, could be obtained; but should they be shipped, to give preference to an English vessel. The firm of Dittrich could not effect the sale, and consequently shipped 913 quarters, to an amount of 837l. 6s. sterling, on the 29th of April 1837, per the 'Mary Swan,' 'G. Wright,' master; and upon the 30th idem informed Callandar thereof; observing, moreover, that the remainder consisting of 133 quarters then was warehoused for his account with Dittrich.

"The purchase price for the quantity shipped of 913 quarters tares is paid in that manner, that Dittrich acknowledged to have received by accepted drafts 450l., and that afterwards, on handing bill of lading, Callandar paid to Dittrich's order 375l. 6s. sterling. As to the payment of 12l. for 300 dunnage mats, the parties have not yet agreed.

"The 'Mary Swan' arrived in London on the 5th of June 1837. Callandar examined the tares, and found they were in so bad a state that he thought himself entitled to refuse receipt thereof, and noted a protest through John Lise Venn, notary public in London, after that two corn factors had previously, as competent judges, or experts, declared the tares to be totally decayed. Immediately, and indeed on the 6th of June, Callandar informs Dittrich of his refusal to receive the tares; then on the 9th of June sent him the report of survey and protest, and again declared, that he declined the receipt of the tares, but had got the same landed and brought into a good and airy granary, [76] where the greatest care and attention would be taken thereof; and that he would also try in favour of Dittrich to procure an abatement or reduction in the duty. Now when Dittrich declined to indemnify Callandar anyway, and on the contrary, sent him brokers' certificates, trying to prove by them that the tares had been fully worth the price charged at the time of their shipment, and that he had consequently performed his part of the contract, Callandar answered that he would, if Dittrich made no other disposition, sell the tares for Dittrich's account, and would do so in small parcels by retail; which proceeding was proposed as the most beneficial to all parties interested. Callandar did accordingly, as Dittrich continued silent, always informing him of the respective sales, but without that Dittrich ever replied thereto.

"On the 29th of December 1837, Callandar sent his account-sales and account-current to Dittrich, and demanded payment of his debt, but as Dittrich did not comply with such demand, Callandar on the 10th of June in the year past, brought an action against him, thereby seeking:

"1. To condemn R. M. Dittrich to pay unto him, the plaintiff, instantly, the sum of 780l. 10s. 1d. sterling with running interest thereon, from the 1st April 1838, under pain of incurring execution.

"2. To pronounce the plaintiff entitled to refuse receipt of those 133 quarters of tares lying still here, according to the defendant's statement, and

"3. To condemn the defendant in the whole of the said charges.

"Defendant has admitted the order having been given precisely as stated by the plaintiff, and has expressly allowed that a contract to furnish and deliver has been entered into; but he has also alleged that he has fulfilled his agreement, and therefore disputed, in quali et [77] quanto, the plaintiff's claim; with this qualification only, that he agrees that the plaintiff should not accept that portion of the tares which had not been sent away, whereby the second part of the action is disposed of.

"For the rest the defendant has principally opposed the plaintiff with the objection of prescription, and by reason of the sects. 342(a) and 345(b), part 1, tit. 5, of the

(a) Section 343 of the Allgemeines Landrecht für die Preussischen Staaten, (General, or Universal Code of Laws for the Prussian States), part 1, tit. 5, runs thus:—"The rights which belong to the purchaser of a thing, on account of natural defects affecting that thing, must be exercised—in respect of real property in the country (Landgüter), within three years—in respect of real property in towns (Städtische Grundstücken), within one year—in respect of movable property (Bewegliche Sachen), within six months, after it has been received."

(b) "If the purchaser (Uebernehmer) suffer these periods to elapse without a judicial complaint against the vendor (Geber), his right is lost."

Prussian Code, for the dismissal of the cause of the plaintiff; the defendant contending, that according to the precept, Part I, tit. 11, sect. 987 of the Prussian Code, after such delivery, all the rules of law which hold between buyers and sellers are to be observed between the contracting parties, and consequently the delivery of tares was fulfilled in the very moment of the shipment on board the vessel, sect. 128 (c) loco citato, and that at six months after the receipt of the goods, the party who ordered the goods (now to be considered as purchaser) has lost by lapse of time (d), his right of action in respect of any defect affecting the thing itself. Not only from the day of the delivery (29th April 1837) but also from the day of the accept-[78]-ance (5th June 1837) to the day of the commencement of the action (10th June 1838), more than a year had elapsed, whereby the plaintiff's right of action was extinguished.

"But eventually the defendant has alleged that the agreement of delivery on his part has been duly performed; as that is a matter which depends upon the state and condition of the tares when put on board, and not upon the state in which they arrived in London, and he is able to prove that the tares were shipped on board the vessel in that stipulated condition.

"With respect to this point he has entered upon his proofs, whereupon the status controversiæ has proceeded with an express postponement of the enquiry as to the amount of damage. Nevertheless the admittance of evidence respecting the state and condition of the tares at the time of their shipment has been suspended per decretum, at the special and concurrent request of both parties, according to which, there should previously, and in conformity with the sects. 68 and 75, tit. 10, part 1 of the General Court Instruction, for the present be decided (be a decision) only upon the preliminary objection of prescription (a)¹.

"The plaintiff endeavours to repel such objection, by alleging that because the transaction between the parties is an agreement of delivery, the objection of prescription (a)¹ must fall to the ground. For the contract for delivery is a commercial contract, as to which, in the same manner as with all other commercial contracts, the particular rule prevails:—

[79] "That if one of the parties does not fulfil or perform his obligation, the other may, without being bound to bring an action for performance, withdraw from the contract or agreement, and claim indemnification, sect. 878, I. 11 (a)², sect. 408, I. 5 (b) of the Prussian Code.

"From this the plaintiff infers, that he had a right to decline to receive goods which were not delivered in the stipulated state and condition, and by declaring his will and intention, to be disengaged from the contract; and that he has declared, most properly and distinctly, through his protest against the acceptance of the cargo. Now if this was regularly done on his part, and consistently with the Prussian law, there can be no idea of the goods having become his property; and if the defendant alleges the rule of law laid down in tit. II. sect. 128 (which see, supra, 78), loco cit. according to which, in contracts, the shipment of goods amounts to a delivery, it must be replied that such is the case only with contracts of purchase, but not with contracts of delivery, the difference from which appears from the different nature of both kinds

(c) "The possession of a right to rescind or abandon (eines Untersagungsrechts) is lost, if the other party has acquired the possession of the opposite right."—"Wenn der andere sich in den Besitz des entgegenstehenden negativen Rechts,—des Rechts etwas zu thun,—gesetzt hat." Part I. tit. 7, sect. 128.

(d) Verjährung; as to which see post, pa. 78 (a).

(a)¹ "Verjährung," (which answers the purpose of the "limitation of actions" in English law) is, by the Prussian code, defined to be "an alteration in certain rights resulting, by the provisions of the law, from the non-exercise of those rights for certain fixed periods." Part I. tit. 9, sect. 500.

(a)² By sect. 878 of the 11th title of the first part of the Prussian Code, supra, 77 (g), "if one party refuse the promised performance, the other may immediately abandon the contract"—"von dem Verträge sofort zurücktreten."

(b) By the 408th section of the fifth title of the first part of the Prussian Code, supra, 78 (a), "In agreements, the principal subject of which is a commercial transaction, the party who asserts that the other has not fulfilled the contract according to its terms, or that he is unable so to perform the contract, may thenceforth, but at his own risk, (auf seine Gefahr) abandon the contract."

of agreements. The purchase has respect to a special matter or thing, and the purchaser may express his acquiescence in the quality if he has an opportunity of inspecting it; therefore the assent of both parties, with respect to the thing delivered, does not exist before the receiver has expressed his satisfaction with [80] the commodity. Such consent is tacitly manifested by acceptance, which assent materially differs from the delivery, as sufficiently appears from the rules on Prescription, tit. 5, ss. 343 (*supra*, 77) and 344 (*b*); and therefore, where acceptance never took place, as in this case, there is no ground for contending that the period of limitation has begun to run."

"Interpreter's Remarks.

["The narrative of the facts having thus been given (as usual in the Prussian judgments), and the quotations and opinions of both mandatories (called commissary of justice in Prussia, synonymous with, and joining the functions of, solicitor, attorney, lawyer, advocate, notary,) stated, the judges now, in their sentence, enter into a special inquiry on the nature of the agreement, merely to ascertain (as they say), where the tares were to be delivered, and when the same have become the property of the plaintiff. For this reason, they have referred to certain extracts of letters, (the dates of the letters follow); and as to the nature of the agreement, they consider this indifferent, both parties having agreed that it should stand as a contract of delivery. Now, as it would be useless to repeat and re-translate into English such extracts and arguments, which would tire and absent the English lawyer or judge, the interpreter leaves that, and now enters upon the real grounds whereby the judges justify their sentence or judgment."]

"In the case now lying before us, the agreement (sense of contract) was clearly this, that the defendant had to deliver the commodity here in Königs[81]-berg into the vessel for account and risk of the plaintiff; such follows, doubtless, from the correspondence between the parties as above referred to, by which the contract was settled.

"The defendant had engaged to deliver a cargo for the plaintiffs, free on board here, and the plaintiff in his letters, 31st January and 30th March, left to the defendant the choice of a vessel, thereby, indeed, recommended to him the earliest possible shipment, and dividing of the whole quantity and shipping it in small vessels, that the danger of heating be lessened; and further stated that English vessels should be preferred, without, however, restricting the arrangements to be made as to the shipment, to either of the courses intimated; therefore defendant was fully entitled to make out the invoice as he did, expressing that he had shipped the tares upon order, and for risk of the plaintiff; he left to the latter to procure the insurance, and with respect to the same, only observed that he might mind (consider of) the risk of craft for the cargo between here and Pillau, and the plaintiff, in consequence of such invoice, thought himself bound to pay the balance of the said invoice.

"So, by the shipment of the tares on board the vessel, the delivery was effected, and the contract in *casu* performed on the part of the defendant. Had the vessel miscarried, and the cargo been lost, the loss of the tares would have touched the plaintiff or the underwriters.

"After fulfilled delivery, the rules on the agreement of purchase (s. 987, I. 11, of the Prussian Code (*supra*, 77)), are the only ones that may be applied. Therefore the plaintiff was no longer at liberty to recede from the contract, as from the day of the completed delivery [82] of the tares into the vessel, the risk as well as the ownership thereof went over upon him; and if he thought the tares defective on their arrival in London, he could then no more refuse the receipt of the same as from the delivery into the vessel. According to contract, the property had become transferred from defendant upon the plaintiff; as to the deficiencies in promise (complaints in respect of badness of quality), the plaintiff was now only allowed to refer to the title arising from s. 198, I. 11, and s. 319, seq. I. 5 (*a*), *loco cit.* The protest could be of no use to

(*b*) Which section prescribes shorter periods of limitation in respect of extrinsic defects.

(*a*) Which sections contain a variety of provisions relating to defects in articles which have formed the subject of contracts.

him, as he had become the owner of the commodity, from the moment of shipment on board the vessel here.

"Therefore, it is also without effect or influence when the plaintiff maintains, that if it be impossible to a purchaser on delivery, to ascertain of the quality before the receipt of the commodity, as on the one hand he may have such goods as are to be delivered abroad inspected or examined previous to and on the shipment taking place, and may suffer the goods to be shipped only in case they be found conform to agreement, and, on the other hand, nobody is entitled to form any claim or right to himself, from the neglect of precautionary measures, under the pretext, that it has been impossible to him to express his mind upon the quality of the goods before the delivery of the same.

The defects in the article which the plaintiff complains of as being contrary to the stipulated quality, he is bound to establish, within the limited periods appointed by sections 343 and 344, Part I. tit. 5, of the Prussian Code, before a competent tribunal, to which the defendant is legally amenable.

"Such prescription commenced, according to s. 343, [83] from the day of receipt; and after s. 344, from that of perceiving the deficiency.

"Indeed, the first day is not to be considered identical either with the day of delivery—if we reflect upon such, as per s. 128, I. 11, loco cit.—of that of transmission—in this case, representing the day of delivery (which has been set forth so striking by Bornemann in his observations or "Commentary on the Prussian Civil Law," par. 2, page 607, s. 99): on the contrary, it may be assumed from the general principles upon prescription, as doubtless, that the limitation should commence only from that day when the examination through the entitled (by the person entitled to the goods) could possibly take place, and, of course, from that day when the object was really taken possession of by him (went into his custody); wherefore, in order to point this out in s. 343, there has intentionally not been fixed upon the day of delivery, but on the day of receipt of the object, as the commencing moment of prescription.

"In consequence hereof, the prescription against the plaintiff in this cause first began from the arrival of the tares in London, when and where the same could be taken possession of by him, and he became enabled to inform himself of the alleged defect in quality.

"But also from this term,—being the 5th of June 1837, until the day of commencing his action, on the 10th of June 1838, the limitations for denouncing the claims upon warranty,—at the furthest six months, as prescribed by ss. 343 and 344, loco cit., had long ago elapsed. The plaintiff consequently has lost his right of claim (s. 345, loco cit.).

"As to the 133 quarters which remained behind, the agreement of the parties, that the plaintiff renounces the receipt, and the defendant is consenting thereto, was to be and has been confirmed.

"The decision upon the point of law-charges follows [84] from s. 2, tit. 23, of the regulations upon law proceedings; which regulations are universally binding.

"Issued under the seal entrusted to us, and the usual signature.

"Koenigsberg, on the 31st day of May, 1839.

"(L.S.).

"Royal Prussian College of Commerce and Admiralty.

"Signed, STELLTER" (a).

Objections were taken on the part of the plaintiff to this judgment, on the ground that no libel or other proceedings were shewn, and that no jurisdiction of the court was proved. All objections to the judgment were reserved by the Lord Chief Justice

(a) There followed a certificate by a "sworn public translator to the royal court of Koenigsberg in Prussia, that the foregoing translation thoroughly renders the true sense and meaning of the original judgment, in German, of the royal court of Koenigsberg." To this is subjoined the original judgment, under which the English consul certifies that "the above signature (Stellter) is the proper handwriting of Mr. Stellter, Director of the royal Prussian court, called 'College of Commerce and Admiralty;' and that unto all acts and writings so signed by him, in that quality, full faith and credit is, and ought to be, given in courts of justice, and elsewhere."

for the consideration of the court; and a verdict was found for the plaintiff on all the issues but the third, which applied to the second count.

A rule nisi has been obtained by the defendant in last Michaelmas term, to enter a verdict for him on the fourth issue (*b*) (being the issue raised by replication to the fourth plea), and a cross rule was obtained by the plaintiff, to enter judgment non obstante veredicto, for him, in case the defendant's rule should be made absolute.

Channell Serjt. and Byles, on the part of the plaintiff, now shewed cause against the former rule. The onus [85] lies on the defendant, to shew that the foreign judgment is in respect of the same causes of action as those set forth in the first and second counts. It is contended on the part of the plaintiff, that it is certainly limited to the cause of action in the first count, even if it embraces that. There is nothing in the judgment to shew, that the plaintiff attempted to enforce a claim in respect of any neglect of duty, or of any breach of contract giving rise to a duty. The suit in the foreign court was for a liquidated sum; here the action is for damages, which is a very different cause of action. The plaintiff was the purchaser, and the defendant the seller of certain tares. In the foreign court, it appears that the plaintiff contended there had been no delivery to him so as to vest the property in him; he received them under protest, and insisted that the property was still in the defendant, and prayed the court to rescind the contract. In the present action the plaintiff in the first count assumes the delivery to him and acceptance by him, and sues the defendant for the damage that has accrued to him, by reason of the tares being inferior to those contracted for. In the second count he states, that the defendant took upon himself a duty, viz. that the goods should be shipped in a proper manner, and there is clearly nothing in the foreign judgment to shew that the defendant was relieved from that liability. Besides, if the plea does not import that the judgment in the foreign court was upon the merits, it would be bad as containing no answer to the action. If it is to be taken as importing a judgment on the merits, then it is not supported by the evidence, as the document produced was merely to the effect that the remedy was lost by lapse of time, as in the case of our statute of limitations, not that the right of action was destroyed. The mere loss of a remedy in another country will be no bar to a right of action in this; as (even supposing the contract to [86] have been made in Prussia, which is denied), the *lex loci solutionis* must prevail over the *lex loci contractus*: *The British Linen Company v. Drummond* (10 B. & C. 903); *Huber v. Steiner* (2 New Ca. 202, 2 Scott, 304); Storey, on the Conflict of Laws (p. 839, 2d ed.); *Don v. Lippman* (5 Clark & Fin. 1). The libel and other proceedings would probably have shewn what really were the causes of action in the foreign court (*e*).

Bompas Serjt. in support of the rule obtained by the defendant. The question, whether the foreign judgment included both of the causes of action set out in this declaration, was for the jury. The present objection was not raised at the trial; it was there taken for granted that the causes of action were the same in both cases, and the defendant ought not now to be called upon to argue this point. [Tindal C. J. It was distinctly understood that all objections to the judgment, were reserved for the consideration of the court.]

The judgment sufficiently shews, that the action abroad had reference to both of the causes of action relied upon in the present action; the whole contract was before the court in Prussia. In order to raise the present objection, the plaintiff ought to have replied, that there was no such judgment as that stated in the plea, as to the cause of action in the second count mentioned. The legal effect of the plea is to refer to the cause of action in each count, and therefore it may be taken distributively. Or, if the court entertain any doubt upon this [87] point, having the same power as the judge at nisi prius, they may amend the plea by inserting that the judgment applied to the cause of action in the first count only.

(*b*) The rule was drawn up for entering a verdict for the plaintiff on the third issue, but this appears to have been an error.

(*e*) They also argued upon the objections taken at the trial as to the absence of proof of jurisdiction in the foreign court, and the effect of not setting out all the proceedings. The arguments upon these points are omitted, as the judgment of the court was confined to the point reported in the text. The following authorities were cited; *Buchanan v. Rutter*, 1 Campb. 63, 9 East, 192, and *Obicini v. Bligh*, 8 Bingh. 335, 1 Mo. & Scott, 477.

The effect of the judgment however is, that the plaintiff's whole right of action is utterly gone. It may be admitted, that the judgment does not say that the plaintiff never had a right of action, but it says that he had lost that right; and decides, therefore, that he had no cause of action at that time.

TINDAL C. J. I am unable to get over the first difficulty that has been urged against the defendant in this case. The court are to consider themselves in the same situation as the judge at the trial; and on perusing the judgment which was produced, it does not appear to me to be the same judgment, in effect, as that on which the defendant has relied. The plea put upon the record is, "that the plaintiff impleaded the defendant in the Royal Prussian court of Commerce and Admiralty of Königsberg, for not performing the very same identical promises, and each and every of them, as are in the first and second counts of the declaration in this action mentioned, and for the damages alleged to have been maintained by the plaintiff thereby." The plea then proceeds to state, that "a judgment or decree was pronounced by the said court, whereby it was adjudged and declared that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him, the plaintiff, through the non-performance of the said promises;" and that such judgment was final and conclusive. This plea, therefore, professes to be an express answer to each of the specific gravamina set forth in the declaration. The issue raised by the replication is, "that no such judgment or decree, final and conclusive between the parties to the suit in [88] that plea mentioned, in manner and form therein alleged, ever was pronounced by the said court."

The judgment produced in evidence appears to have been given in a cause concerning a claim for a specific sum of money made by the plaintiff against the defendant "on account of a cargo of 917 quarters of tares received in the year 1837, by the ship 'Mary Swan,' commanded by G. Wright, master." Now the first count in the declaration is for the breach of a promise by the defendant, that he would deliver to the plaintiff a certain quantity of tares at a certain fixed price; and that the said tares were to be "large, sound, good Königsberg seed tares, of the growth of the year 1836, and of the best quality;" and the breach alleged is, that the defendant did not deliver to the plaintiff tares of the quality agreed upon, but that the tares delivered were "very soft, heated, discoloured, mouldy, rotten, decayed and wholly unfit to be used as and for seed tares, or for any other purpose, and not of the growth of the year 1836."

Now it is by no means clear that the judgment in the Prussian court relates to the same cause of action as that mentioned in the first count. But without considering that point, let us see what is the contract alleged in the second count of the declaration. That count states that the "defendant promised the plaintiff that he, the defendant, would superintend the shipping and loading of the said tares at Königsberg aforesaid, and would take and use every reasonable and proper precaution in seeing that the same were properly shipped and stowed in and on board a fit and proper vessel, or fit and proper vessels, in that behalf, for the conveyance of the said tares;" and then alleges, as a breach, that the defendant did not "superintend the shipping and loading of the same tares, or use any precaution whatsoever in or towards seeing that the same were properly shipped or stowed in or on board a fit or proper vessel, or fit or [89] proper vessels, in that behalf;" and that "on the contrary thereof, the vessel, in and on board of which the same 917 quarters of the said tares were so shipped and loaded as aforesaid, at the instance of the defendant, by reason of her having on board too great a quantity of cargo, and by reason of the state, size, condition and circumstances of the same vessel, was on the occasion aforesaid, a very unfit and improper vessel wherein to ship or stow the same tares, as the defendant at the time well knew." And the plaintiff then alleges that the tares were damaged by reason of their having been so improperly shipped.

Now, if for a moment it were supposed that this second count contained the sole subject of action in this case, could it be said that the judgment was for the same cause of action as that upon which the plaintiff had declared? Could we have seen our way, without parol evidence to shew that the judgment produced applied to the damage alleged to have been sustained by the plaintiff, in consequence of the improper shipping and stowing of the tares? I think it clear we could not; and therefore that, upon this point, there is a variance between the proof and the allegations on the record.

To this, one answer that is attempted to be set up is, that the plea may be severed, and treated as applicable to the first count only ; but to this I reply that, though true it is, that some pleas are in their nature severable and distributive,—as, for instance, where there are several counts in assumpsit, the general issue may be distributed and considered applicable to each count, so as to meet the finding of the jury upon the different issues that may be raised ;—yet that, where, in answer to the whole action, a document is produced—which, though not indeed a record according to our law, is still a solemn proceeding in a foreign court, evidenced by the seal of that court—we cannot say that a plea, which sets up [90] that document as an answer to the whole action, is divisible, and take it as applicable to one part of the action only. Then again, it is said that we might amend the plea in this case. But I do not think we could amend the issue so as to make the plea apply to the first count only, and thereby occasion a different set of issues. Upon the whole, therefore, I think the verdict must be entered for the plaintiff upon this issue, as the defendant has failed to make it out affirmatively.

COLTMAN J. The answer set up by this plea is, not that there was no reasonable cause of action in justice or honesty on the part of the plaintiff ; it is merely in the nature of a technical answer, and therefore it ought, I think, to be strictly proved. On the best consideration I have been able to give this case, it appears to me, that the suit in the court of Commerce at Königsberg, was not brought for the same cause of action as the action now before this court. The proceedings in the foreign court appear to be either very imperfect in their nature, or not to be fully before us. The suit in the Prussian court seems to be rather for the rescission of the contract ; while the present action is for damages resulting from a breach of that contract. Now it seems clear that a party may not be entitled to rescind a contract, and yet may be entitled to an action for the breach of it. Upon this ground, therefore, I think the plea is no answer to this action.

With respect to the point that has been raised as to the amendment of the plea, I think that no favour or stretch of authority is to be shewn, or made on behalf of a party who is seeking to withdraw his case from our jurisdiction ; and that if we even had the power to amend, we are not called upon to exercise it in this case, or to make any extraordinary exertion on his account.

[91] Upon the whole, I think the defendant has failed on this issue, and that the rule for entering the verdict for him thereon must be discharged.

ERSKINE J. I am of the same opinion. In discussing this question I think we have nothing to do with what the effect of the foreign judgment may be in this country. The issue is, whether such judgment, as stated in the plea, is final and conclusive between the parties, as to the two causes of action mentioned in the two counts in the declaration. If the defendant had made that out, in point of fact, he would undoubtedly have succeeded ; and the onus lay upon him to shew that there had been a final and conclusive judgment such as he alleges. It does not appear upon the record in this action, that the foreign judgment operated as a bar by limitation. It is pleaded as a final and conclusive judgment between the parties. The question then is, whether the defendant has made out the affirmative of this issue. Even assuming that the foreign judgment put in evidence is a final and conclusive judgment, the question still is, whether it is such a judgment as is mentioned in the plea, namely, a judgment as to the identical causes of action mentioned in the first and second counts of this declaration. Now we must look to the judgment and see if it is what it is alleged to be. I confess it does not appear to me a judgment for either of these causes of action. The suit in the foreign court appears rather to be founded upon a promise by the defendant to repay the plaintiff a sum of money ; which is a very different cause of action from either of those set forth in the first two counts of this declaration. But that is not the ground of objection. The plea states a judgment recovered in respect of two distinct promises ; the judgment appears to be in respect of one promise only, and to have no reference [92] whatever to any agreement or duty on the part of the defendant with regard to the shipment or stowage of the tares. The judgment, therefore, does not in my opinion support the plea, inasmuch as it appears to be for, at any rate, a very different cause of action from that set forth in the second count of this declaration.

The next point is, whether or not we can take this plea distributively, so as to apply it to the first count only. But the defendant was bound, I think, to state the

legal effect of the judgment, and he states it as applicable in law to both counts in the declaration. For the reason just given, it does not however appear to me that the judgment can be considered as a bar to the cause of action mentioned in the second count. There is, therefore, a variance between the statement in the plea, and the legal effect of the document produced to support it.

We are then asked to amend the plea; but I think we ought not to do so. I agree with my brother Coltman that it would be unjust to do so in a case where there is no real answer put forth upon the merits. And even if we did amend, the plaintiff must have the opportunity of raising the question, whether the foreign judgment is conclusive as a bar to an action in this country; and I think, for such a purpose, we ought not to assume a power which it is by no means clear that we possess.

CRESSWELL J. I quite agree that the present rule for entering a verdict for the defendant on this issue must be discharged.

A distinct question is raised by the issue, whether there has been any final and conclusive judgment between these parties delivered by the court of Commerce in Prussia, on the causes of action in the first and second counts in this declaration. I cannot myself see [93] that the judgment was in respect of either of those causes of action. With regard to the first count, it may be that there was, or that there was not, such a judgment; all that I say is, that I do not myself see that there was. Looking at that which was properly the judgment produced, it speaks of the claim of the plaintiff against the defendant, "on account of a cargo of 917 quarters of tares received in the year 1837, by the ship 'Mary Swan'" (ante, 74); but this is so vague and uncertain, that I cannot say what was the nature of that claim, or what the object of that suit; it may have been to rescind the contract, or it may have been for damages in respect of the nonfulfilment of the contract. To my apprehension, it is not clearly applicable to the cause of action in the first count of this declaration. Some years ago it was supposed in our courts, that if an article sold did not correspond with a warranty, the purchaser might either rescind the contract, and sue the vendor for the recovery of the purchase money, in an action for money had and received; or sue for damages occasioned by the breach of the contract (b). Now, it rather appears, that this suit in the foreign court was something of the former class; for in what is set out in the document produced as an appendage to the judgment, and called the "Reasons" of the court, it is stated that when the "Mary Swan" arrived in London, the plaintiff "examined the tares and found they were in so bad a state, that he thought himself entitled to refuse the receipt thereof;" and immediately afterwards he informed the defendant "of his refusal to receive the tares" "and repeatedly declared that he declined the receipt of the tares;" and then it further appears, that one of the points upon which the plaintiff prays judgment in the [94] foreign court, is that he may "be entitled to refuse receipt" of the tares. It seems, therefore, that this suit was to rescind the contract, rather than a suit for damages.

But even supposing that this judgment does apply to the cause of action set forth in the first count, we must then look to the second count; and there is clearly nothing in this judgment, that points to any negligence in shipping the tares, which is the cause of action in the second count. The plea says, the foreign judgment goes to the whole cause of action; but when it is produced, it does not appear to do so; it does not therefore support the allegation in the plea.

But then it is said, that the judge at nisi prius might have amended, and that the court, being considered in the same situation as the judge, may also exercise that power; but we can only amend as to the variance, by altering the statement in the plea, that the foreign judgment was for both of the causes of action mentioned in the first and second counts. If we did so, however, we should only make it a bad plea; for it would then be pleaded to both counts, and would, on the face of it, apply only to one.

Rule discharged.

(b) Vide *Street v. Blay*, 2 B. & Ad. 456.

[95] WHITE v. NICHOLSON, Executor of Harriett Reeves, Deceased. April 28, 1842.

[S. C. 4 Scott, N. R. 707; 11 L. J. C. P. 264.]

By an agreement made and dated 31st May, A. let to B. a house at "80l. a year, payable quarterly, to commence from the 29th September next." B. agreed to take the fixtures at a valuation. The following memorandum was at the foot of the agreement:—"A. agrees to take the fixtures again at the expiration of the tenancy, provided they are in as good condition then as they now are; and B. agrees to leave the premises in the same state as they now are." Though not so stated in the agreement, the house was, at the time of the making of that agreement, in the occupation of C.—as tenant to A.,—who quitted on the 26th of September:—Held, first, that notwithstanding the existence of express terms of agreement (b), an implied contract arose on the part of B. to use the premises in a tenant-like manner; and secondly, that the agreement supported the allegation of a promise to deliver up the premises in the same state as they were in at the commencement of the tenancy.

Assumpsit. The declaration stated, that, in consideration that Harriett Reeves, at her request (a), then had become and then was tenant, to wit, as tenant from year to year, to the plaintiff, of a certain messuage and premises with the appurtenances, upon and subject to the terms that the said H. R. should use the said messuage and premises during the said tenancy, in a tenant-like and proper manner, and should, at the expiration thereof, leave the said messuage and premises in the same state as the same were in at the time of the commencement of the said tenancy, the said H. R. promised the plaintiff to use the said messuage and premises in a tenant-like and proper manner during the said tenancy, and to leave the same, at the expiration thereof, in the same state as the same were in at the [96] commencement of the said tenancy. **Averment:** that the tenancy continued to the time of the death of H. R. and long afterwards, and was duly determined by a certain notice from the defendant, as executor, to the plaintiff. **Breach:** that H. R. in her lifetime did not use the messuage and premises in a tenant-like or a proper manner, but, on the contrary, used them in so untenant-like and improper a manner that they became and were ruinous, &c.; and that the defendant, as executor, after the death of H. R., did not, upon the expiration of the said term, or at any other time, leave the said messuage and premises in the same state as the same were in at the commencement of the said tenancy, but, on the contrary thereof, on the said expiration of the said tenancy, to wit, on, &c., left the said messuage and premises in a much worse state than the same were in at the said commencement of the said tenancy, and left the doors, windows, &c. greatly dilapidated, &c.

Pleas: first, non assumpsit.

Secondly, as to the first breach, that H. R. did not use the premises in an untenant-like or improper manner.

Thirdly, to the second breach, that, at the expiration of the said tenancy, the defendant left the premises in the same state as they were in at the commencement of the said tenancy.

At the trial before Erskine J., at the sittings at London, after last Hilary term, the following agreement was given in evidence.

"Memorandum of an agreement, made and entered into, the 31st day of August 1838, between Nicholas White of, &c. of the one part, and Harriett Reeves of, &c. of the other part, as follows: N. W. agrees to let, and H. R. agrees to take a house and premises, No., &c., late in the occupation of S. Seabrook, at the clear net rent of 80l.

(b) Vide *Shepherd v. Pybus*, ante, vol. iii.

(a) The allegation of request appears to be unnecessary; as the consideration stated is not a benefit conferred on the defendant, (which, in the absence of an antecedent request, would be taken to have proceeded from the plaintiff spontaneously, as a mere gratuitous benefit), but an agreement for a tenancy, from which both parties, or if not the plaintiff (as in the declaration no rent is mentioned or alluded to), at least the defendant, would derive advantage.

per year, payable quarterly, to com-[97]-mence from the 29th day of September next, and the first quarter's rent to become due and payable on the 25th day of December next. The said H. R. to pay all rates, taxes, and assessments assessed upon the premises. The said H. R. also agrees to take the fixtures at a fair valuation in the usual way; and it is hereby agreed by the said parties, that if either of them is desirous of putting an end to the tenancy, a proper notice in writing must be given for that purpose.

"Witness, &c.

"N. White agrees to take the fixtures again at the expiration of Mrs. Reeves's tenancy, and to allow the price at which they may be valued, provided they are in as good condition then as they now are; and Mrs. Reeves agrees to leave the premises in the same state as they now are.

"(Signed) NICHOLAS WHITE,
"HARRIET REEVES."

Another tenant was in possession at the time the agreement was entered into, who did not quit till the 26th of September.

It was objected, on behalf of the defendant, first, that the clause at the end of the agreement being in special terms, the implied contract to use the premises in a tenant-like manner did not arise; and, secondly, that the agreement proved did not support the promise as laid in the declaration; inasmuch as the former was, to leave the premises "in the same state as they now are," viz. on the 31st of August, the date of the agreement; and the latter was, to leave them "in the same state as they were in at the commencement of the tenancy," viz. the 29th of September. The learned judge offered to amend; but this was declined on the part of the plaintiff. Both points were reserved for the consideration of the court; and it was agreed that the court might make any amend-[98]-ment that a judge at nisi prius might have made. The jury returned a verdict for the plaintiff, with nominal damages.

Bompas Serjt. now moved to enter a nonsuit, and renewed the objections taken at the trial.

Upon the second point the court granted a rule nisi, against which

Channell Serjt. now shewed cause. The tenancy, in fact, commenced on the 31st of August, the date of the agreement, inasmuch as it contained words of present demise. The reference to the 29th of September in the agreement related to the payment of rent; and the words "to commence" should be read "to commence to be paid." If the tenancy was not to commence till the 29th of September, the word "now" may be construed to mean "at the commencement of the tenancy," as it would be absurd to suppose the testatrix would have undertaken to leave the premises in the state they were in on the 31st of August, if she was not to have possession till the 29th of September.

Bompas Serjt., in support of the rule. As the rent did not commence until the 29th of September, it was equally absurd to suppose that the testatrix was to have the premises from the 31st of August to Michaelmas for nothing. There was no valuation of the fixtures at the time of the agreement. It is therefore clear that the tenancy did not commence then. It might be an improvident agreement on her part; but it was distinctly stipulated that her tenancy was to commence on the 29th of September, and that she would keep the premises in the same state they were in on the 31st of August.

TINDAL C. J. I cannot help thinking that the good sense of the agreement is, that the parties must have [99] referred to the state of the premises at the time of the commencement of the term. That would be an agreement consistent with the tenant's own enjoyment of the premises; and this interpretation would get rid of the difficulty that would otherwise arise as to injuries which might be done to the premises in the mean time by the tenant then in possession. Upon the whole, therefore, I think it is not too much to say that the parties were stipulating as to the commencement of the term, as they were clearly speaking in a very general way. And, looking at the whole of the clause at the end of the agreement, I think the word "now" may fairly be taken to refer to the commencement of the term. The plaintiff thereby "agrees to take the fixtures again at the expiration of Mrs. Reeves's tenancy, and to allow the price at which they may be valued, provided they are in as good condition then as they now are; and Mrs. Reeves agrees to leave the premises in the same state as they now are." The word "then" clearly means the period of the determination of the

term, and it is used in opposition to the word "now," which, I think, may mean the commencement of the term. The statement in the declaration therefore appears to be right and proper, and there is no variance.

COLTMAN J. I am of the same opinion. I think the party agreeing to take the premises must have meant that she would deliver them up in the same state as they were in when she entered upon them: that would be a natural agreement. Otherwise, if the party in possession at the time of the agreement, had pulled down the house before Michaelmas, the testatrix would have been liable. The parties, to be sure, are, to a certain degree, fettered by the use of the word "now," and we could not easily give the proposed meaning to that word, but for its being used in opposition to the word [100] "then," which clearly indicates the determination of the term. Upon the whole, therefore, I think the word "now" may fairly mean the time when the party was to commence the enjoyment of the premises.

ERSKINE J. I own I did not think at the trial that the agreement could bear that interpretation, and I have some difficulty in thinking so now; but I believe justice will be done by adopting it, and it will probably carry out the real meaning of the parties.

CRESSWELL J. I am inclined to think that the agreement may bear the construction put upon it by the rest of the court. It appears that the fixtures are not to be taken until the commencement of the tenancy; and they, also, at the end of the term, are to be given up in as good condition "then as they now are:" that would seem to shew that the word "now" must refer to the commencement of the tenancy.

Rule discharged.

[101] STURTEVANT v. FORD. April 22, 1842.

[S. C. 4 Scott, N. R. 668; 11 L. J. C. P. 245. Discussed, *In re Overend Gurney and Company*, 1868, L. R. 6 Eq. 359.]

A plea by the acceptor of a bill, to an action by the indorsee, that the bill was accepted before it became due, at the request and for the accommodation of J. S., and without any value or consideration for the acceptance or for the payment; and that the bill was indorsed to the plaintiff after it became due, is bad.

Assumpsit by the indorsee against the acceptor of a bill of exchange drawn by J. Ayres for 243l. 7s. 8d., dated 17th of August 1838, payable in London (a), for value received in iron.

Fourth plea, that the bill was accepted by the defendant before the same became due or payable, at the request and for the accommodation of Ayres, and without any value or consideration whatever for the acceptance thereof or for the payment thereof; and that the said bill was so indorsed to the plaintiff as in the said declaration mentioned, two years after the same had become due and payable, according to the tenor and effect thereof. Verification.

Special demurrer, assigning for cause, that it is not averred or shewn in the said plea that the defendant accepted the said bill upon the terms that the same should not be indorsed or negotiated by Ayres after it became due; that the said plea does not allege that the plaintiff had notice of the premises or any of them in that plea mentioned, before or at the time the said bill was indorsed to him, or that the defendant ever required Ayres not to indorse the bill after it became due.

Joinder in demurrer.

[102] Channel Serjt. in support of the demurrer. The plea does not state that the plaintiff is not a holder for value, and it must be therefore taken upon the record that the plaintiff is a holder for value. Neither does the plea state that, before the plaintiff became the indorsee of the bill, he had notice that the bill was drawn for the accommodation of the drawer and without value. It does not shew that the drawer was under any restriction as to indorsing a bill after it became due. The question to

(a) As to the effect of the insertion of the words "in London" in the body of the bill, see *Selby v. Eden*, 3 Bingh. 611, 11 B. Moore, 511; *Fayle v. Bird*, 6 B. & C. 531, 9 Dowl. & Ry. 639, 2 Carr. & P. 303; *Gibb v. Malher*, in *Error*, 8 Bingh. 214, 2 Cro. & Jerv. 254, 2 Tyrwh. 189, 1 Mo. & Scott, 387, ante, 10, n.

be decided upon the demurrer is, whether a holder for value taking a bill which is over due, without notice that the instrument is an accommodation acceptance, is not entitled to recover. [Cresswell J. The question is, whether an indorser can give a better title than he himself has.] In *Charles v. Marsden* (1 Taunt. 224) it was held not to be a sufficient defence to plead that the bill was accepted for the accommodation of the drawer without consideration, and indorsed to the plaintiff after it became due. In *Stein v. Yglesias* (5 Tyrwh. 173; 1 C. M. & R. 565; 1 Gale, Exch. Rep. 98; 3 Dowl. P. C. 252), it was pleaded that the bills were accepted for the accommodation of the indorser, and without any consideration for such acceptance. The plea was held to be bad, on the ground that it did not state that the bill had been accepted before it became due, and that there was nothing to shew that the defendants intended to limit the negotiation of the bill to the time before it became due. The plaintiff would have his remedy over against the party accommodated. It lay on the defendant to shew that the power of indorsing, and thereby raising money, was limited to the period during which the bill was running. The defendant is not entitled to notice of non-payment. *Tinson v. Francis* (1 Campb. 19), which will be relied on for the defendant, was a case of gross fraud.

[103] Talfourd Serjt., *contra*. This is a point of considerable importance. In *Tinson v. Francis* it was held that an indorser of a promissory note for value, who had received the note after it became due from an indorser who had not given value, could not sue the maker.

In *Brown v. Davies* (a), where a promissory note was indorsed to the plaintiff after it became due, it was held that the maker was entitled to go into evidence to shew that the note was paid, as between him and the payee. In that case Buller J. says, "There is this distinction between bills indorsed before and after they become due. If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is over due, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him."—"I am speaking of cases where the note has been indorsed after it became due, when I consider it as a note newly drawn by the person indorsing it."

The law as laid down by Buller J. is not, it is true, adopted to its full extent by Lord Kenyon, who was not prepared to go the same length where the indorsee cannot be fixed with notice of the dishonour of the note or bill. But the contract and the understanding upon the drawing of a bill of exchange is, *prima facie*, that the party shall have the benefit of the time during which the bill has to run, and not for an indefinite period.

TINDAL C. J. Upon these pleadings the plaintiff must be taken to be a holder for value, without notice [104] of any defect in the title of his indorser. Upon the authority of the cases,—without saying what would be my opinion if the question were *res integra*,—I think the plaintiff is entitled to judgment. In *Charles v. Marsden* the plea stated, that, at the time of the indorsement, the plaintiffs knew that the bill had been accepted by the defendant for the accommodation of Atkinson, the payee; that, therefore, was a stronger case than the present. I do not see much force in the argument, that the circumstance of the bill being overdue when it is indorsed puts the indorsee in the same position as the indorser, who, in the case of a bill drawn for his accommodation, cannot sue at all. I do not think that the holder is precluded from suing in all cases of accommodation bills indorsed after the time at which they purport to be payable. Nothing dehors the bill, as payment, &c. ought, I think, to affect an indorsee for value. In *Stein v. Yglesias* it was said, without disapprobation on the part of the court, that the defendant was bound to allege want of consideration for the indorsement.

COLTMAN J. I am of the same opinion. In *Charles v. Marsden*, Lawrence J. says, "Where a party has obtained the bill by fraud, or where there is any prejudice to the drawer, those cases apply; but, unless in instances of this kind, the acceptor is not relieved. This case may fall within some general expressions which have been used by the court in giving judgment, but those expressions are always to be taken

(a) 3 T. R. 80. And see *Borough v. Moss*, 5 Mann. & Ryl. 296; *Burrough v. Moss*, 10 Barn. & Cressw. 558.

with reference to the cases to which they were applied. One was a case of clear fraud, another was a smuggling transaction. In the present case, it is to be supposed that the party persuades a friend to accept a bill for him, because he cannot lend him money. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should [105] advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it. But if there had been such an agreement, it should have been stated in the plea; and it might then have been a defence; but that is not so here. This bill, then, must be presumed to be given in order that the party may raise money on it in the ordinary way. I see nothing in the transaction prejudicial to the acceptor, and the plea is bad in substance."

ERSKINE J. I am of the same opinion. It must be taken here that the plaintiff was a holder for value. The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been so averred. A jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be an inference of law; it should therefore have been made the subject of an averment. In the absence of such an averment, the question is, whether the mere fact of the bill being an accommodation bill prevents it being negotiable after it becomes due. It is said that a bill indorsed after it becomes due, is taken by an indorsee subject to all the equities. The question is, whether the matter of defence set up, is an equity which attaches to the bill. The drawer of this bill could not sue the acceptor. If the plaintiff has given consideration there is no equity to attach to him. Then is this an equity with which the bill is encumbered? It seems to me that no equity attaches to the bill; because it was placed in the hands of the drawer, for the very purpose of raising money. Looking at the cases of *Charles v. Marsden* and *Stein v. Yglesias* I think the [106] plaintiff's right to recover is not concluded by the facts disclosed in this plea.

CRESSWELL J. I am of the same opinion. Had this been *res integra*, I am not prepared to say that I should have come to the same conclusion. I should have thought it a case of doubt. By the law merchant, an indorsement may give to the indorsee a better title than the indorser had. It is said that the indorsee of a bill which is over due, takes it subject to all the equities; perhaps a better expression would be that he takes the bill subject to all its equities. That brings it to the question, whether this is an equity which attaches to the bill. In *Charles v. Marsden* the court said, that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it. *Attwood v. Crowdie* (a) is consistent with the law as laid down in *Charles v. Marsden*.

Judgment for the plaintiff.

[107] FRENCH v. MAULE. April 30, 1842.

Where the master has fixed the amount of security for costs to be given by a plaintiff resident in Ireland, the court refused to interfere to reduce the amount.

In this action, which was brought on an attorney's bill for 275l. 13s. 11d., it appeared that, as the plaintiff resided in Ireland, a judge's order had been obtained to stay the proceedings in the cause till he should give security for the costs; and it having been sworn on the part of the defendant, that it was necessary for his defence that several witnesses of a superior station in life should be brought over from Ireland,

(a) 1 Stark. N. P. C. 483. In that case Lord Ellenborough ruled, that the acceptor of accommodation bills may reclaim them in the hands of the indorsee of the party for whose accommodation they were accepted, if, at the time they fall due, the balance of accounts, as between the indorser and the indorsee, to whom they have been remitted on account, be in favour of the indorser; but that, if not so reclaimed, the indorsee acquires a lien for subsequent advances made by him to the indorser; and the court refused a rule for a new trial.

the master, to whom the matter had been referred, fixed the amount of the security at 400l.

Shee Serjt. applied for a rule calling on the defendant to shew cause why the amount of security for costs to be given by the plaintiff in this cause should not be reduced. He submitted that requiring security in so large a sum amounted to a denial of justice, and that the defendant might have the witnesses examined on interrogatories, according to the suggestion of Patteson J. in *Kent v. Poole* (7 Dowl. P. C. 572).

Per curiam. This is not a case in which we ought to interfere with the discretion of the master, the subject being one so much more within his experience, than within that of the court. There is nothing to shew that the view which he has taken of the matter is erroneous.

Rule refused.

[108] BULMER AND OTHERS v. GILMAN AND OTHERS. April 30, 1842.

[S. C. 4 Scott, N. R. 781 ; 11 L. J. C. P. 174.]

A parliamentary agent, entrusted with the passing of a local bill through parliament, who puts a construction on an order of the House of Lords which is doubtful in its terms,—such construction being different from that which is adopted by the standing orders committee and by the House, whereby it becomes necessary to abandon the bill,—is not guilty of such gross negligence as to disentitle him to recover a remuneration for his labour in passing the bill through the House of Commons.

Assumpsit, for work and labour, care and diligence, as attorneys, in and about soliciting and passing a certain bill in and through the Commons' House of Parliament, and in and about other businesses, &c. with counts, for money paid, and on an account stated.

Pleas ; first, non assumpsit.

Secondly (to the first count), that the work and labour, care, and diligence by the plaintiffs done, performed, and bestowed for the defendants, as in the said first count mentioned, were by the plaintiffs done, performed, and bestowed in so careless, negligent, and insufficient a manner, that the same, from the time of the doing and performing thereof, and from thence until the time of the commencement of this suit, became and were, and from thence hitherto have been, and still are, wholly useless and unbeneficial to the defendants ; and the defendants, by and through such carelessness, negligence, and inefficient conduct of the plaintiffs, as aforesaid, derived no benefit whatsoever from the same. Verification.

Thirdly (to the second count), that the sum, so paid by the plaintiffs for the use of the defendants, as in the second count mentioned, was money paid by the plaintiffs, for, in, about, and in respect of, work and labour by the plaintiffs done and performed for the defendants ; and that such work and labour were done and performed by the plaintiffs in a careless, &c. (as in last plea) ; and from which last-mentioned work and labour, and the money paid by the plaintiffs, for, in, about and in respect thereof, by and through such carelessness, [109] negligence and ignorance of the plaintiffs as aforesaid, the defendants had derived no benefit whatever (a). Verification.

Replication (to the second and third pleas), de injuriâ.

At the trial before Tindal C. J., at the Middlesex sittings after last Michaelmas term, the following facts appeared :—

The plaintiffs are parliamentary agents ; and the action was brought by them against the defendants, who were attorneys, residing in Norwich, for conducting a bill "for better paving, lighting and improving the city of Norwich and county of the same city," through the House of Commons, in the years 1838 and 1839. There were

(a) The plaintiff had moved to strike out the first plea or the second and third. On shewing cause it was agreed that the pleas should stand, the plaintiff to be at liberty to reply de injuriâ. Quære, whether the special pleas would not have been bad, on demurrer, as amounting to the general issue. See *Hill v. Allen*, 2 M. & W. 283 ; *Randall v. Ikey*, 4 Dowl. P. C. 682 ; *Cooper v. Whitehouse*, 6 C. & P. 545.

other acts in existence for similar purposes, but their operation was confined to the city of Norwich.

The following are the standing orders of the House of Lords, made in 1838 as to private bills :—

“Standing orders, the compliance with which must be proved before the Standing Orders Committee, in all bills for railways included in the second class, and in any other bill included in any of the three classes, which may be opposed ; and before the committee on the bill, in any other case.

“1. That notices shall be given in all cases where application is intended to be made for a bill included in any of the three classes above mentioned.

“2. That such notices shall be published in three successive weeks in the months of October and November, or either of them ; and in the case of such railway bills as are included in the second class, in lieu of [110] those months, twice in the month of February, and twice in the month of March, immediately preceding the session of parliament in which application for the bill shall be made, in the *London, Edinburgh, or Dublin Gazette*, as the case may be, and in some one and the same newspaper of the county in which the city, town, or lands to which such bill relates shall be situate, or if there is no newspaper published therein, then in the newspaper of some county adjoining or near thereto.

“3. That if it be the intention of the parties applying for a bill to levy any tolls, rates or duties, or to alter any existing tolls, rates or duties, the notices shall specify such intention.

“4. That on or before the 31st day of December, immediately preceding the application for a bill, by which any lands or houses are intended to be taken, or an extension of the time granted by any former act for that purpose is sought for, application in writing (and in cases of bills included in the second class in the form set forth in the appendix marked (A)) be made to the owners, or reputed owners, lessees, or reputed lessees, and occupiers, either by delivering the same personally, or by leaving the same at their usual place of abode, or, in their absence from the United Kingdom, with their agents respectively ; and that separate lists be made of such owners, lessees and occupiers, distinguishing which of them have assented, dissented, or are neuter, in respect thereto.”

The three classes of bills referred to in the above orders, are as follows :—

“1st Class. Bills for inclosing, draining, or improving lands . . . for paving, lighting, watching, cleansing, or improving cities or towns . . . relating to poor-rates, or the maintenance or employment [111] of the poor ; and bills for altering any act passed for any of the said purposes, except such bills as are included in the third class of bills.

“2d Class. Bills for making, maintaining, varying, extending or enlarging any bridge, turnpike road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry or dock ; and bills for altering or amending any act passed for any of the said purposes, except such bills as are included in the third class of bills.

“3d Class. Bills relating to county rates, gaols or houses of correction ; . . . and bills to continue or amend any former act passed for any of the purposes included in the two preceding classes, where no further work than such as was authorized by any former act is proposed to be made.”

The following notice had been prepared by the plaintiffs ;

“Notice is hereby given, that application is intended to be made to Parliament in the next ensuing session, for leave to bring in a bill to alter, amend, enlarge and repeal certain of the powers and provisions of an act passed in the forty-sixth year of the reign of His late Majesty, King George the Third (46 G. 3, c. lxxvii.), intituled ‘An Act for better paving, lighting, cleansing, watching and otherwise improving the city of Norwich.’ And also of an act passed in the sixth year of His late Majesty, King George the Fourth (6 G. 4, c. lxxviii.), intituled ‘An act for amending and

enlarging an act of His late Majesty, for better paving, lighting, cleansing, watching and otherwise improving the city of Norwich.' Dated, this 8th day of November, 1838.

"CHAS. S. GILMAN, Solicitor,
"Norwich."

[112] But in consequence of a letter from one of the defendants, suggesting that this notice was insufficient by reason of its not stating that it was intended to extend the powers of the existing acts to the hamlets, &c. in the county, and to levy rates on the owners and occupiers thereof, the notice was re-settled, and duly published, in the following form ;

"Notice is hereby given, that application is intended to be made to Parliament in the next ensuing session, for leave to bring in a bill to alter, amend, extend and enlarge the powers and provisions of an act passed in the forty-sixth year of the reign of His late Majesty King George the Third, intituled 'An act for better' &c., and also of an act passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled 'An act for amending,' &c.

"And notice is hereby also given, that it is intended to insert in the proposed bill a power for enabling the owners and occupiers of houses, lands and hereditaments, in the parishes, hamlets, liberties, precincts and places, within the county of the said city, to extend the powers and provisions of the said bill to the said parishes, hamlets, liberties, precincts and places, or to certain parts thereof.

"And notice is hereby further given, that it is intended, by the said bill, to take powers for raising money, for the purposes thereof, by rates on the owners and occupiers of houses, lands and hereditaments within the said city and county.

"Dated, this 8th day of November, 1838."

On the 9th of March, 1739, the bill was read a first time in the House of Commons.

The preamble stated, that "Whereas an act was passed in the forty-sixth year of the reign of King George the Third, intituled 'An act for better,' &c. And whereas an act was passed in the sixth year of the reign [113] of King George the Fourth, intituled 'An act for amending,' &c.: and whereas the said recited acts, so far as relates to the watching of the said city, have ceased, in consequence of a notice, given in conformity with the provisions of the act for regulating municipal corporations in England and Wales (5 & 6 W. 4, c. 76, s. 88): and whereas since the passing of the hereinbefore-first-recited acts, the inhabitants in the suburbs of the said city, usually called the county of the city of Norwich,—which comprise eight parishes or hamlets, the liberty of the town-close, and parts of certain parishes, the residues whereof are within the said city,—have very greatly increased, and a large number of houses have been erected, and several new streets formed therein; and it would tend much to the comfort and convenience of the inhabitants, were the powers of the hereinbefore-recited acts enlarged, and extended to the said suburbs: and whereas the powers and provisions of the said two several first hereinbefore-recited acts have been found, in many respects, defective, and insufficient for the purposes intended; and it is expedient that the same should be repealed, and that other powers and provisions should be granted and made for better paving, lighting, cleansing and improving the said city and suburbs, and for removing and preventing nuisances and annoyances therein: but the same cannot be effected without the authority of parliament," &c.

By sect. 62 the commissioners were empowered to cause streets, &c. to be lighted with oil or gas; and by sect. 67, they were authorized to recover rents for gas (b).

Section 96 was as follows:—"And be it further enacted, that for the purpose of making the narrow parts of the squares, crescents, terraces, roads, streets, [114] lanes, ways, passages, and places, safe and commodious for carriages and passengers, and for opening proper communications between the said squares, &c. or any of them, and for stopping up unnecessary communications between the said squares, &c. or any of them, and for altering or widening any road or roads within the said city or county, and for altering, widening, and improving the present communications between the said squares, &c. or any of them, and for otherwise improving the said city and county, it shall be lawful for the said commissioners to treat and agree with such person or

(b) These sections are not set out at length, as the question arising upon them was not discussed on the motion for a new trial. See post, p. 121.

persons, or body or bodies politic or corporate, spiritual or lay, respectively, as shall be or be deemed to be owner or owners of, or interested in any houses, buildings, erections, projections, encroachments, lands, tenements, or hereditaments, within the said city and county, as the said commissioners shall think right and proper to be taken or used for the purpose of making such improvement, for the absolute purchase thereof respectively, or for any damage to be sustained by the proprietors thereof in effecting such improvement: Provided always, that nothing in this act contained shall authorize and empower the said commissioners to take or use any house, building, yard, garden, orchard, lawn, shrubbery, or plantation, without having previously obtained the consent of the owner or proprietor thereof."

By sect. 100, in case the parties were incapable to treat, the amount of satisfaction and compensation was to be settled by a jury.

By sect. 110 damages under 20l. might be settled by justices.

Sect. 117 was as follows:—"And be it further enacted, that upon payment, or legal tender, of such money as shall have been agreed upon between the parties, or awarded by a jury or justices, in manner [115] aforesaid, for the purchase of any lands, or of any estate or interest in any lands, to the respective proprietors of such lands, or other person entitled, according to the provisions of this act, to receive such money, within three calendar months next after the same shall have been so agreed upon or awarded, or whenever any of the respective cases shall happen, wherein such money, satisfaction, or compensation, is hereinbefore authorized or directed to be paid into the Bank of England, then upon payment into the Bank of England, in manner in such case hereinbefore authorized or directed, it shall be lawful for the said commissioners immediately to enter upon such lands, and thereupon such lands, and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest, of all parties therein, paid or compensated for by such payment as aforesaid, shall thenceforth be vested in, and become the sole property of, the said commissioners, to and for the purposes of this act; and the said commissioners shall not be bound to see to the application of any such purchase-money, compensation, or satisfaction; and such payment, or tender and conveyance, as hereinbefore mentioned, or such deposit in the Bank of England as aforesaid, shall not only bar all right, title, interest, claim, and demand, of every such party, but shall also bar all dower and all estates-tail and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever, of and in the said lands so compensated and paid for as aforesaid: Provided nevertheless, that before such payment, tender, or deposit, in the Bank of England, as aforesaid, shall have been made, it shall not be lawful for the said commissioners, or for any person acting under their authority, to enter upon such lands for any of the purposes of this act, save for the purposes of surveying or valuing the same for the purposes of this act, without [116] the previous consent of the owners and occupiers thereof respectively."

The bill having gone through the different stages in the House of Commons, was, on the 24th of June, read there a third time, passed, and sent up to the Lords. In the House of Lords the bill was read a first and second time, and referred to the committee of standing orders; and the following extracts from the journals of the House of Lords were given in evidence:—

"Die Jovis, 18^o Julii, 1839.

"The Earl of Shaftesbury reported from the Lords—committees appointed to consider of the bill, intituled 'An act for better paving, lighting, and improving the city of Norwich and county of the same city,' that the committee had met, and considered the said bill, and, in the first place, proceeded to inquire how far the standing orders of the House, relating to bills for the improvement of cities and towns, have been complied with on this bill; and had found that notices of the bill have been inserted in the county newspapers and in the *London Gazette*, and have been affixed on the church doors of the several parishes affected by the bill, within the period limited by the standing orders; but the committee had found that such notices did not contain any mention of the intention of taking power for lighting and improving certain parts of the town of Norwich within the county of the city of Norwich, without the consent of the owners and occupiers of such district; and that powers for that purpose are proposed to be taken by the present bill. The committee further found that powers for the compulsory purchase of houses and lands are contained in the bill, and that no application has been made to the owners, lessees, and occupiers, of such houses and

lands, as is required by the standing orders. Under these circumstances the committee were of opinion that it would be necessary to strike out of the bill all the provisions contained therein for the purpose of lighting and improving the parts of the town of Norwich within the county of the city of Norwich, without the consent of the owners and occupiers thereof, and for the compulsory purchase of houses and lands. Upon such opinion being intimated, certain petitions were presented to the House, praying to be heard by counsel against the bill and against the proposed alterations. The committee have, therefore, thought it right to direct the bill to be reported to their Lordships in its present state, and recommend to their Lordships to refer the said bill to the standing-orders committee, as an opposed private bill.

"Which report being read by the clerk,

"Ordered, that the said report do lie on the table.

"Ordered, that the said report, together with the bill intituled 'An act for the better paving,' &c., be referred to the committee appointed to consider how far the standing orders of this House relating to certain railway bills and opposed private bills, have been complied with on such bills."

The following extract from the proceedings of the standing-orders committee was also produced :—

"Die Martis, 23° Julii, 1839.

"The Earl of Shaftesbury in the chair.

"It appearing from the said report that the notices of the bill, though given within the period limited by the standing orders, did not contain any mention, &c. (as in the report, ante, p. 116)

"After discussion,

"It is moved to resolve

"That the standing orders have not been complied with on this bill, and that the committee do not recom-[118]-mend to the House that the said orders should in this case be dispensed with.

"The same is, upon the question, agreed to."

And the following extract from the journals of the House :—

"Die Jovis, 25° Julii, 1839.

"The Earl of Shaftesbury reported from the Lords-committees appointed to consider how far the standing orders of the House relating to certain railway-bills and opposed private bills have been complied with on such bills, and to report to the House, and to whom was referred the bill intituled, 'An act for better paving,' &c. ; and to whom were also referred the report from the committee on the Norwich Improvement bill, and the petition of R. J. Harvey, &c., owners of estates in the county of the city of Norwich, praying to be heard by counsel in support of the said bill, with leave to the petitioners to be heard by their agents in support thereof ; that the committee had met and inspected the said bill, and had considered the said report, and also the said petition, and had inquired how far the standing orders of this House, relating to matters required to be done by parties promoting bills for the improvement of cities or towns previously to the second reading of such bills, have been complied with on this bill, and had found that notices of the bill had been inserted, &c. (as in the report, ante, p. 116) : and the committee do not recommend to the House that the standing orders should in this case be dispensed with.

"Which report, being read by the clerk, was agreed to by the House."

In consequence of this report, the parties interested in the bill, not considering it expedient to proceed with it, abandoned it altogether.

[119] The defence to the action, in substance, was, that the plaintiffs were chargeable with gross ignorance and negligence in not having prepared the notice as required by the standing orders of the House of Lords.

The Lord Chief Justice, in summing up, directed the jury that the question they had to determine was, whether the failure of the bill arose from a culpable degree of negligence on the part of the plaintiffs, or whether they shewed reasonable care and skill in that which they had to perform. His lordship further observed, that the

point to be considered was, whether the plaintiffs had comported themselves with due diligence, and with a proper degree of knowledge of those standing orders, which it was peculiarly their duty to carry into execution. For it was to be supposed that in the character in which they held themselves out to do business as parliamentary agents, they were thoroughly conversant with all the particular facts, in carrying a bill through the House, necessary to insure its passing. His lordship then commented on the standing order of the House of Lords, requiring application to be made to the owner or lessee of lands or houses; and said that it was undoubtedly a very proper clause, that if there was any bill which intended taking, by the force of the bill, any property belonging to any individual against his consent, he should have due notice of the bill before it was passed, in order that he might appear and make such opposition to the bill as he thought the justice of the case required. It was obvious that a notice would be necessary when specific property was intended to be taken; for instance, in a bridge bill, where, in order to make the access to the bridge more complete, it was requisite to take either a house or some portion of ground. His lordship then applied similar observations to canal and railway bills, and bills for the alteration of a turnpike road. "In all these cases" (his lordship observed) "the act [120] may be said to take away property from some person, and an omission to apply to that person, for his assent or dissent, would be a breach of the standing orders, and would import a gross degree of negligence on the part of the individual whose duty it was to see that such standing orders had been complied with. Therefore, if the intended act has the same degree of reference to the standing orders as those others have, which I have mentioned, I should think it gross negligence on the part of these plaintiffs, who undertake the business of parliamentary agents, if they had not themselves applied, or caused applications to be made by their agents in the country, to ascertain the assent or dissent of the parties whose property was so to be taken. But looking at this bill, I cannot help entertaining a very considerable degree of doubt, whether the fourth standing order can apply to this case. It is one question whether the parties have or have not had notice that parliament may pass a bill which has such a clause in it; it is another and different question whether it lies within that precise standing order. The bill in question does not at all contemplate the taking of any one's land or property specifically; it only supposes that, in the course of events and of time, it may become necessary to widen some streets, and to alter their direction, for the purpose of improving the city; so that all the powers pointed out by the proposed statute were only given contingently,—if at some future time it should seem fit to exercise them. The question, therefore, is,—there being no specific object in view and no particular person to whom notice could be given,—whether it was necessary to ask every man in the city who had property there, for his assent; for every man's property might possibly be affected." His lordship then read the sections of the bill, observing that there appeared to be a mistake in the report of the committee in stating that there was a compulsory clause in the bill, for taking [121] houses and lands, inasmuch as there was no compulsory clause for taking houses at all; and his lordship added, "I cannot help thinking that it is so extremely doubtful, whether the fourth standing order could apply to a case of this sort, that, at least, it would be a hard measure to say, that persons were guilty of gross negligence, if they did not understand that order in the way in which the defendants have sought to apply it."

The jury returned a verdict for the plaintiffs for 543l., being the sum they had paid out of pocket.

Channell Serjt., in Hilary term last, obtained a rule nisi for a new trial, on the ground of misdirection; against which,

Bompas Serjt. now shewed cause. According to the resolutions of the standing-orders committee of the House of Lords, which were afterwards adopted by the House, the plaintiffs were considered not to have complied with the standing orders in two particulars; first, in respect to the notice as to lighting the town; and, secondly, as to the application to the owners of property under the clause relative to taking lands, &c. It is understood that no question is now raised upon the first point. [Channell Serjt. assented.] Then the only question is, whether, because the plaintiffs have put a wrong construction upon the standing orders of the House of Lords, or rather a different construction from that which the House has adopted, they have been guilty of such gross negligence as to debar them from all right to recover a remuneration for their work and labour, or at any rate to be repaid the costs out of pocket. The

application of the standing orders to such a bill as the present is, to say the least of it, by no means clear. The other side contend that this is a bill falling within the first of the classes referred to by the standing orders, as [122] a bill for "paving, lighting, watching, cleansing, or improving cities or towns," and this may be admitted; but then it is argued that as, by the 96th and 117th clauses of the bill, the commissioners are authorised to purchase houses, &c. for widening streets and squares, the fourth standing order will apply; and that an application in writing should have been made "to the owners, lessees, and occupiers, and that lists should have been made of such owners, lessees, and occupiers, distinguishing which of them have assented, dissented, or were neuter, in respect thereto." But, to any ordinary understanding, the interpretation that would be put upon this rule, would be, that it applies to bills for railways, canals, &c., or perhaps to paving bills, where specific property is to be taken under the powers of the act. It appears that the plaintiffs were of this opinion, and so also was the Lord Chief Justice at the trial; and that alone is sufficient to shew that the plaintiffs, though they may have been wrong, were not chargeable with negligence or gross ignorance. The construction put upon the order by the House of Lords would give rise to insurmountable difficulties. To whom is the application to be made? To every owner of land in a city that may have 70 or 80,000 inhabitants? Or suppose such a bill to be brought in respecting the metropolis, what would have to be done in such a case? The order refers to bills "by which any lands or houses are intended to be taken," but, as construed on the other side, it ought to be read "by which any lands or houses may hereafter be intended to be taken." Besides, as the bill was lost upon two grounds, it cannot be said that it was so lost on the ground of this objection only; and the other objection has been abandoned.

Channell Serjt. in support of the rule. The point as to the other objection was left properly to the jury. With regard to both objections there have been three [123] decisions against the plaintiffs; 1st, that of the committee appointed to consider the bill (ante, p. 116), 2dly, that of the committee of standing orders (ante, p. 117), and, 3dly, that of the House of Lords (ante, p. 118); all shewing that the plaintiff had put a wrong construction on the fourth order. The Lord Chief Justice at the trial expressed a strong opinion as to the objection now under consideration, that the order did not apply to the bill in question; and the jury therefore, fettered by this direction, found that there had been no negligence on the part of the plaintiffs. It cannot be argued that the decision of the House of Lords was wrong in their interpretation of their own order; and it was the duty of the plaintiffs, as parliamentary agents, to be acquainted with its meaning. It is not denied that the Lord Chief Justice was bound to give an opinion upon the subject for the guidance of the jury. [Cresswell J. Do you mean to say that there was any negligence imputable to the plaintiffs, beyond the fact of their not knowing that the bill would be affected by the order in question?] No other negligence is imputed to them. [Cresswell J. And you admit that my lord was bound to give an opinion on that point.] It need not have been so strongly expressed. It is submitted that the bill did fall within the fourth standing order. This is not a question about compulsory powers to take land; for it is true that no such powers are given by the bill; as all that is given is a power to treat with parties. But it is clear that this is a bill by which land is "intended to be taken." The rule would necessarily apply to all railway bills. [Cresswell J. Not, in case no land was intended to be taken. Tindal C. J. Suppose a man made a railway through his own land, and an act were required to enable him to take tolls, could it be said that the rule applied, and [124] that the party was bound to make an application to himself? Erskine J. The order says, "if lands are intended to be taken;" that condition overrides all the clause.] If there had been any provision in the bill as to taking any particular land, there could be no question but that the rule would apply; but the most unlimited powers were asked for as to taking land generally. There was no notice that any power to take land was given by the bill, and the safeguards required by the standing orders of the House were therefore entirely thrown aside. But the greater the powers sought for, the greater the caution necessary. [Coltman J. What do you consider would have been a perfect compliance with the order in this case? That all the owners of property in the city should have been applied to?] Yes; inasmuch as the promoters of the bill claim the right to take any part of such property. [Cresswell J. What should they have

asked them to assent to?] To the exercise of the general power. At any rate the published notice should have specified what powers were sought to be obtained.

COLTMAN J. It is true that this case was left by my lord to the jury, accompanied by strong observations; but I think they were necessary from the peculiar circumstances of the case. He was called upon to state his opinion; and to my view he would have been wrong in not telling them, that, looking at this bill, he entertained considerable doubt whether the fourth standing order could apply to it. The observations of his lordship, even assuming that a mistake had been committed by the attorneys, ought, in my opinion, to have been made to the jury; and, if upon the evidence submitted to their consideration they had found gross negligence on the part of the plaintiffs, I think their verdict must have been set aside.

[125] ERSKINE J. I am of the same opinion. I think the construction of the standing orders of the House of Lords turned upon a question of law; and, looking at the words of the order in question, it is, to my mind, exceedingly doubtful whether it would apply to this case. In leaving the case to the jury, it was not necessary for my lord to give a decided opinion on the construction of the order: but the construction being doubtful, I think attorneys cannot be said to have been guilty of such gross negligence, in construing it as the plaintiffs did, as to defeat their right of action for business done. It is unnecessary to say whether the order does or does not apply in this case; it is sufficient to remark that the words of the order are by no means clear, or at least so clear as to render the plaintiffs open to the charge of gross negligence; and I agree that if the jury had arrived at such a conclusion—no particular land or property being directly required to be taken for the purposes of the intended act—there would have been grounds for the court to grant a new trial.

CRESSWELL J. I also think that the rule ought to be discharged. There are two descriptions of negligence; negligence in fact, and, what may be termed, negligence in law. If the plaintiff had neglected to give the notices required by the standing orders, that would have been negligence in fact; if there had been negligence in the form of framing those notices, that might have been negligence in law. But that cannot be considered as gross negligence, concerning which persons of competent skill may entertain a doubt. The construction of a written instrument is a question for the court; it was for the judge, therefore, at the trial, to say whether the construction of these orders of the House of Lords was so doubtful as to exonerate an attorney from gross negligence, who had put a construction upon [126] them, which turned out, according to the view taken by the committee of the House, not to be correct. Now I must say, I participate fully in all the doubts entertained by my lord at nisi prius, as to the effect of these orders. Perhaps it might not be safe to say that the committee of the House of Lords were wrong in their conclusion; it might possibly be considered an invasion of the privileges of the House; but I certainly consider the point extremely doubtful, and if I had to try the case at nisi prius, I should direct the jury in the same manner. I think, therefore, that the direction and the verdict are both right.

TINDAL C. J. was understood to concur.

Rule discharged.

FOULKES v. SCARFE, POLLARD, TOESLAND, BROWN, AND MASON. May 2, 1842.

[S. C. 4 Scott, N. R. 713, 1 D. N. S. 691; 11 L. J. C. P. 247.]

To a declaration in case for breaking and entering rooms in the occupation of the tenant of the plaintiff, and tearing down the ceiling over the landing of the staircase, the roof over the same, and the chimneys, and demolishing the windows, the defendants justified under a deed of assignment, in trust for creditors, from C. H. (who was shewn to be the lessee of the premises before the accrual of the title of the plaintiff, to whom color was given), whereby a right of entry was given to take and sell furniture: Held, that the plea was bad, as confessing more than it avoided, inasmuch as the right to enter did not give a right to tear down the ceiling, &c., unless entry could be obtained in no other way; which was not averred.

Case. The declaration stated that certain rooms and apartments, parcel of a certain messuage, together with certain furniture, chattels, and effects, to wit, &c. of

the plaintiff, were, on, &c. in the possession and occupation of a certain person, to wit, one Mary Stafford, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; which [127] M. S. held and occupied and possessed the said furnished rooms and apartments, and the use of a certain staircase and landings thereto belonging, with the appurtenances, as monthly tenant thereof to the plaintiff, upon and at a certain rent, to wit, &c. as and for the rent or hire of the said rooms and apartments together with the said furniture, &c.; yet the defendants, well knowing the premises, but contriving, &c. to injure and aggrieve the plaintiff, and to deprive him of the benefit and advantage which he derived, and the just gains and profits which might, and would, have accrued to him from the letting of the said rooms and apartments, with the said furniture, &c. to the said M. S., and from the continued possession and occupation thereof by her the said M. S. as such tenant thereof to the plaintiff on the terms aforesaid, to wit, on, &c. wrongfully and injuriously broke and entered the said rooms and apartments, and then made a great noise and disturbance there, and then tore down and prostrated the ceiling over the landing of the staircase, and the roof over the same; and then tore down divers, to wit, two chimneys, and broke and demolished divers, to wit, ten glass windows, of and belonging to the said rooms and apartments; and then seized and took the said furniture, &c. from and out of the possession of the said M. S.; and carried away, converted, and disposed of the same to their own use; whereby the said rooms and apartments were rendered, and still are, of no use or value to the plaintiff; and the said rooms and apartments were rendered unfit for the residence and habitation of the said M. S., and the said M. S. was compelled and obliged to, and then did, quit and abandon the said rooms and apartments, and give up the same, and surrender the tenancy therein. By means of which several premises the plaintiff hath entirely lost the said several sums of money for the rent of the said rooms and apartments, [128] with the appurtenances, which would have accrued and have been paid to him the plaintiff, if the said M. S. had not been so by the defendants intruded upon, disturbed, and annoyed, and forced and compelled to give up and quit the tenancy and occupation thereof; and during all the time from the day and year first aforesaid, hitherto hath been and still is unable to let the said rooms and apartments with the appurtenances, and is, by means of the committing of the several last-mentioned grievances by the defendants as aforesaid, otherwise greatly injured and aggrieved in his reversionary estate and interest in the said rooms and apartments, and in the said goods, &c. Whereupon, &c.

Fourth plea, as to the supposed grievances in the declaration mentioned,—so far as the same relate to, and were occasioned by, the said breaking and entering the said rooms and apartments, and making the said noise and disturbance therein, and tearing down and prostrating the said ceiling and roof, and tearing down the said chimneys, and breaking and demolishing the said glass windows,—the defendants Scarfe, Pollard, Browne, and Mason say that long before the plaintiff or the said M. S. had any thing in the said rooms and apartments, or any of them, to wit, on the 29th day of September 1834, one Winckworth and Sandys were seised, in their demesne as of fee, of and in the said messuage, and of and in the said rooms and apartments, staircase, and landing, and being so seised, by a certain indenture of lease, then made between the said W. and Sandys of the one part, and one Charles Hallett of the other part, the said W. and Sandys demised the said messuage, and rooms and apartments, staircase and landing, to the said C. H. for twenty-one years, &c.; (averment of entry by C. H.); and the defendants, Scarfe, Pollard, Browne, and Mason further say, that the said C. H., after the making of the said indenture, and whilst [129] he was possessed of the said messuage, and rooms and apartments, staircase and landing, to wit, on the 29th of June 1840, was also possessed of divers goods, chattels, furniture, fixtures, and effects, in and upon the said messuage, and in the said rooms and apartments, staircase and landing; and that afterwards, and whilst the said C. H. was so possessed of the said messuage, &c. and of the said goods, &c. and before the times when, &c. to wit, on, &c. by a certain indenture, bearing date the day and year last aforesaid, then made between the said C. H. of the first part, the defendant Scarfe and one J. S. Nettlefold of the second part, and the several other persons, creditors of the said C. H., who had subscribed their names thereto, of the third part; and which indenture, &c. (profert (a)), after reciting that the said C. H. was indebted

(a) In the Common Pleas the usual course is to make profert at the end of the

to the several persons, parties to the said indenture of the second and third parts, in certain sums of money, and was not prepared to satisfy the same, and that several of the creditors of the said C. H. had threatened proceedings against him to recover their claims, of whom the said C. H. had requested a letter of licence,—which the said creditors had consented to give upon the said C. H. executing the bill of sale thereafter contained,—in pursuance of the said agreement, and in consideration of the said debts and of the letter of licence thereafter contained, he the said C. H., at the nomination and request of the several parties thereto of the third part, testified, &c., did by the said indenture assign and transfer unto the said Scarfe and J. S. N., as trustees for themselves and the rest of the said creditors of the said C. H., all and singular the said furniture, fixtures, and effects in and about the said dwelling-house, and in [130] the said rooms and apartments, staircase and landing, in which, &c., mentioned and comprised in a certain inventory in the said indenture mentioned, and of which he was so possessed as aforesaid, and all right, title, and interest of him the said C. H. in and to the same and every part thereof, and of which possession had, at the time of the execution of the said indenture, been given and transferred to the defendant Scarfe and the said J. S. N., as the said C. H. did by the said indenture acknowledge: to have, receive, take, and enjoy the same unto the defendant Scarfe and the said J. S. N., their executors, &c., thenceforth, as and for their own goods, &c., but subject to the covenants thereafter contained. And the said C. H. did thereby, for himself, his heirs, &c., amongst other things, covenant with the defendant Scarfe and the said J. S. N. that he the said C. H. would pay to the defendant Scarfe and the said J. S. N., as such trustees as aforesaid, the sum of 120l. in part payment of the said several debts mentioned in the schedule thereunder written, on the 26th day of July then next, and the further sum of 93l. 6s. 8d. on every succeeding third month, until the whole of the several amounts due and owing to the parties thereto of the second and third parts should be fully paid, with interest thereon at the rate of 5l. per cent. per annum; provided always, and it was thereby further agreed between the several parties thereto, and particularly by the said C. H., that the defendant Scarfe and the said J. S. N., their executors, &c. should, at any time during the continuance of the said indenture, be at liberty to enter upon the said messuage, and see the state and condition of the said several articles of furniture, fixtures, and effects; and that in case the same or any part thereof should be removed from the said messuage, or in case the rent of the said messuage, or any part thereof should be in arrear for more than six months, or the [131] rates, taxes, or other outgoings, of the said messuage, or any part thereof, should be in arrear for the space of seven months after the same respectively should have become due, or in case he the said C. H. should not pay the said instalments, and each and every of them, in manner thereinbefore appointed, or in case the said C. H. should suffer an execution to issue against him for any debt contracted subsequently to the execution of that indenture, and should not, in due time, pay out the same, or should petition to go through the insolvent debtors' court, or should become bankrupt, or should die, then in each or any of the said cases the defendant Scarfe and the said J. S. N., their executors and administrators, should be at liberty to sell and dispose of the said furniture, &c.; and, for that purpose, to enter the said messuage, and rooms and apartments, staircase and landing, in which, &c., and remove the same; and out of the produce thereof, after paying the expenses of and incident to such sale, to pay all rent, rates, taxes, and outgoings, if any, which might have accrued due; and, in the next place, to pay the several creditors, parties thereto of the second and third parts, ratably, and in proportion to their several debts, and to pay the surplus, if any, to the said C. H., or his assigns. And further, that afterwards, and before the said times when, &c., to wit, on the 1st day of February 1841, all the estate and interest, property, term of years then unexpired, of and in the said messuage, and rooms and apartments, staircase and landing, by assignment thereof, then came to and was vested in the plaintiff; and thereby the plaintiff became and was entitled to the said estate in the said declaration mentioned. And further, that after making of the last-mentioned indenture, and before the committing of the said grievances, &c., the said sum of 120l. by the said indenture so payable as aforesaid became due and pay-[132]-able

declaration of all the deeds which have been set out, and of which the defendant is entitled to enjoy.

from the said C. H. to the defendant Scarfe and the said J. S. N., but the said C. H. did not nor would pay the same, and the said C. H. then made default in payment thereof. And further, that at the said times when, &c. the said sum of 120l. remained due and unpaid. And because the said goods, &c., so bargained, sold, &c. as aforesaid, before and at the times of the committing of the said grievances, were in and upon the said messuages, rooms, &c., and because the defendant Scarfe and the said J. S. N. were desirous to sell and dispose of the said goods, &c., and seize and take the same for that purpose; and because the said M. S., at the said times when, &c., refused, upon being requested by the defendant Scarfe so to do, to suffer or permit, and would not suffer or permit him to enter into or upon the said rooms and apartments, or the said staircase or landing, for the purpose of seizing and taking from and out of the same the said goods, &c., so that the defendant Scarfe and the said J. S. N. might sell and dispose of the same,—the defendant Scarfe, in his own right, and the defendants Pollard, Brown, and Mason, as his servants, and by his command, at the said times when, &c. for the purpose of seizing, and taking from and out of the said rooms and apartments, and from and out of the said staircase and landing, the said goods, &c., in order that he and the said J. S. N. might sell and dispose of the same, did break and enter into and upon the said rooms and apartments, and into and upon the said staircase and landing, and make a little noise and disturbance therein, and to a little and necessary degree, tear down and prostrate the ceiling over the said staircase and landing, and the roof over the same, and tear down the said chimneys, and break and demolish the said windows, and at the said times when, &c. did seize and take from and out of the said rooms and apartments the said goods, &c., doing and using no [133] more damage or violence than was necessary in that behalf, for the purpose of seizing and taking away the said goods, &c., for the purposes aforesaid, which are the same alleged grievances in the introductory part of this plea mentioned, &c. Verification.

Special demurrer; assigning for causes, that although the defendants Scarfe, Pollard, Brown, and Mason, profess to justify and answer the grievances in the declaration mentioned, so far as the same relate to and were occasioned by the breaking and entering the said rooms and apartments, and making the said noise and disturbance therein, and tearing down and prostrating the ceiling and roof, and tearing down the chimneys, and breaking and demolishing the glass windows; yet the plea does not shew or state any matter that can in law justify the same, or authorize such violence and injury to the said ceiling, roof, chimneys, and glass windows, or any of them, or any part thereof. And also for that the defendants in their said plea do not shew or state wherefore it was necessary, for the removal of the said goods and chattels, that they should tear down and prostrate the ceiling over the landing of the said staircase, and the roof over the same, or the said chimneys, or any of them. And also for that the plea attempts to put in issue matter of law, improper for the decision of a jury, by attempting to justify the tearing down and prostrating of the said ceiling, roof, chimneys, and glass windows, under a supposed authority, to wit, the said bill of sale; which is in law no justification of the last mentioned grievances. And also for that the said last plea is double, &c.

Bompas Serjt. for the plaintiff. The plea sets up an authority under the bill of sale from Hallett to enter upon the premises and seize the goods there. But that is clearly no justification for breaking the ceiling and roof, and breaking down the chimneys. The plea con-[134]fesses the whole wrong alleged, but avoids only part. The defendants say they had a right to take the goods, and therefore they demolished the house. [Tindal C. J. Is not that rather matter of new assignment?] In a note to *Greene v. Jones* (1 Wms. Saund. 295 c.; 296, n. (1)), where the declaration charged an assaulting, beating, and wounding of the plaintiff, and the plea was not guilty as to the wounding, and as to the residue a justification by arrest under process, and son assault demesne, the commentator observes, that the plea included “a justification both of the wounding and beating charged in the declaration, because the plaintiff, after he was arrested, assaulted the defendant, and resisted him in the execution of his office; in which case it was lawful for him to wound and beat the plaintiff in his own defence, in order to enforce the process of the law” (b). And he adds, “but

(b) Citing M. 21 H. 7, fo. 39, pl. 51; S. C. Bro. Tresp. 218; Fitz. Tresp. 247; Cro. Eliz. 268; 2 Inst. 316; 1 Hawk. P. C. 130; 1 Bac. Abr. 155.

unless resistance, or an attempt to rescue himself be shewn, the defendant cannot justify the beating, and still less the wounding, of the plaintiff in arresting him under process; but he must plead not guilty to the wounding and beating, and a justification as to the assault, otherwise the plea will be ill upon demurrer" (c)¹. Here, the defendants have attempted to justify that which they shew they had in law no justification for doing. The real question in this case is whether, because the party in possession re-[135]-fused the defendants permission to enter, they were justified in pulling off the roof; the plea does not go on to say they could not enter in any other way. [Tindal C. J. It is something like the case (*Pickering v. Rudd*, 1 Stark. N. P. C. 56), where, in trespass for throwing the plaintiff off a ladder, the defendant justified in defence of his possession, the plaintiff being on the ladder, nailing a board to the defendant's house, and alleged that he gently shook the ladder, and gently overturned it, and gently threw the plaintiff from it on the ground, doing him as little damage as possible; and the plea was held bad on demurrer (b).]

Channell Serjt. was then called upon to support the plea. The facts as to breaking the roof and pulling down the chimneys, are matters of aggravation and not of substance (c)²; the defendants say they had a right to break and enter, and they could not do so without a little breaking the ceiling and so forth; and this is a sufficient justification for all that is alleged.

TINDAL C. J. It appears to me that the subject-matter of complaint, namely, the breaking down of the ceiling, roof, and chimneys, is so perfectly different in substance from the right claimed of entry into the rooms, that it behoves the defendants to shew, much more distinctly than they have done, the impossibility of entry, except by the mode to which they resorted. The plea undoubtedly confesses more than it avoids. The case seems to me to fall within the principle of the one which I have cited.

The other judges concurred.

Judgment for the plaintiff.

[136] WATSON AND ANOTHER v. HALCOMBE. May 4, 1842.

Where an application to a judge to set aside an execution is ordered to be referred to the master, the cost of the reference to be in his discretion, and the judge's order has been made a rule of court, it is not necessary to apply to the court for leave to issue execution on the master's allocatur as to such costs.

Shee Serjt. moved for liberty to issue execution against the goods of the defendant, for the sum of 1l. 10s. with costs (a) under the following circumstances:

The defendant gave a cognovit to the plaintiffs for a debt. Judgment having been entered up and an execution issued, the defendant's goods were seized, whereupon the balance due to the plaintiffs was paid. The defendant, however, applied to a judge at chambers to set aside the execution, on the ground that more money than

(c)¹ Citing 2 Stra. 1049; S. C. Ca. temp. Hardw. 298; 1 Ld. Raym. 231; 2 Ventris, 193. The learned serjeant adds, however, "But perhaps it is not very material whether the arrest shall be considered as a justification of the battery or not. For if a bailiff, &c., do more than barely arrest a person,—if he beat him or otherwise ill-treat him after the arrest, without any resistance, or attempt made to rescue himself,—he is subject to an action; and if he justify by an arrest under process, the plaintiff may new-assign, which will bring it to much the same thing; 21 H. 7, 21, p. 5; S. C. cited Lutw. 930, *Patrick v. Johnson*." 1 Wms. Saund. 296 (1). But see note (a) in the fifth edition of Saunders.

(b) Note in *Collins v. Renison*, Say. 138. See also *Gregory et Ux. v. Hill*, 8 T. R. 299; *Johnson v. Northwood*, 7 Taunt. 689; *Oakes v. Wood*, 2 M. & W. 791; *Oakes et Ux. v. Wood*, 3 M. & W. 150.

(c)² Vide *Taylor v. Cole*, 3 T. R. 292; 1 Wms. Saund. 28 a.; ante, vol. ii. 441.

(a) Every writ of execution formerly issued, and is still supposed to issue, upon an award of execution by the court, [137] granted at the prayer of the party. By making such a prayer, in a case in which the courts now allow the successful party to issue execution for himself, he would submit to delay apparently for the purpose of fixing the adverse party with costs.

was really due to the plaintiffs had been paid to them. Coltman J. made an order referring it to the master "to see whether the debt, &c. had been overpaid; the costs of and occasioned by the application to be in the discretion of the master;" which order was made a rule of court. The master found that the debt had been paid, but not overpaid, and allowed the plaintiffs, for the costs of the application, the sum of 11. 10s. Three applications had been made for that sum.

TINDAL C. J. There was no necessity for applying to the court in this case; it is clear the plaintiff cannot have the costs of this application. The court will make no rule.

COLTMAN and ERSKINE JJ. concurred.

CRESSWELL J. was absent.

The learned serjeant took nothing.

[137] CHARLES PALMER v. SPARSHOTT. May 4, 1842.

[S. C. 4 Scott, N. R. 743; 11 L. J. C. P. 204.]

By an agreement between A. of the one part, and B. and C. of the other part—reciting that B. and C. had assigned certain property to A. for 150l. apiece, and that it had been agreed that A. should retain 50l. out of each of the purchase moneys—the defendant, in consideration of the two several sums of 50l., and 50l. so retained, promised B. and C. to indemnify "them and their and each of their estates" from the costs of a certain action. Held that C. might sue A. alone upon this promise without joining B.

Assumpsit. After reciting that John Ewer Poole claimed to be a creditor of, and entitled to receive from, the defendant and the plaintiff, and from divers other persons, the sum of 157l. 18s. for work done in relation to certain premises at Norwood, wherein the plaintiff, the defendant, and the said other persons were severally and respectively interested, which money, if due at all, was due from the plaintiff, the defendant, and the said other persons jointly; and further, that Poole had brought an action of debt against the now plaintiff for the recovery of the said sum; and further, that it was then agreed by the plaintiff, the defendant, and the said other persons, that they the plaintiff, the defendant, and the said other persons should bear and pay in shares, any debt, and damages, costs, and expenses that might ultimately be recovered by Poole against the plaintiff; and further, that the plaintiff had duly conveyed and assigned to the defendant the part, share, and interest of him the plaintiff, of and in the said premises at N., at and for the consideration of 150l.; and further, that at the time of the completion thereof by the defendant and plaintiff, it was arranged that the defendant should retain 50l. of the said purchase and consideration money of 150l., and release the plaintiff from any liability in respect of the said debt, &c., and expenses of [138] the said action; the declaration stated, that thereupon afterwards, in consideration thereof, and that the plaintiff, at the special instance, &c., had permitted and suffered the defendant to retain and keep, and that the defendant had retained and kept, 50l. of the said purchase or consideration money of 150l., the defendant undertook, &c. to save harmless, and indemnify, him, the plaintiff of, from, and against all debt, &c. to be recovered and received by Poole in respect of the said action, or of any suit or proceeding to be instituted or taken by Poole in respect of the same; and further, that in case a sixth part of the whole amount of the damages, &c., to be in any way incurred in and about the said action, suit, or proceeding as aforesaid, or in relation thereto, should not amount to the sum of 50l., then the defendant, his heirs, &c., should pay or hand over to the plaintiff the difference in amount between the said sum of 50l. and the amount of such respective sixth part of the said damages, &c., when the same should be ascertained. Averment—that the defendant did retain the sum of 50l.; that Poole by the judgment of the court of Exchequer recovered against the plaintiff 175l. 15s. (prout patet); that Poole sued out a writ of testatum *fi. fa.* indorsed to levy the said sum, &c.; and that the plaintiff was compelled to pay the sum so recovered, with costs, &c., amounting to 190l. 5s.; of all which the defendant had notice, &c.

Plea: non assumpsit.

At the trial before Maule J., at the sittings for Westminster during this term, the following document was given in evidence.

"Memorandum of agreement made, &c., between William Sparshott (the defendant) of the one part and Frederick William Palmer, and Charles Palmer (the plaintiffs), of the other part: Whereas an action at law was lately commenced in Her Majesty's court [139] of Exchequer of Pleas by one Thomas (sic) Poole against the said C. P., and upon the trial of the said case a verdict was given for the plaintiff for the sum of 82l. 10s.: And whereas various proceedings have been taken by and on behalf of the said C. P. to obtain a new trial of the said action, and which proceedings are still pending: And whereas it hath been arranged that any damages, costs, and expenses that may ultimately be recovered by the said T. P. shall be borne and paid in equal shares by the said W. S., F. P. and C. P., and three other parties, who are equally interested with them in certain estates and premises situate at, &c.: And whereas by a certain indenture bearing even date with these presents, and made between the said F. P. of the first part, the said C. P. of the second part, and the said W. S. of the third part, in consideration of the sum of 150l. apiece the said F. P. and C. P. duly conveyed and assured their two several undivided sixth parts, shares, and interests of and in the said estates and premises to the said W. S., his heirs, &c.: And whereas at the time of the completion of the said purchase it was arranged that the said W. S. should retain 50l. out of each of the said purchase or consideration moneys of 150l., and release the said F. P. and C. P. from any liability in respect of the said damages, costs, and expenses of the said action: Now these presents witness, that for and in consideration of the said two several sums of 50l. and 50l. so retained by him as aforesaid, the said W. S. doth hereby, for himself, his heirs (b)¹, executors, &c., covenant (b)¹ and agree with and to the said F. P. and C. P., their executors, &c., to save harmless and indemnify them the said F. P. and C. P., and each of them, their heirs, executors, and administrators, and their and each and every of their [140] estates and effects of and from and against all damages, costs, and expenses to be in any way incurred in and about the said action, suit, or proceedings as aforesaid or in relation thereto, shall not amount to the sum of 50l.; that he the said W. S., his heirs, executors, and administrators, shall and will pay or hand over to the said F. P. and C. P., their executors, &c., the difference in amount between the said sums of 50l. and the amount of such respective sixth parts of the said damages, &c., when the same shall be ascertained. As witness, &c."

It was suggested, on the part of the defendant, that there was a variance between the declaration and the document put in evidence, inasmuch as the former stated the contract of indemnity to have been made with the plaintiff alone, and the latter shewed it was made with the plaintiff jointly with Frederick William Palmer. The learned judge was of that opinion; but he offered to amend the declaration; and the plaintiff recovered a verdict for 186l.

Manning Serjt. now moved in arrest of judgment, or for a new trial, supposing the amendment not to have been actually made, in which case the objection as to the variance would be still open. [Tindal C. J. Leave having been given to amend by the learned judge, it must be taken as though the amendment had actually been made.] Then by the amendment the declaration is rendered bad; for it will shew the objection on the face of it. [Erskine J. The amendment only goes to the consideration, and not to the promise; a consideration from two will uphold a promise to one.] The declaration, as amended, shews a joint cause of action; and it is not the less joint because it is for the benefit of the two Palmers separately.

TINDAL C. J. It appears to me that this case falls within the principle, that where a man covenants with [141] two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages, notwithstanding the words of the covenant are joint; as established in *Windham's case* (5 Co. Rep. 7 a.), and others (b)². Here, the agreement was certainly joint in its terms, but

(b)¹ The instrument not being under seal, the mention of "heirs" and the insertion of the word "covenant" were of course nugatory.

(b)² See *Wotton v. Cooke*, Dyer, 337 b.; *Wilkinson v. Lloyd*, 2 Mod. 82; *Tippet v. Haukey*, 3 Mod. 263; *Withers v. Bircham*, 3 B. & C. 254, 5 D. & R. 106; *Place v. Deleгал*, 4 New Ca. 426, 6 Scott, 249.

the interest of the parties was distinct and separate. Each party had, in effect, advanced the sum of 50l. ; each had sustained a separate damage ; and each, therefore, might sue without joining his co-promissee.

COLTMAN J. The language of the agreement is, that the defendant shall "save harmless and indemnify the said Frederick William Palmer and Charles Palmer, their heirs, executors, and administrators, and their and each of their estates," which are clearly severable words.

ERSKINE and CRESSWELL JJ. concurred.

Rule refused.

[142] MAY v. SELBY. May 4, 1842.

In an action against a surveyor for negligence in making a valuation, expenses incurred in making a second valuation, for the purpose of ascertaining the correctness of the first, are not to be allowed in costs.

Channell Serjt. applied for a rule to review the master's taxation in this cause. It appeared that the action was brought against a surveyor for alleged negligence in making a valuation of certain hop-poles and farming effects ; that the defendant had subpoenaed thirteen other surveyors as witnesses, who had valued the hop-poles ; that at the trial at the Spring Kent assizes the plaintiff was nonsuited ; that the defendant's attorney had made out his bill of costs at 325l. 2s., including charges for the sums paid to the thirteen surveyors for valuing the hop-poles, amounting to fifty-five guineas, and for their attendance at the trial ; but that the master had taxed off 176l. 2s., including (inter alia) the whole of the sums paid for valuation, and the sums charged for the attendance of five of the surveyors at the trial, and for a brief for a third counsel.

The learned serjeant submitted, that although the general rule was, not to allow the expenses of qualifying a witness to give evidence, yet that where the matter in issue wholly depended upon opinion and not upon facts, it formed an exception.

TINDAL C. J. I do not see how such expenses as these can be called expenses in and about the suit. In cases where experiments have been necessary, the expenses attendant upon such experiments have been disallowed, as in *Severn v. Olive (a)*. To allow such preliminary expenses as the present would be to open much too large a field.

[143] Upon the other points we cannot lay down any express rule ; there must be some discretion left with the master ; and I do not think this is a case in which the court ought to interfere.

COLTMAN J. concurred.

ERSKINE J. I have always understood the rule to be, that in cases turning upon measure and value, the expenses of surveyors are not allowed.

CRESSWELL J. concurred.

Rule refused.

CLARIDGE v. MACKENZIE. April 20, 1842.

[S. C. 4 Scott, N. R. 796 ; 11 L. J. C. P. 72.]

A. pays rent to B., a termor by whom A. was not originally let into possession, A.'s possession having been derived from C., under a demise from E., a prior owner of the term. After the expiration of the term, A., not knowing that the term had expired, enters into a parol agreement with B. for a tenancy, and, under such agreement, pays rent to B. A. is not estopped from shewing that B.'s title had expired. —Such agreement is not equivalent to a fresh letting into possession.

Trespass, for breaking and entering the plaintiff's house, situate No. 51 South High Street, Marylebone, with an asportation of goods. There was a second count for similar trespasses on another day.

Plea : not guilty—by statute.

(a) 3 Brod. & B. 72 ; 6 B. Moore, 235. See also *Bayley v. Beaumont*, 11 B. Moore, 497.

At the trial, before Tindal C. J., at the sittings for Middlesex after last Michaelmas term, it appeared that the action was brought for two different distresses taken by the defendant, who claimed to be landlady to the plaintiff. The first distress was taken on the 2d of July 1840, for a year's rent up to the preceding Midsummer; and the second in the October following, for a quarter's rent up to Michaelmas. The rent and ex-[144]penses were paid by the plaintiff on both of these occasions under protest (a)¹.

In anticipation of the defendant's case, it was proved on the part of the plaintiff that in 1710 the Duke of Newcastle purchased the freehold of a plot of ground in Marylebone, including the locus in quo; the property on his death passed to his daughter and heir, afterwards the Countess of Oxford, and was subsequently vested in trustees for her, with powers to them to grant building leases.

In July 1740 the trustees granted a building lease to John Payne of a piece of land comprising the locus in quo, at a ground rent of 6l., for a term of ninety-nine years, commencing at Lady-day 1740, old style (6th of April new style), which lease therefore expired on the 6th of April 1839.

The reversion of the estate had vested in the present Duke of Portland by the marriage of one of his ancestors into the Oxford family.

Payne, having mortgaged the premises to John Hatch, bequeathed his interest in them to Jane Saunders, who, together with Mrs. Ann Hatch, the legal representative of the mortgagee, by a lease dated the 23d of June 1762, underlet a portion, comprising the locus in quo, to Thomas Pitts, at a ground rent of 4l., for a term of seventy-six years from Midsummer-day in that year. This lease therefore expired on the 24th of June 1838.

Jane Saunders, after the underlease to Pitts, paid off the mortgage, and obtained a reassignment from Ann Hatch, of the original term.

Payne's interest in the original lease, by various mesne assignments, passed from Jane Saunders to different parties; and there was some evidence to shew that it [145] was vested in one Gledhall at the time of the expiration of such original lease in April 1839.

Pitts's interest had vested (though it did not appear in what manner) in Daniel Mackenzie, the father of the defendant; and in 1810 D. Mackenzie let the premises to one Tilbury for a term of twenty-eight years from Midsummer in that year; which lease, consequently, expired at the same time with the lease to Pitts, viz. on the 24th of June 1838 (a)².

Tilbury built two houses on the premises so leased to him, and let one of them (the locus in quo) to the plaintiff, who paid rent (42l. per annum) regularly to Mackenzie during his life (the rent being generally paid to the defendant as his agent), and after his death to the defendant, who claimed as his representative.

After the expiration of the sublease to Pitts (24th of June 1838), the plaintiff, supposing that the title to the premises was in the defendant, agreed verbally (according to the testimony of a witness of the name of Richards) to continue her tenant at the rent of 35l. per annum; but no explanation as to the state of her title was then given; and he paid the rent regularly up to Lady-day 1839. At Midsummer in that year the defendant demanded a quarter's rent; but the plaintiff, having been made aware of the Duke of Portland's title, refused to pay. The defendant thereupon distrained; the plaintiff replevied, but was nonsuited in the action, which he brought in consequence, by reason of a formal defect of evidence, and the quarter's rent was paid to the defendant. There was some evidence that this payment had been made under protest. No rent was paid to the defendant from that time up to Midsummer 1840; and it was for that year's rent that the [146] first distress was made, in respect of which the present action was brought.

All the evidence as to the title of the Duke of Portland was objected to on the part of the defendant, upon the ground that it was incompetent to the plaintiff, as tenant to the defendant, to dispute her title. The evidence was, however, admitted. The Lord Chief Justice left it to the jury to say whether, at the time of the two distresses, the plaintiff was in possession, as tenant to the defendant, under an agree-

(a)¹ Semble, that no protest was necessary, or could be of any effect.

(a)² According to several modern cases, the demise from D. Mackenzie to Tilbury would operate, not as an underlease, but as an assignment. Vide 5 Mann. & Ryl. 157-162.

ment with her after her term had expired ; and, secondly, supposing such an agreement to have been made, whether it was made under error or mistake ; and his lordship directed the jury, that if they should be of opinion that there was no agreement, or that, there being one, it had been made under an error or mistake, they were to find for the plaintiff. The jury returned a general verdict for the plaintiff.

Shee Serjt., in last Hilary term (17th January), moved for a new trial, on the ground that the above evidence had been improperly received, and also that the verdict was against evidence.

The court at first refused the rule ; but afterwards (21st of January), the Lord Chief Justice intimated that a doubt had occurred to the minds of some of their lordships as to the right of the plaintiff to dispute the defendant's title ; and a rule nisi was granted. On a subsequent day (27th of January), on the application of Talfourd Serjt., who moved upon an affidavit that the defendant had put in a fresh distress, the cause was fixed for argument on this day, when

Talfourd Serjt. shewed cause against the rule. The question is, whether, under all the circumstances of the [147] case, the plaintiff is at liberty to dispute the title of the defendant to the premises in question. There is no doubt that the plaintiff did, by paying rent to her after her title had in fact expired at Midsummer 1838, *prima facie* acknowledged her title ; but it is obvious that such payment was made under a mistake ; for it would be absurd (*vide infra*, 153, 156) to suppose that the plaintiff, knowing that defendant had no title, would voluntarily pay rent to her. It is important to observe that the plaintiff was not let into possession by the defendant, but by Tilbury (*b*)¹, and that he remained in possession when Tilbury's lease expired.

There are three suppositions upon which the plaintiff was justified in disputing the defendant's title.

First, even supposing that the plaintiff had been let into possession by the defendant, still it would be competent to him to shew that her title had since expired. The only payment made subsequently to Lady-day 1839, when the Duke of Portland's title accrued, was made after the plaintiff had, in consequence of an accident, been nonsuited in replevin, and was made under protest ; and assuming, that the defendant had title for the three quarters of a year between Midsummer 1838 and Lady-day 1839, there was no acknowledgment of her title after the latter period, and the plaintiff may shew that it then expired. In *Burne v. Richardson* (4 Taunt. 720), it was decided that a termor, who had let to an under-tenant, could not, after his term had expired, enforce the continuance of the undertenancy by distress, if the under-tenant refuse to acknowledge him as landlord, or paid him under threat of distress.

Secondly, the plaintiff may have made the new bargain with the defendant for the three quarters of a year only, [148] on the supposition that she had title for that period. Thirdly, either the alleged agreement with her after her title had expired, if made at all, was clearly made under a mistake as to the facts, or the defendant must have falsely asserted a title to the premises ; and either way the plaintiff is not estopped from disputing her title. In *Fenner v. Duplock* (2 Bingh. 10, 9 B. Moore, 38), payment of rent by a lessee to a lessor after the lessor's title had expired, and after the lessee had notice of an adverse claim, was held not to amount to an acknowledgment of title in the lessor, or to a virtual attornment (*b*)², unless, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired. He also relied upon *Gregory v. Doidge* (3 Bingh. 474, 11 B. Moore, 394. *Vide post*, 153).

Shee Serjt., in support of the rule. The fact that the defendant has no title is only shewn by the evidence, the admissibility of which was objected to. It is argued that the plaintiff was not let into possession by the defendant (*vide supra*, 147 (*b*)) ; but he was clearly in possession at the time when the defendant's title is shewn to have expired ; and though there was not a letting into corporeal possession, there was distinct proof, that after that period a new contract of tenancy was entered into between the plaintiff and the defendant, for a different term and at a different rent from the former. This amounted to a new letting into possession by the defendant, and not merely to an attornment on the part of the plaintiff. The payment of the rent for

(*b*)¹ But Tilbury had received the possession from Mackenzie, so that the plaintiff came into possession mediately under Mackenzie. *Vide* 4 N. & M. 29.

(*b*)² *Vide Doe dem. Linsey v. Edwards*, 6 Nev. & Mann. 635 (*a*), 640 (*a*), 656 (*a*).

three quarters of a year after Midsummer 1838 is not disputed, and it was again paid after the nonsuit in the replevin, which was after the Duke of Portland's title had accrued. If this nonsuit had been accidental, as it was contended, a new trial [149] might have been obtained. The relation of landlord and tenant, therefore, had clearly been established between the parties; and consequently the rule of law, that the latter cannot dispute the title of the former, applies. The cases of *Gregory v. Doidge* (3 Bingh. 474, 11 Moore, 394), *Gravenor v. Woodhouse* (1 Bingh. 38, 7 B. Moore, 289), and *Rogers v. Pitcher* (6 Taunt. 202, 1 Marsh. 541), might assist the plaintiff, if the facts were that he was not let into possession by the defendant, and if there had been a mere attornment by mistake. But the facts are the other way; and therefore it was not competent to the plaintiff, even to shew that the defendant's title had expired. In *Balls v. Westwood* (2 Campb. 11) it was held, in an action for use and occupation, where the defendant had come in under the plaintiff, that he could not shew the plaintiff's title had expired, unless he had solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. That course was open to the plaintiff here. In that case Lord Ellenborough expressed himself in these strong terms: "You may as well attempt to move a mountain. You cannot controvert the continuance of the title of the person under whose demise you continue to hold. The security of landlords would be infinitely endangered if such a proceeding were permitted. Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now inquire into the validity of the seizure, and consider, who is legally entitled to the premises; but the same tenancy continues which was created by the original demise, and the tenant must still pay rent to the lessor whose title he then recognised." In *Doe dem. Knight v. Smythe* (4 Maule & S. 347), Lord Ellenborough again said, [150] "Who shall be considered as landlord is a consequence to be deduced from the acts of the parties, and is not to be doled away at pleasure." And Dampier J. added, "The tenant in possession paid rent to the lessor, and then disclaimed. But he ought to give back the possession to the lessor, and after that the defendant may have her ejectment. It has been ruled often, that neither the tenant, nor any one claiming by him (vide supra, 147 (b)) can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord." Suppose A. were to hold as tenant from year to year of B., the freeholder B. dies, and A. then enters into another contract of tenancy with C., the eldest son of B. believing him to have title, and pays him rent, and afterwards finds out that he is illegitimate, can he dispute C.'s title? [Erskine J. That appears to be this very question.] In *Phipps v. Sculthorpe* (1 B. & Ald. 50) where premises had been let to B. for a term determinable by a notice to quit, and pending such term, C. applied to A. the landlord, for leave to become the tenant instead of B., and upon A. consenting, agreed to stand in B.'s place, and offered to pay rent; it was held that (though B.'s term had not been determined, either by a notice to quit or a surrender in writing) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action.

The argument on the other side is, that at the time the plaintiff acknowledged the title of the defendant, he was not aware that she had none in fact; and that when he finds that out he may dispute her title. But that is not so; and the cases cited shew he was bound, either formally to disclaim the possession, or to surrender to her. It is not like the case of a mere at-[151]-tornment to a party having no title; it is tantamount to being actually let into possession.

TINDAL C. J. This is an action of trespass brought for two distresses; the first for a year's rent claimed by the defendant to be due from the plaintiff at Midsummer 1840; the second for a quarter's rent at Michaelmas in the same year. The question in the case is, whether the plaintiff, who now disputes the legality of these distresses, is at liberty to do so, or whether he is not precluded by a rule of law, that a tenant cannot dispute the title of his landlord. There is no doubt, upon the evidence, that the defendant had, in point of fact, no title whatever to the premises in question after Midsummer 1838. The Duke of Portland's reversionary estate did not accrue till old Lady-day 1839; the mediate interest being vested in some one else, but in whom it did not very clearly appear (a), nor is it material.

(a) Probably this small reversionary interest was not worth the liability to which

It appears to me that this case does not fall within the rule adverted to; and that upon two grounds.

First, upon the ground that there was no new taking of the premises by the plaintiff, or any letting into possession by the defendant; and secondly, that even assuming there was such a new taking or letting into possession, it was left by me to the jury to say, whether the transaction took place on the part of the plaintiff without a knowledge of the circumstances, and that the jury found such to be the case.

Upon the first point, I think it was competent for the plaintiff to shew that the defendant's title had expired. The plaintiff was in possession of the premises; and after the expiration of the defendant's interest, he con-[152]-tinued to occupy, as tenant by sufferance under the party who was entitled to the intermediate term of three quarters of a year. The witness Richards speaks of a new agreement having been entered into between the plaintiff and the defendant, that the former should continue in possession as tenant to the latter: but there was no new possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shewn that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises which had been formerly occupied by the tenant. It is said, indeed, that this makes no difference, and that the facts of this case amounted, in law, to a new letting into possession; and the case of *Balls v. Westwood* (a) was cited as an authority to shew that where a party has come in under another, the former cannot shew that the title of the latter has expired without solemnly renouncing such title, and commencing a fresh holding under another person. But though such appears to have been Lord Ellenborough's opinion in that case, his opinion was subsequently altered; for in *Doe dem. Lowden v. Watson* (2 Stark. N. P. C. 230) that learned judge held that a defendant in ejectment, who had paid rent to the lessor of the plaintiff, might shew that his landlord, pending the term, had sold his interest in the premises; that is, in effect, the tenant was allowed to shew an alteration in his landlord's title. So, in *England dem. Syburn v. Slade* (4 T. R. 682), which was ejectment by a landlord against a tenant whose term had expired, it was held that the latter was not barred from shewing that his landlord's title had expired. And in [153] effect all that the plaintiff proposes to do in this case is, to shew that the defendant had at one time a good title, which has since expired.

But upon the other point, I cannot distinguish this case from that of *Gregory v. Dodge* (3 Bingh. 474), where the plaintiff in replevin had occupied lands under A., and upon A.'s death had entered into an agreement to pay rent to the defendant, and paid 1s. as an acknowledgment of his title, being ignorant that it was disputed. It turning out afterwards that the defendant had no claim to the property, this court was clearly of opinion that the plaintiff, having come into possession under a former owner, and having entered into the agreement in ignorance of the defect in the defendant's title, might, under a plea of non tenuit, shew that the defendant was not his landlord (b). The tenant's right to dispute the title is there put in the most precise way, being raised by the express plea of non tenuit; and that case seems to me to embrace the case now before us. Upon the second ground therefore, supposing that there had been a new tenancy created after the expiration of the defendant's title, I think it clear that the plaintiff had a right to shew what were the circumstances under which he entered into the agreement with the defendant—a right to shew the jury that, at that time, he was ignorant of the real facts as to the defendant's title. Now, it is highly improbable that the defendant disclosed to the plaintiff that she had no right to the premises; for if she had, no man of common sense (c) would have taken her as his landlady; but, in fact, she then asserted, and even now stoutly maintains, her right to the premises. [154] I left it to the jury to say, whether the agreement in

a claimant would have subjected himself in respect of the covenants of the original lease.

(a) 2 Campb. 11; and see *Keilway*, 65.

(b) See *Williams v. Bartholomew*, 1 B. & P. 326.

(c) He would have placed himself in the position of being liable to pay the amount of the rent over again to the Duke of Portland, either in the shape of mesne profits or as a compensation for the use and occupation.

question was entered into by the plaintiff with a full knowledge of the facts, or under a misapprehension as to their nature; and they, in effect, found the latter. I see no reason to be dissatisfied with their verdict; and the case of *Gregory v. Doidge* is an authority to shew that the direction to the jury was correct.

Upon the whole, therefore, I am of opinion that the present rule must be discharged.

COLTMAN J. I am of the same opinion. In the case of *Doe dem. Higginbotham v. Barton* (11 A. & E. 307, 3 P. & D. 194), where a mortgagor in possession had demised the premises, and the tenants, having received notice from a party to whom their lessor had executed a second mortgage, had paid rent to him, the question was, whether the tenants could, in ejectment by such second mortgagee, dispute his title. Lord Denman C. J., in giving the judgment of the court, said, "It is clear that the lessor of the plaintiff never had any legal estate; and he must rely on the rule with regard to landlord and tenant. That rule is fully established: viz. that the tenant cannot deny that the person by whom he was let into possession had title at that time: but he may shew that such title is determined. With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent, if he can shew that it was paid under a mistake."

In this case, therefore, if the plaintiff was not let into possession by the defendant, it is clear that he is not precluded from shewing that her title is at an end. What, then, is the meaning of being let into possession? The plaintiff, it is admitted, was not let into corporeal possession by the defendant; he had been let in by [155] Tilbury, quite independently of Mackenzie (vide ante, 145 (a)). But then it is argued that in July 1838 the plaintiff entered into an agreement to take the premises from the defendant; and I think that such must be considered to be the result of the evidence. And if she had a legal right at that time, and might have turned the plaintiff out of possession, I am not prepared to say but that he must have formally surrendered to the defendant. But the infirmity of the defendant's case consists in this, that at the time of this agreement she had in fact no power to turn the plaintiff out of possession; and I think therefore that he cannot be said to have been let in by her. The question then is, was this agreement made under a mistaken notion as to the facts? This point was properly left to the jury, and they have found in the affirmative. The plaintiff, therefore, was entitled to shew that, at the time of making the distresses, the defendant's title had determined.

ERSKINE J. I am of the same opinion. The facts of the case are all perfectly clear, and indeed are not disputed. After Midsummer 1838 there was no title in the defendant; but the title of the Duke of Portland did not accrue till the 5th of April following. The plaintiff had been let into possession originally, not by the defendant, but by Tilbury; but after his right had expired (which was at Midsummer 1838, when the defendant's title also expired), the plaintiff had paid rent to the defendant up to Midsummer 1839, and, as it would seem, not under protest. This was a *prima facie* acknowledgment of her title; but the cases that have been cited shew, that where such a payment has been made in ignorance of the real circumstances, and the tenant has not been let into possession by the party claiming to be [156] landlord, the former may shew the want of title of the latter. The defendant, however, relies upon an agreement proved by the witness Richards to have been made in July 1838, after the expiration of her term, whereby the plaintiff agreed to hold the premises as her tenant; and if this agreement were made with a full knowledge of the facts, perhaps the plaintiff would not be entitled to deny that he was bound to pay her rent. But it is impossible to suppose that he knew she had no title at the time of the agreement; and the evidence shews that no explanation was at that time entered into. Is the agreement, then, to be taken as conclusive? There were two questions left by my lord to the jury. The first was, whether the plaintiff was in possession as tenant to the defendant under the agreement; the second, whether the agreement was made with a full knowledge of all the circumstances. The jury found a general verdict for the plaintiff, and must therefore be taken to have found, either that there was no agreement, as stated by the witness Richards, or that the plaintiff had, at the time, no knowledge of the facts. It is probable they thought the agreement was in fact made, but under a mistake as to the facts. It is said this is not merely the case of an attornment, but is a letting into possession; and the rule of law is relied upon,

that, under such circumstances, the tenant cannot deny the landlord's title. Now I agree that this might be so if in July 1838 the plaintiff had made the agreement with knowledge of the facts; but it is clear he was in perfect ignorance as to them, or, at any rate, was not fully aware that the defendant had no title to the premises. Then, is there any difference between an express agreement to hold of a party and an attornment to him? They each amount to an admission of such party's right. Unless it could be shewn that the defendant had put the plaintiff into actual possession, I think the agree-[157]-ment would stand on the same footing as an attornment. If, indeed, at that time, the defendant might have turned the plaintiff out of possession, he could not have denied her title. But that is not so; because if, in July 1838, the defendant had brought her ejectment, she must have stood on her own title, and she had, in fact, none to prove. I am therefore of opinion that an agreement entered into under these circumstances, does not preclude the plaintiff from disputing the defendant's title to the premises.

CRESSWELL J. I also am of opinion that the direction of the Lord Chief Justice was right, and that the finding by the jury was so likewise. It is undoubtedly true that if one person obtain possession of premises by means of another as his landlord, the former is estopped in law from saying that the latter had no right to give such possession. If, therefore, he obtain possession as tenant, he must give up the premises to his landlord,—*rebus sic stantibus*. But if he mean to insist that the landlord's title is at an end, he must shew a change of circumstances, such as a sale of the property by the landlord, or an expiration of his title by efflux of time, &c. Now, assuming that the plaintiff in this case took possession from the defendant, I should by no means have been sure that the plaintiff might not have shewn that the defendant's title was gone. But the question here is, whether the Lord Chief Justice was right in leaving the questions, as he did, to the jury. (His Lordship here recapitulated the facts of the case.) Now the arrangement with the defendant recognises her as the party entitled to the remainder, which in point of fact she was not. Then the question arises, was that arrangement entered into under a mistake or not? The evidence clearly shews that, at the time, she was asserting her right to the property; her title therefore was recognised by the [158] plaintiff under a mistake. It seems to me, therefore, that the case was rightly left to the jury, and that there is no ground for disturbing the verdict.

Rule discharged.

BEATY AND ANOTHER v. WARREN. April 30, 1842.

In this court a rule for judgment non obstante veredicto ought to be drawn up "upon reading the record;" but semble, the omission of these words by the misprision of the officer will not prejudice the party who has obtained the rule. At any rate, the record is sufficiently before the court if a copy of the pleadings be annexed to the affidavits on which the rule was obtained.

Assumpsit, on a special contract to make bricks; to which the defendant pleaded non assumpsit, and several special pleas. The cause and all matters in difference were referred. The arbitrator directed a verdict to be entered for the plaintiffs on the first issue, and for the defendant on the other issues, and he found that the plaintiffs were not entitled to any damages for the breaches of the contract alleged.

Channell Serjt., on behalf of the plaintiffs, on a former day (19th April) of this term, obtained a rule nisi to set aside the award, or for judgment non obstante veredicto, upon the ground (*inter alia*) that the second, third, fourth and fifth pleas were bad in law, and that the sixth did not go to the whole cause of action.

Bompas Serjt. now took a preliminary objection, that, as the pleadings did not appear on the face of the award, and the rule was not drawn up "on reading the record," the record was not before the court, and therefore the plaintiffs could not be heard to object to any thing contained therein. [Tindal C. J. When a motion is made for judgment non obstante veredicto, is not the record supposed to be before the court?] Still, in this court it is necessary that the rule should be drawn up "on reading the record," although it is not so [159] in the Queen's Bench; and that court, on an application to set aside an award made pursuant to an order of nisi prius, will look at the record, although the rule is not drawn up on reading it. The difference

between the practice of the two courts was pointed out by Patteson J. in *Sherry v. Oke* (3 Dowl. P. C. 349, 351). (He was then stopped by the court, after they had consulted with the master (Griffith).)

Channell Serjt., *contra*. This objection cannot be sustained. In a recent case in the court of Exchequer, where there was an application to set aside a verdict in a cause that had been tried before the sheriff, it was necessary to ascertain the form of the second plea. It was objected that it was not before the court, as the rule was not drawn up "on reading the record;" but Parke B. said he considered the record was in court. [Bompas. The rule in that court is in the same form as in the Queen's Bench (b).] At most this is merely a mistake of the officer in drawing up the rule, for which the party ought not to suffer (c). The terms of the rule are never indorsed by the counsel.

TINDAL C. J. I think this is a mere misprision of the officer. The record is never really in court; and though it seems that the rule should properly have been drawn up "upon reading the record;" still the record may be considered as being virtually and potentially in court (d). It is, after all, but a technical objection.

[160] It then appearing that a copy of the pleadings was annexed to the affidavits upon which the rule nisi had been obtained, the argument in the cause proceeded: but terms were afterwards agreed upon.

GIBSON AND MARTIN, Assignees of F. Harris, v. MUSKETT. May 4, 1842.

[S. C. 3 Scott, N. R. 419, 427; 10 L. J. C. P. 301; 11 L. J. C. P. 225.]

A., a trader, being in embarrassed circumstances, offered his creditors a composition of 7s. 6d. in the pound, which was refused by the majority of them, and by B. among the number. B. filed an affidavit in the court of bankruptcy, and, on the 13th of March, served on A. a copy thereof and a notice, demanding payment pursuant to sect. 8 of 1 & 2 Vict. c. 110, and he also served a notice on an auctioneer, who had advertised the sale of A.'s goods, not to proceed with the sale. The goods were sold, and out of the proceeds a payment was made, on the 5th of April, to the defendant (a creditor) of the amount of the composition of his debt. Held that this was a fraudulent preference.—*Quære* whether, under the act in question, the twenty days after the service of the notice are to be reckoned inclusively of the day of service.—The question, whether a fraudulent preference was given, appears to be one of law rather than of fact. (Per Coltman J.).—"A payment really and *bonâ fide* made," within the eighty-second section of 6 G. 4, c. 16, is a payment made without any intention of its being reclaimed. (Per Tindal C. J.).—The court, being greatly dissatisfied with two successive verdicts, ordered a third trial.

Assumpsit, for money had and received to the use of the plaintiffs, as assignees, and upon an account stated with them as assignees. Plea: non [161] assumpsit. At the trial, before Lord Abinger C. B., at the Hertford summer assizes, 1840, a question

(b) See Chitty's Pract. Forms, 707.

(c) He adopts the mistake when he serves the rule.

(d) In Tidd's Practice (9th ed. p. 928), it is said, "The motion in arrest of judgment, or for judgment non obstante veredicto, &c., may be made, in the King's Bench, at any time before the judgment is given, though a new trial has been previously moved for. But it is against the ancient course of the court, to make a rule to stay judgment, unless the *postea* be brought in; and therefore it is said, that if one move in arrest of judgment, he ought to give notice to the clerk in court on the other side; but the better way is to give a rule upon the *postea* for bringing it into court, and that is notice of itself.

"In the Common Pleas, the motion in arrest of judgment must be made before or on the appearance day of the return of the *habeas corpora juratorum*; and it cannot be made, without notice, on the last day of term. On moving in arrest of judgment after verdict, the roll should be brought into court, if it be entered on record; if not, the record of *nisi prius* should be produced by the associate."

arose, whether a payment made by Harris, the bankrupt, under the circumstances hereinafter stated, was void, as being a fraudulent preference.

Harris had been a trader at St. Albans, and a customer of the defendant, who was a banker there. In February 1839, Harris being largely indebted to various persons, including the plaintiff Martin and the defendant, a composition with his creditors of 7s. 6d. in the pound was suggested; and it was on three different occasions proposed to the plaintiff Martin to come into this composition, which he declined to do. On the 13th of March Martin filed, in the court of Bankruptcy, an affidavit of the amount due to him from Harris, pursuant to the stat. 1 & 2 Vict. c. 110, s. 8 (a)¹, and a copy thereof, with a notice requiring immediate payment of the debt, was served on J. Harris on the 15th of March. Harris's goods were [162] advertised for sale by one Crawley, an auctioneer, on the 21st. An hour before the sale notice was served upon him by the solicitors of Martin, that proceedings had been instituted for the purpose of making Harris a bankrupt. The sale, however, took place; and, out of the proceeds, Crawley paid to various creditors of Harris (including the defendant) the composition of 7s. 6d. in the pound on their respective debts. The payment to the defendant was made on the 5th of April. Harris not having complied with the requisites pointed out by the act above referred to, a fiat was issued against him on the 9th of April 1839, under which the plaintiffs, on the 2d of May, were appointed assignees. Of thirty-three creditors only fourteen had come into the composition. The sum received by the defendant amounted to 121l. 10s., to recover which the present action was brought.

The Lord Chief Baron told the jury that if they were satisfied that Harris, at the time the payment was made, believed Martin would proceed to make him a bankrupt, or knew he could not prevent Martin from doing so,—if he thought that bankruptcy was inevitable,—the payment would amount to a fraudulent preference, and they should find a verdict for the plaintiffs; but if they thought that Harris did not intend to commit an act of bankruptcy, and did not conceive that Martin would proceed to make him a bankrupt, they ought to find for the defendant. The jury returned a verdict for the defendant.

Sir Thomas Wilde Serjt. in Michaelmas term 1841 obtained a rule nisi for a new trial, upon two grounds; first, upon the ground of misdirection, as to whether the money had been paid in contemplation of bankruptcy; and secondly, that the verdict was against evidence.

[163] Channell Serjt. in Trinity term 1841 (a)² shewed cause against the rule, and Sir Thomas Wilde was heard in support of it. The court delivered their judgment as follows:—

May 29.—TINDAL C. J. It seems to me, the jury have come to an improper conclusion, and that the case ought to be sent to a new trial. The money, it appears, was paid by Harris to Musket on the 5th of April, that sum being the amount of 7s. 6d. in the pound on a debt due from Harris to Musket; and it is important to consider what was Harris's situation with respect to Martin, another of his creditors, at this time.

(a)¹ Which enacts that, "if any single creditor (or creditors, being partners), whose debt shall amount to 100l., or any two creditors whose debts shall amount to 150l., or any three or more creditors whose debts shall amount to 200l. of any trader within the meaning of the laws respecting bankrupts, shall file an affidavit in Her Majesty's court of Bankruptcy, that such debt is due, and that such debtor is such trader, and shall cause him to be served personally with a copy of such affidavit, and with a notice in writing, requiring immediate payment of such debt, and if such trader shall not, within twenty-one days after personal service of such affidavit and notice, pay such debt, or secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, with two sufficient sureties, as a commissioner of the court of Bankruptcy shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with costs, or to render himself, &c., after judgment recovered, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after the service of such affidavit and notice, provided a fiat shall issue within two calendar months from the filing of such affidavit."

(a)² Before Tindal C. J., Coltman, Erskine, Maule JJ.

Before this payment was made Harris had received a notice given to him by Martin, which notice, following the language of the act of the 1 & 2 Vict. c. 110, required immediate payment of the debt; and the act specifies that if the party do not, within twenty-one days after personal service of the affidavit, pay the debt, or secure, or compound for, the same, to the satisfaction of the creditor, or enter into a bond for such sum, with two sufficient sureties, as a commissioner of the court of Bankruptcy shall approve of, to pay the same, then that there shall be an act of bankruptcy deemed to have been committed on the twenty-second day after the service of the affidavit, provided a fiat be sued out within a certain time.

Therefore, on the 5th of April, when Harris made this payment, he knew that, at any rate, on the 6th, he would be in a situation that Martin might, at any time within two months afterwards, sue out a fiat against him unless he performed one of the three conditions, none of which was he able to fulfil. Harris could not pay the debt, for he had exhausted all his money; he could not secure or compound for the same to the satisfaction of the particular creditor; for he knew that Martin, in [164] giving the notice, had shewn that he was unwilling to accept, and had determined not to accept, the composition which had been previously offered; he could not enter into a bond with two sufficient sureties such as the court of Bankruptcy should approve; because there was not time to perform that condition.

That being the state of the case, it further appears, that on the 21st of March, a notice had been given to the auctioneer, not to go on with the sale. It is impossible, under these circumstances, that Harris should not know that it was the intention of Martin to proceed adversely to him, and to issue the fiat.

Then the question is, whether this was not money paid in contemplation of bankruptcy; that is, under such circumstances that any prudent man taking a reasonable view of his situation, and the surrounding circumstances at the time, might fairly expect bankruptcy would follow; and I think we must say, that here there was such a contemplation of bankruptcy, and therefore that the case should be submitted to the consideration of another jury to exercise their judgment on that point.

I am not, however, prepared to say that the direction is of that description, that we can make any distinction between this and the ordinary case, where a cause is sent down again by reason of the verdict being against evidence. The learned judge indeed told the jury that in order to find this a payment made in contemplation of bankruptcy, they must be satisfied that bankruptcy was inevitable; but I do not think that the word "inevitable" was there used simpliciter, but rather *secundum subjectam materiam*, that is, with respect to this act of bankruptcy, which depended not on the act of himself, but on an act by a third person, in invitum.

I think what was passing in the mind of the judge, and what the jury might reasonably understand the substance of the whole direction taken together to be, is this, "if you think there is evidence that he had [165] bankruptcy in his view, then you must find for the assignees. But supposing you do not think that, yet, if you are satisfied he thought that bankruptcy was inevitable, still you must find for the assignees." Although taking particular parts of the summing up, the point of inevitable expectation of bankruptcy is perhaps put rather strongly, yet, looking at the whole together, I cannot call it a misdirection.

COLTMAN J. I am of the same opinion. I think the jury have come to an erroneous decision on the matter of fact, and though strong observations appear to have been made on those facts by the Lord Chief Baron, I am not prepared to say he did not, on the whole, make the jury understand correctly the nature of the point they had to decide; for he closes his summing up by saying, "If you think on the other hand he did not intend to commit bankruptcy at the time, and did not conceive that Mr. Martin would proceed to make him a bankrupt, then you ought to find for the defendant." That is his closing sentence; and that is correct. One can easily understand what may have led the jury to the conclusion they drew; viz. they imagined that Mr. Martin had dealt harshly; and they probably thought that the offer which Harris had originally made of 7s. 6d. in the pound to each of the creditors was a fair offer. That is a ground on which a jury might naturally act, yet it is not one that can be supported in point of law; for though Harris pays no more than 7s. 6d. in the pound to Mr. Muskett, which is the composition he is willing to pay to every one, yet, under the circumstances of the case, this payment cannot be exempted from falling within the consideration of the law as a fraudulent preference.

ERSKINE J. concurred.

[166] MAULE J. I am of the same opinion. I think that the direction of the judge was not erroneous. The specific act of bankruptcy proved is one of a peculiar nature, depending, not on what had been done or omitted by the bankrupt alone, but on what, if done at all, would be done by some one else. The learned judge, in effect, puts this to the jury. "If you are of opinion that Harris thought he could not help Mr. Martin making that an act of bankruptcy, which it would be at the option of Mr. Martin to make an act of bankruptcy or not, then the payment was in contemplation of bankruptcy." That appears to me to be quite correct. He used, indeed, the term "inevitable." That has been put as if that were meant by the judge, and understood by the jury, as a statement that unless an act of bankruptcy must absolutely and necessarily happen, and unless the bankrupt knew that, this was no payment in contemplation of bankruptcy. I do not think that is the fair meaning of the expression. It means, if he intended to do something himself which would amount to an act of bankruptcy, or if he knew he could not prevent another person from taking a step which would make him a bankrupt, then he must be held to have contemplated bankruptcy; that in either of these circumstances there was a fraudulent preference in contemplation of bankruptcy. I think that is explained by the passage my brother Coltman has read from the judge's summing up. He used the phrase, "if he knew he could not prevent Mr. Martin from proceeding to make him a bankrupt," and it cannot be said, I think, that he did not know that; and therefore it cannot be said the judge was incorrect. Probably if his lordship had pressed the fact to the jury in the way it has been pressed to this court, the jury might have come to a different conclusion. All that he has done, or rather has omitted to do, is, that he has not given an opinion on the matter of fact to the jury; but that is no misdirection; that is an [167] error which may be rectified when the case goes before another jury.

Rule absolute, on payment of costs.

The cause was tried a second time before Tindal C. J., at the summer assizes for 1841, when the jury again found a verdict for the defendant.

Nov. 5.—Sir T. Wilde Serjt., in Michaelmas term 1841, obtained a rule for a second new trial upon the ground, that by 1 & 2 Vict. c. 110, s. 8, the twenty-one days, at the expiration of which the trader, not having complied with the requisites of the act, is to be taken to have committed an act of bankruptcy, are to be calculated inclusively of the day on which the notice is given; and that, consequently, the payment was made after an act of bankruptcy; and, secondly, that the verdict was against the evidence which clearly established a fraudulent preference.

Channell Serjt. now shewed cause. First, the verdict was sufficiently supported by the evidence. The composition was perfectly fair. The only question is, whether the payment was made by Harris in contemplation of bankruptcy; and two juries having found that it was not, the court will not send the case to a third trial. There was nothing to shew that Harris must have contemplated bankruptcy at the time. It is true the plaintiff Martin, as a creditor, had filed his affidavit under the act, and served a copy, with notice, upon Harris; and if the latter did not do certain acts within the twenty-one days prescribed by the act, it was competent to the creditor to make his debtor a bankrupt, by issuing a fiat at any time within two months. But it does not follow that the creditor would take this step, and that the fiat would issue. The debtor might or might [168] not be aware that he had exposed himself to peril; but at any rate he could not know whether the creditor would take advantage of his situation. The right to obtain a fiat seems to be confined to the creditor who makes the affidavit. [Tindal C. J. That may be doubtful. The section says, that if the trader does not do certain things, he "shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit and notice, provided a fiat shall issue within two months;" so that if there is an act of bankruptcy, it would seem that any party might obtain the fiat.] Still the question would be, whether the bankrupt must necessarily have contemplated bankruptcy, as he could not know whether any creditor would obtain a fiat. [Tindal C. J. It increases the field against him at any rate.] The mere possibility, or even the probability, that a fiat would issue, would not be sufficient.

The argument upon the other point, viz.: whether the twenty-one days mentioned in the 1 & 2 Vict. c. 110, s. 8, were to be reckoned inclusively or exclusively of the day on which the notice was given, is omitted, as the judgment of the court did not

turn upon it. The learned serjt.,—who contended that the day of the notice was not to be reckoned in the twenty-one days,—cited *Webb v. Fairmanor* (3 M. & W. 473), *Blunt v. Heslop* (8 A. & E. 577, 3 N. & P. 553), *Young v. Higgon* (6 M. & W. 49), and *In re Higham* (9 D. P. C. 203), and distinguished *Glassington v. Rawlins* (6 East, 407), *Ex parte Rose* (4 Deac. 125), and *Ex parte Whilby* (id. 139, 1 Mont. & Chit. 671).

Talfourd Serjt. in support of the rule. The payment in this case, if made voluntarily and in contemplation of bankruptcy, was clearly a fraudulent preference in law. [169] The fairness of the composition is not the test, as to whether a payment amounts to a fraudulent preference. The principles of the rule upon which the doctrine of fraudulent preference is based, are laid down by Lord Mansfield C. J. in *Alderson v. Temple* (4 Burr. 2235. S. C. 1 W. Bl. 660), and also in *Harman v. Fisher* (1 Cowp. 117. S. C. Lofft. 472). Although the question of fraudulent preference may be one for the jury, yet it is one on the very verge of the law, and may properly be reviewed by a judicial tribunal: and the court will not scruple to send down a case to a third trial, where they clearly see that the verdict is against law (c). It is clear that, under the circumstances of this case, Harris must have contemplated bankruptcy at the time the payment was made; and such was the decided opinion of this court in granting the former new trial in this case. The rule as to what shall constitute a sufficient contemplation of bankruptcy to make a voluntary payment amount to a fraudulent preference, is laid down in *Poland v. Glyn* (d), *Gibbins v. Phillips* (7 B. & C. 529, 2 Mann. & Ry. 238), *Belcher v. Prittie* (10 Bing. 408, 4 Moore & Sc. 295). In the latter case, although the payment was confirmed under the circumstances, the question was very fully discussed. In *Gibson v. Bouts* (3 Scott, 229), Tindal C. J. says, "Contemplation of bankruptcy I take to mean, where the party believes bankruptcy to be the necessary result of his condition, and such belief is operating upon his mind at the time of making the payment." And Bosanquet J. adds, "If a man, believing himself to be in danger of bankruptcy, voluntarily hands over money for the purpose of securing a favoured creditor, that, in my opinion, [170] is a payment made in contemplation of bankruptcy, within the meaning of the law as laid down upon the subject of fraudulent preference."

Upon the second point he was proceeding to argue that the day on which the notice was given, was to be included in the twenty-one days under the 1 & 2 Vict. c. 110, and consequently that they had expired on the 5th of April, the day on which the payment to the defendant was made, and, that, therefore, such payment was made after an act of bankruptcy. (Channell Serjt. Even in that case the payment would be protected by the 6 G. 4, c. 16, s. 82 (a), being, if not a fraudulent preference, a payment bonâ fide made by the bankrupt before the issuing of the fiat, without notice to the creditor of any prior act of bankruptcy.) It may perhaps be put, that the payment in this case was made during the very progress of the act of bankruptcy. [Erskine J. I think the act of bankruptcy must be taken to have been committed, either wholly before or wholly after the payment.] The argument on this point certainly is, that the act was committed before the payment, but even in that case there may be a payment which may well be said not to be made bonâ fide; though it may not amount to a fraudulent preference.

TINDAL C. J. I think the expression "payments really and bonâ fide made" in the eighty-second section [171] of 6 G. 4, c. 16, must mean payments of money not

(c) See *Goodwin v. Gibbons*, 4 Burr. 2108.

(d) 4 Bingh. 22, n., 12 B. Moore 109, n., S. C. 2 D. & R. 311; but as to this latter report, see the observations of Best C. J., 12 B. Moore, 109, and Park J., ib. 112.

(a) Which enacts, "That all payments really and bonâ fide made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

intended to be reclaimed by the party ; and it is clear there was no such intention in this case.

I must confess I have great reluctance in sending down any cause to a third trial ; but cases may occur in which we cannot help feeling that justice has not been done. In the present instance there certainly appears to have been a struggle on the part of the jury against the bankrupt laws. But, without saying more to prejudice the case, I think it ought to go down again to trial, on payment of costs.

COLTMAN J. The question of fraudulent preference may really be considered as hardly other than a question of law. The jury were, perhaps, misled by what they may have thought the honesty of the case ; but, being substantially a point of law, I agree there ought to be a new trial.

ERSKINE J. concurred.

Rule absolute, on payment of costs.

[172] HARTLEY v. MANSON. May 5, 1842.

[S. C. 1 D. N. S. 711 ; 11 L. J. C. P. 199.]

By the stamp act (55 G. 3, c. 184, sched. Part 1), a warrant of attorney is required to have an ad valorem stamp, except where it is given for securing a sum of money for which the party giving it is in custody, when a one pound stamp is sufficient. Where a warrant of attorney was given under such circumstances : Held, not necessary that it should appear on the face of it that the party was in custody.—Held also, that an interlineation in the instrument made by consent of both parties, after execution, stating the party to be “now a prisoner in the custody of the sheriff of K., was not an alteration in a material part of the instrument, so as to render a new stamp necessary (a).—Semble, that if, by reason of the insufficiency of the stamp, the warrant of attorney had been invalid, the court would not have granted a rule nisi to set it aside, inasmuch as the plaintiff might remove the objection before he would be required to shew cause against such rule (vide tamen post, 178 (b)).

Atcherley Serjt. applied for a rule to set aside the warrant of attorney, judgment, and execution, in this case, and to discharge the defendant out of custody. The following facts were stated from the affidavits. On the 13th of November 1839, the defendant being in the custody of a sheriff's officer, for 370l. at the suit of the plaintiff, executed a warrant of attorney, duly attested, for securing to the plaintiff that sum and costs ; the defendant was therein described as “of the Grove, Woolwich, in the county of Kent ;” the warrant of attorney was stamped with a 1l. stamp. The defendant was then [173] discharged. On the following day the defendant received a note from the plaintiff, stating that the warrant of attorney required “a little formal addition ;” and the plaintiff's clerk together with the attesting attorney, called upon the defendant in the afternoon of the same day with the warrant of attorney, and the former said it was necessary to insert the words, “but now a prisoner in the custody of the sheriff of the said county of Kent,” after the word “Kent” in the description of the defendant in the warrant of attorney. The attesting attorney said he thought the alteration would invalidate the warrant of attorney, but the suggested alteration was made by the plaintiff's clerk. The defendant and the attesting attorney traced over their respective signatures with a dry pen, and the warrant of attorney was re-delivered by the defendant, no alteration having been made in the date. The attesting attorney had not been required by the defendant to attend or act for him on

(a) As to this latter point, vide *Markham v. Gonaston*, Cro. El. 626, which was an action on the case for destroying the effect of a bond by filling up blanks ; S. C. 2 Roll. Abr. 29, 30, 13 Vin. Abr. 40. It appears from the report of the same case in Sir F. Moore, 547, pl. 730, that though the plaintiff recovered in the action on the case,—having been nonsuited in the action on the bond, upon non est factum pleaded, by reason of the alterations,—he brought a second action on the bond, in which action, to a plea of issint non est factum, he replied that the blanks were filled up by the consent of obligors and obligee, and recovered. And see *Anon.* Select Cases in Chancery in Lord King's Time, 24, 13 Vin. Abr. 103, pl. 12.

That the defence should be specially pleaded, see *Anon.* Sir F. Moore, 66, pl. 179.

this occasion. Judgment had been entered up on the warrant of attorney, and the defendant, on the 15th of April 1841, was charged in execution under it, and had been in custody ever since.

The learned serjeant contended:—First, the warrant of attorney was invalid in its original condition, for not stating, upon the face of it, that the defendant was then in custody. By the stamp act (55 G. 3, c. 184), sched. Part I. tit. Warrant of Attorney, the same duty is imposed on a warrant of attorney as on a bond for the security of money, which is an ad valorem duty; but there is an exception “where the warrant of attorney shall be given for securing any sum or sums of money, for which the person giving the same shall be in custody under an arrest;” in which case a 1l. stamp is sufficient. But, as it does not appear on the instrument, that the defendant was in custody, an ad valorem stamp was necessary; and, without it, the warrant of attorney was void.

[174] Secondly, at the time of the re-execution of the warrant of attorney on the 14th, the defendant was not in custody, and therefore an ad valorem stamp was then clearly necessary. [Tindal C. J. These are merely objections as to the amount of the stamp; but of what use would it be to grant a rule? the plaintiff would go to the stamp office and set it right, pending the rule. In *Burton v. Kirkby* (7 Taunt. 174), where a judgment had been entered up on a warrant of attorney given on an insufficient stamp, this court held that the objection was cured by procuring the instrument to be stamped, although the defendant had applied to the court to set aside the judgment.]

Thirdly, the warrant of attorney was not duly attested under the stat. 1 & 2 Vict. c. 110, s. 9, on the 14th of November,—the attesting attorney not having been required to act by the defendant. In *Bailey v. Bellamy* (9 Dowl. P. C. 507) a warrant of attorney to confess judgment for 1000l. was executed by the defendant, and duly attested by an attorney on his behalf; an alteration was afterwards made, by consent, in the sum, by substituting 2000l., and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The attorney who was present wrote his initials opposite to the alterations, and drew a dry pen over the alterations, and over each letter of his own signature, and the court held that the warrant of attorney was not duly attested.

Fourthly, assuming the warrant of attorney to be valid on the 13th, the alteration made in it afterwards would render it void, being made in a material part. As it stood at first, parol evidence would have been requisite to shew that the defendant was in custody when the warrant of attorney was originally executed.

[175] TINDAL C. J. I see no sufficient ground of objection against this warrant of attorney to induce the court to grant the rule prayed for.

I am disposed to think that the warrant of attorney was good on the 13th of November; the only objection against it in its original shape being that it had an improper stamp, not indeed with reference to the actual situation of the defendant at that time, but on the ground that his situation did not appear, as it is contended it ought to have done, on the face of the warrant of attorney. But admitting that to be an objection, it is a sufficient answer to say the court would not be inclined to grant a rule to set aside a warrant of attorney merely on the ground of its bearing an imperfect stamp, because while the rule was pending the parties might set the matter right by going to the stamp office and paying the penalty. But, as I have before stated, I think that—*rebus sic stantibus*—in the state of affairs on the 13th of November, this was a good warrant of attorney.

Then the question arises whether a material alteration has been made in the instrument since that time, so as to vitiate it. The authorities are strong to shew that if a deed be altered in an immaterial part, by a stranger (a), or in a material part

(a) For this position Comyns cites 11 Co. 27 a. (*Henry Pijot's case*), where, in a bail-bond, the words “sheriff of the county of Oxford” were added after the execution. The defendant pleaded non est factum, without demanding oyer of the bond or condition. The court gave judgment for the plaintiff upon a special verdict, on the ground that for any thing which appeared to the court, the alteration may have been made in a point not material. Had oyer been demanded, it would have appeared that the bond, as originally drawn, was void, as being a bail-bond made to the sheriff otherwise than by his name of office; *Guybon v. Whitelost*, Cro. El. 800; *Noel v. Cooper*, Palmer, 378; *Kirkebridge v. Wilson*, 2 Lev. 123.

by the consent of the parties (b)¹, it is not thereby vitiated: they are collected [176] in Com. Dig. tit. Fait (F. 1). Now the alteration in this instrument was not material in my opinion; it was moreover made with the consent of both parties, and was merely intended to correct a mistake and carry out their original intention. It falls within that numerous class of cases upon bills of exchange, where, after a bill has been drawn and delivered, an alteration, made in pursuance of the original intention of the parties, has been held not to vitiate the bill; as where the words "or order" were introduced after the bill had been indorsed (a).

The utmost that can be said is, that the introduction of the words in this warrant of attorney (b)² might save the parties some trouble and expense in proving that the defendant was in custody at the time the warrant of attorney was given; as it does not appear in any way to interfere with the object of the instrument. In *Walmesley v. Bryant* (1 Moo. & Rob. 529), where a bond was conditioned [177] for the payment of money, which was declared to be the same money as that secured to be paid by an indenture of even date, but it did not appear, by any recital, that the indenture required an ad valorem stamp, Parke B. held, that in order to dispense with an ad valorem stamp on the bond, it was necessary to produce the indenture, to shew that it was properly stamped with an ad valorem stamp. This however was not done for the purpose of negativing the obligation of the bond, but the party was put to this extra trouble from not having recited the fact in the deed.

On these grounds, therefore, I think the rule must be refused.

COLTMAN J. I am of opinion that the original warrant of attorney was valid. Objections on the stamp laws—though the revenue certainly ought to be protected—are not to be stretched against the subject. I think extrinsic evidence would have been sufficient to support this warrant of attorney so as to shew that it was good on the 13th of November.

The alteration did not vary the liability of the parties, for it was not in a material part, and, consequently, would not vitiate what was good before.

ERSKINE J. I also am of opinion that the warrant of attorney after the execution on the 13th of November was valid; and that the subsequent alteration did not deprive it of its validity. No case has been cited to shew that a 1l. stamp was not sufficient on the 13th, as the instrument then stood; and I think it was not necessary to shew on the face of the warrant of attorney that the defendant was then in custody. In the schedule to 55 G. 3, c. 184, under the title Warrant of Attorney, the exception to the general duty is confined to the two cases where the payment of money shall be already se-[178]-cured by a bond, mortgage, or other security which shall have paid the ad valorem duty, and where the warrant of attorney shall be given to secure any sum of money for which the person giving the same shall be in custody under an arrest. In these cases a duty of 1l. is imposed, the two cases being put on the same footing; and the same construction must be given to both exceptions. The present case, therefore, which falls within the latter class of exceptions, would be governed by *Walmesley v. Bryant* (1 Mood. & Roby. 529), which came within the former class.

Then I think if the stamp was sufficient as the instrument originally stood, without

(b)¹ For this Comyns cites 2 Lev. 35 (*Zouch v. Claye*), where, after a bond had been executed by A. and B., the two obligors named therein, the name and addition of C., a third obligor, were interlined, with the consent of all parties, and C. executed the bond, which was held to be the joint bond of A., B., and C. He also refers to a dictum of Popham, in Cro. El. 627 (*Markham v. Gonaston*), in which, according to the statement in Comyns, it would appear that Popham had said that a material alteration made by consent, upon an agreement that an addition should be made after the deed is sealed, does not vitiate the deed. But upon referring to Cro. El., it will appear that the dictum is of a more qualified character: "But if it had been appointed by the obligor before the ensembling and delivery thereof, that it should be afterwards filled up, it might then, peradventure, have been good enough, and it should not have made the deed to be void." Vide ante, 172 (a).

(a) See *Kershaw v. Cox*, 3 Esp. N. P. C. 246, 10 East, 437; *Jacobs v. Hart*, 2 Stark. N. P. C. 45; *Byrom v. Thompson*, 11 A. & E. 31, 3 P. & D. 71. See also *Brett v. Picard*, 1 R. & M. 37; *Attwood v. Griffin*, ib. 425.

(b)² As to the consequences of such an alteration, see *Markham v. Gonaston*, ante, 172 (a), 175 (a).

the recital of the fact of the defendant being in custody, the subsequent alteration, by the introduction of the recital of that fact, was not material. If it were material, the only effect would be to make a new stamp necessary; but even then, for the reasons already given, I think the court ought not to grant a rule to set aside the warrant of attorney. But independently of that, the words introduced were in accordance with the original intention of the parties, and, therefore, according to decided cases, even supposing the alteration were material, a new stamp could not be necessary.

CRESSWELL J. concurred.

Rule refused (*b*).

[179] GIBSON AND ANOTHER v. BRAND. May 3, 4, 5, 1842.

[S. C. 4 Scott, N. R. 844; 11 L. J. C. P. 177.]

In case, for infringing a patent for a new and improved process or manufacture of silk, the infringement alleged in the declaration was that the defendant had, directly and indirectly, made, used, and put in practice the said invention, and counterfeited the same: Held, that this allegation was supported by proof that the defendant had ordered silk to be manufactured by certain parties by the plaintiffs' process, and had afterwards received and sold the same.—A plea in an action on the case for infringing a patent, set out the specification in *hæc verba*, and alleged that the plaintiffs did not inrol any instrument other than that set out, and that such instrument did not particularly describe the nature of the invention. The jury having found a verdict for the plaintiffs upon their traverse of this plea: Held (*hæsitante* Coltman J.), that judgment could not be arrested upon the ground of the specification being otherwise defective.—The third and fourth issues raised the question whether the alleged invention was a new invention; the jury found specially that it was not a new invention, or a new combination, but that it was an improved process: Held that, upon these issues, the verdict should be entered for the defendant.

Case, for the infringement of a patent, granted to the plaintiffs for a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances. The declaration stated that the patent contained the usual provisoes, as to the invention being new, and as to the inrolment of a specification; and that the plaintiffs were the true and first inventors of the process described, and did inrol a certain instrument in writing containing a proper specification. Breach: that the defendant had directly and indirectly made, used, and put in practice the said invention and every part thereof, and counterfeited, imitated, and resembled the same.

Pleas: first, not guilty; secondly, a traverse of the allegation that the plaintiffs were the inventors; thirdly, that the invention in the letters patent and in the specification mentioned, was not a new invention; concluding with a verification; fourthly, that the said alleged invention and improvement were of no benefit or advantage to the public; concluding with a verification; fifthly, that the said instrument in writing in the declaration mentioned, was as follows:—

"To all to whom, &c. (It then recited the grant of [180] the letters patent to the plaintiffs, their executors, &c. with the provisoes for inrolling a specification, and then proceeded thus: Now know ye, that in compliance with the said proviso, I, the said J. Gibson, on behalf of myself, and also of the said J. G. Campbell, do hereby declare that the nature of our said invention consists; first, in a part of our process by which we discharge the gum from that peculiar kind of silk denominated silk-waste, when the same is in the state of sliver or rove; secondly, in a part of our

(*b*) The objection that a warrant of attorney has an insufficient stamp, or none at all, can be taken advantage of only by a motion to set the warrant of attorney aside. If it is a ground for refusing such an application that the defect may be cured, there seems to be no motive for incurring the expense of a stamp in any case.

The revenue would appear to be better protected, by granting the rule, and afterwards discharging it upon payment of costs by the party whose contravention of the law had occasioned the application.

process by which we dye silk-waste, when in the state of sliver or rove; thirdly, in a part of our process by which we spin yarn from dressed or heckled silk-waste of long fibres, either in the gum or discharged; fourthly, in a part of our process by which yarn from silk-waste with long fibres may be spun in combination with flax of a similar length of fibre; fifthly, in a part of our process by which yarn from silk-waste with long fibre is spun in combination with wool; sixthly, in the application of our improved process to the throstle-machine on the principle of the long ratch for the new and useful purpose of spinning silk-waste; seventhly, in certain improvements effected by us in the throstle-machine by which its utility in spinning silk-waste is greatly augmented; eighthly, in the application of water to silk-waste with long fibres in the process of spinning with the long ratch.

"Having thus explained the nature or leading characteristics of our invention, it is desirable before we enter into the practical details of them to give a brief outline of the methods, heretofore adopted, for spinning yarn from silk-waste.

"Silk-wastes differ considerably with respect to quality and cleanliness, and they are generally in a ravelled state. To free them from naps and other refuse matters, and to clear the ravellings, they are first submitted to the action of a machine called a breaker, for the purpose [181] of breaking or clearing out the more stubborn or knotty ravellings. The waste is next put under the operation of the dressing machines to be farther unravelled and cleared from naps and other impurities, which process also straightens the filaments and causes them to lie evenly together, resembling in this respect heckled flax, although the fibres of the latter usually possess more uniformity as to length. This process of dressing is applicable to silk-waste, either in the gum or discharged. The former, however, is more easily dressed, contains less refuse, and is generally of a better quality. The third process upon the ordinary plan is, to take the dressed silk to the cutting-machine, where it is cut into lengths of about two inches, a little more or less, according to circumstances. If the silk-waste that has been thus cut be in the gum, it is next discharged and afterwards dried. The silk having become matted in the discharging process, the fibres of it are next opened up by a scutching-machine, or other similar apparatus before it undergoes the process of carding. When carding, the roving is prepared by a similar engine to that used for cotton, and it is spun on the mule-jenny, which is on a similar principle to that of the cotton-jenny. Having thus explained the old ordinary process of converting silk-waste into yarn, I will proceed to describe our novel process, by which we produce our new or improved manufacture of yarn or thread.

"The silk-waste having been dressed in the usual way, or in any other manner that may be found more advantageous (such as heckling or otherwise), either discharged or in the gum, we submit it to the drawing, roving, and spinning machinery, thereby entirely obviating the supposed necessity of cutting or shortening the filaments of silk-waste, a destructive process, which has heretofore been considered as an indispensable sacrifice in order to convert it into yarn or thread. The kind of [182] machinery we have found to answer best for the drawings and rovings of dressed heckled or carded silk-waste of long fibres, is the same as that used by flaxspinners; and we adopt the same methods as are practised by them with long or cut-line flax. The silk is first submitted to the spreading or first drawing-machine, the slivers obtained from which are doubled and applied to the second drawing, and in like manner to the third drawing-machine, and finally to the roving-machine. The number of doublings and drawings requisite will depend upon the kind of silk used, which every competent manufacturer will know how to determine and arrange.

"It may be proper to observe, that there are several kinds of flax-drawing and roving machines, and as they are in common use for flax and tow, no description of them is necessary, and it will therefore be sufficient to distinguish them by their names of circular, spiral and sheet or chain. Cut-line flax and tow, drawing and roving machines are made either on the circular or spiral plans. The sheet or chain is also made for cut-line flax, but not for tow. The drawing and roving machines that we have found to answer best, are those which are made on the spiral plan, as the gills or heckles of these come closer to the nip of the drawing-roller than in either of the other plans; and thereby enables the short filaments of the silk to be drawn and distributed more uniformly with the long fibres than if the said heckles or gills were more remote from the drawing-roller. For the longest fibres of dressed or heckled silk-waste, we employ what is designated by flax spinners long-line preparation. For the medium

lengths of fibres of dressed, heckled or carded silk, cut-line ; and for the shorter lengths tow-preparations.

"We have already noticed, that the roving from silk-waste may be made, either when in the gum or dis-[183]-charged, and that the said rovings may be spun to suit the particular kind of goods to which yarn or thread is to be applied ; but as there is a much greater demand for silk yarn discharged than in the gum, we usually discharge the gum from the sliver obtained by the first drawing or spreading machine. For this purpose the sliver is put into hanks of about half a pound each, then each of these hanks is put into a little bag made of an open fabric, such as thin canvas ; a quantity of these are collected (according to the dimensions of the boiler), put into the vessel, and discharged or 'boiled off' in the usual manner. After this, the hanks, still contained in the bags, are to be well washed, to free them from the deposition of the glutinous matter, or the presence of soap, alkali, or other impurities. The silk is now to be taken out of the bags with care, and, after being thoroughly dried, the hanks are to be put upon swifts, and after finding the end of the sliver, it is to be coiled into cans, or may be wound on bobbins, or otherwise disposed of, as may be convenient. The next operation upon these slivers consists in submitting them to the drawing-machines, whereby the required number of drawings and doublings are to be given, and finally the roving is formed as already mentioned. The process of boiling or discharging gum-silk, we sometimes apply after it has been formed into roving. In this case the roving is to be reeled from the bobbins into hanks of about half a pound weight each ; these are to be put into bags, and the discharging conducted by the same process as that described with respect to the sliver. The discharged roving is next to be wound on bobbins preparatory to spinning ; but we give the preference to the roving made from silk which has been discharged in the sliver.

"Another improvement in our process or manufacture consists in dyeing the silk before it is spun into yarn or thread ; and we find that this operation is best [184] performed after it has been discharged and washed, and in the form of the sliver as already described. After dyeing, the silk undergoes repeated doublings and drawings, and is finally made into roving, in the same manner, and by the same mechanism as are employed with the undyed silk. The process of dyeing is also applied by us to silk which has been discharged, previously to its being dressed or heckled ; and we usually dye it in the hanks obtained from the sliver of the first drawing. The process of dyeing may also be applied to the rove, which is to be reeled from the bobbins into hanks, of a size and weight the most convenient to the dyer. After dyeing, it is to be wound upon bobbins previously to being spun ; but we prefer the roving which has been made from silk dyed in the sliver. Care must be taken that the silk, whether dyed or undyed, be properly dried prior to its being submitted to any of the processes of drawing, roving, and spinning. The advantages obtained in this part of our invention, of dyeing the silk previously to its being spun into yarn or thread, consist in the certainty that the colouring matter will reach every fibre, and consequently produce a more uniform and perfect dyeing. We also find that a superior lustre is obtained by our mode over that wherein the silk is dyed subsequently to being spun ; which effect we consider to be caused by the violent action upon the silk by the dyer's process, by which many of the fibres are broken and started from their parallel positions with respect to each other, thereby destroying the wiry and lustrous appearance of the yarn or thread.

"For making rove from silk-waste of long fibres and flax combined, and from silk-waste of long fibres and wool combined, we employ the same machinery throughout as we do for making rove from silk-waste alone. The proportions of silk-waste to that of flax, and of silk-waste to that of wool, are varied according to the par-[185]-ticular manufacture to which the yarns are to be applied. The method we have adopted is, to obtain slivers of flax, or of wool, from the spreading or first drawing machine. The number of slivers of flax or of wool to that of silk slivers obtained from the first drawings, is regulated in the second drawings, in proportions suitable for the peculiar description of yarn required.

"Having now explained the nature of the drawing and roving machinery which we have found to answer best, and the several processes of drawing and roving silk-waste alone, and of silk-waste in combination with wool and with flax, I will proceed to describe the spinning machine, by which the rove is drawn or elongated into strands, to be spun into yarn or thread. The annexed drawings, for the most part, represent

the well-known spinning frame called a throstle, on the principle of the long ratch, as employed in the spinning of flax, which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres into yarn or thread, from rove, either in the gum, or discharged or dyed as before-mentioned, and also from rove made from silk-waste of long fibres, in combination with flax or with wool."

(The document then contained explanations of the machine, with references to letters and figures which would not be intelligible without a drawing, and which are not material for the understanding of the case.)

"Our application of the brass bosses to the drawing roller, together with the application of water, we have found to be an important improvement in the spinning of silk-waste, whether dyed or undyed, as the brass preserves the silk from stains which occur when iron is used. Neither the brass bosses nor the pressing rollers are fluted, which fluting we have found to be unnecessary in spinning silk-waste of long fibres with the ratch [186] corresponding in lengths thereto. Great advantages also result from employing the throstle-frame, instead of the mule-jenny, for spinning silk-waste. In the first place a great saving is made in the cost of production, by obviating the necessity of operatives at high wages. In the second place, by using a long ratch corresponding to the length of fibres to be spun, not only yarn or thread is obtained of very superior strength, but it can be spun to very fine numbers, even as high as No. 200, or upwards, on the cotton scale, a result quite unprecedented in spinning by the throstle. The application of water to the silk, communicated by means of the pressing-roller, not only toughens the fibres, but gives them a greater tenacity or adhesiveness to each other, enabling them to sustain the action of being spun, besides communicating a greater degree of flexibility, which facilitates or induces the ends of the fibres to adhere or incorporate more readily with the yarn. Likewise, owing to the short distance between the top of the spindle and the nip of the bosses of the drawing or delivering roller, the yarn is subjected to less vibration, and can be spun to finer numbers, than with the spindles at a greater distance. The silk yarn thus produced has a smooth wiry appearance, and when spun with but little twist, the natural lustre of the silk fibres is preserved, and it approximates in appearance to tram or organzine silk.

"The spinning frame just described is also applicable to the spinning of silk and flax, combined as well as to the spinning of a combination of silk and wool, in each case varying the sliding ratch to suit the lengths of the fibres to be spun.

"Having now given the necessary details of the manner in which our invention is to be performed, we desire it to be understood that we disclaim those parts of the process or mechanism, which were, or may have been, [187] previously to the granting of our patent, well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new, and of great public utility. In witness whereof," &c. The plea then proceeded to state, that the plaintiffs did not, nor did either of them, within six calendar months, &c., inrol, &c., any instrument, &c., other than and except the instrument in that plea mentioned and set forth; and that that instrument did not particularly describe and ascertain the nature of the said supposed invention, and in what manner the same was to be performed. Verification.

The replication joined issue on the first and second pleas; and traversed the third and fourth, upon which issue was joined: and to the fifth plea alleged that the plaintiffs did, within six calendar months, &c., inrol, &c., an instrument in writing under the hand and seal of John Gibson, one of the plaintiffs, particularly describing and ascertaining the nature of the said invention, and in what manner the same is to be performed (to wit) the said instrument in the said fifth plea above mentioned and set forth; and that that instrument does particularly describe and ascertain the nature of the said invention, and in what manner the same was and is to be performed; concluding to the country; upon which issue was joined.

At the trial before Tindal C. J., at the sittings for Middlesex after Trinity term 1841, the specification set out in the fifth plea was read. It was proved on the part of the plaintiffs, that the defendant had ordered silk waste to be spun by certain parties in England, by a process similar to that described by the plaintiff, and had received and sold the silk so spun. Evidence was also given to shew, that the ordinary method of spinning silk waste, previously to the plain-[188]-tiffs' patent, was that

stated in the specification; namely, by the use of machinery similar to that used in cotton spinning; and it was proved, that the silk produced by the plaintiffs' process was very superior in beauty and value. On the part of the defendant, evidence was given to shew that long before the plaintiffs' patent, silk waste in the long uncut fibre had been spun by the common machine for spinning flax, and sold in large quantities; that any workman might vary the distance of the spindle from the roller, as described in the specification, at pleasure, and that this had often been done; and that the brass bosses and water trough had long been in general use in the same manner as described in the specification. Notice of objections had been delivered under the 5 & 6 W. 4, c. 83, s. 5, but nothing turned upon the objections. An application was made for a nonsuit, on the ground that there was no evidence, that the defendant had made, used, or put in practice the invention, or had counterfeited, imitated, or resembled it. The Lord Chief Justice refused to nonsuit, but reserved leave to the defendant to move to enter a nonsuit; and the jury returned a verdict for the plaintiff upon all the issues except the second and third, and as to these, they found that the invention was not new, but was an improved process, and not a new combination.

Nov. 4.—Channell Serjt., in last Michaelmas term, obtained a rule nisi to enter the verdict on the second and third issues for the defendant: or to set the verdict aside and enter a nonsuit; or to arrest the judgment; and

Bompas Serjt., on the next day, obtained a cross rule to enter judgment for the plaintiffs on the special finding; or, in the event of the court being of opinion that the verdict was incongruous, for a new trial.

[189] Bompas Serjt. now shewed cause against the rule obtained on behalf of the defendant.

First, as to entering a nonsuit. This applies to the first issue. The evidence clearly shewed an infringement of the patent by the defendant, supposing the patent to be valid. It appeared that parties had been employed by the defendant to make silk by the plaintiffs' process, and that the silk so made had been sold by the defendant; this was, in effect, a making by him. [Tindal C. J. Upon the principle *qui facit per alium, facit per se* (a).]

Secondly, as to arresting the judgment. This is applied for on the ground that the specification, as set out in the fifth plea, is not sufficient. Two objections, it is understood, are raised to the specification; first, that the processes, by which the improvement is carried into effect, are not described; and, secondly, that no distinction is made between the old and new parts of the invention. As to the first point, it is submitted that the description of the process is sufficiently intelligible. No doubt, any one might use the machine in question for the purpose of spinning flax, notwithstanding the plaintiffs' patent, but it is new, as applied to the spinning of waste silk; and the jury have found that it is an improved process for that purpose; it is therefore the subject of a patent. Even the omission of part of a former process, if it give rise to an improvement, may be a good ground for a patent; as in *Russell v. Cowley* (1 C. M. & R. 864), where the plaintiff had obtained a patent for manufacturing metal tubes, by drawing them through pierced dies or holes; and it appeared that a former patent had been obtained for a similar method of manufacturing tubes by drawing them through rollers, with the additional use of a maundril or stamp. The maundril was not used in the plaintiff's process, and the patent was held valid, as being a great improvement on the former process. As to the second objection; it is sufficient to support a patent for an improvement, if, from reading the specification, an ordinary workman can distinguish the old parts from the new; as in *Harmer v. Playne* (11 East, 101. S. C. in Chanc. 14 Ves. 130), where the plaintiff having obtained a patent for a certain manufacturing machine, of which he duly inrolled a specification, afterwards obtained another patent for certain improvements in the said machine, in a latter grant by the former patent was recited; and it was held, that a specification containing a full description of the whole machine so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was sufficient. But, independently of these objections, the plea contains an averment, that the specification did not particularly describe the invention. This averment is traversed, issue is joined thereon, and the jury have found that the specification was sufficient. The defendant, therefore, cannot avail

(a) As to the application of this maxim, see 20 Vin. Abr. 466, 21 Vin. Abr. 75.

himself of the other parts of his plea, which are not in the issue, in order to arrest the judgment.

Thirdly, as to entering the verdict on the second and third issues. It is to be observed, that the present patent is not for any article of manufacture, but for a process. The distinction is pointed out in *Rex v. Wheeler* (2 B. & Ald. 345). The process here consists of eight several heads or parts, all of which form but one whole; and the patent is taken out, not for any of the separate parts, but for the whole. It appears from the evidence that, [191] before the plaintiffs' patent, the spinning of silk-waste was performed by the machinery used for cotton-spinning. The plaintiffs have applied the machinery for flax spinning to the spinning of silk-waste, and the jury have found it to be an improved process; and, consequently, a great improvement upon the old method of spinning silk-waste. It is said that some parts of the process have been used before for the same purpose; but that will not vitiate the patent if there be novelty in the whole. And, indeed, it may be very doubtful upon the evidence, whether there was any publicity in the previous use of those parts of the process. It is probable that the jury took an incorrect view of the meaning of the words "new invention;" and that as the thing manufactured was not new, and the machine for the purpose was not new, they fancied there was nothing to countenance a claim of a new invention. But that is not so. It was a new or an improved process; and that is a new invention. Or if it be only an improvement, as the jury have in fact found it to be, it is an invention so far as the improvements go, and the subject of a patent. Taking the whole together, it is new as regards the manufacture of silk-waste; it is a new mode of spinning it, and it is for that the patent is taken out. [Cresswell J. It appears that the plaintiffs do not claim the machine, or any part of it, as theirs. It is just as if the old machine for flax-spinning were used in their process.]

Channell Serjt., in support of the rule obtained on behalf of the defendant.

First, as to entering the verdict upon the second and the third issues. The declaration alleges that this was a new invention; this allegation is traversed by the second plea; and the jury have found that it was not a new invention, or a new combination, but an improved process. Upon this issue, therefore, the [192] defendant is clearly entitled to the verdict. What is found for the plaintiffs does not give them a right to the patent; and what is found for the defendant wholly destroys it. It is possible that an improved process may be a new invention; but it cannot be so considered in this case, as the jury have expressly found, that though the plaintiffs' was an improved process, it was not a new invention.

The plaintiffs' patent is taken out for the invention of a new process, &c., consisting of improvements; but in fact whatever novelty there is in the process consists merely in the application of a known process for the purpose of spinning silk; and that will not support the patent. In *Hill v. Thompson* (3 Mer. 622, 629. S. C. in C. P. 8 Taunt. 375, 3 B. Moore, 424), Lord Eldon C. said "there may be a valid patent for a new combination of materials, previously in use for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of such new combination and application, and of that only, and not lay claim to the merit of original invention in the use of the materials." In *Brunton v. Hawkes* (4 B. & Ald. 541) a patent for improvements in the construction of ship's anchors, windlasses, and chain cables, was held not to be supported unless there were novelty in each invention; and therefore as it turned out that there was no novelty in the construction of the anchors, it was held that the patent was wholly void. In the present case the invention of certain improvements is made part and parcel of the patent; but it is found there was no new invention in the process. In *Kay v. Marshall* (4 New Ca. 492, 7 Scott, 548), a patent was taken out in respect of new machinery for preparing flax, and improved machinery for spinning [193] flax: the improvement as to spinning consisted in spinning at a shorter reach than had before been practised; but the contraction of the reach was rendered practicable by the maceration of the flax in the new machinery for preparing it: for spinning machines, varying in the distance of the reach, had been in use before; and this court held that the patent was void, though the machinery for preparing the flax was new and useful. That case went afterwards to the House of Lords, and the decision of this court was supported (a). From [194] these cases it is clear, therefore,

(a) In that case (*Kay v. Marshall*) the plaintiff filed a bill in Chancery for an

that if a patent is taken out for an invention consisting of several parts, any one of which is not new, the whole is void. The jury have negatived what is claimed by the plaintiffs, namely, invention; and the finding that the plaintiffs have introduced an improved process, can only mean that old machinery, and previously known principles, have been more skilfully applied by them: but this will not support the patent. The patent consists of eight heads or parts; the fourth and fifth it is not material to consider; the [195] seventh and eighth may also be omitted; for they relate to the question whether there has been any combination; which the jury have negatived; the sixth, the plaintiffs say, consists, "in the application of their improved process to the throstle machine, on the principle of the long ratch for the new and useful purpose of spinning silk-waste." This must mean the process as described in the first three heads; the

injunction in *H. T. 1835*; but he did not apply for the injunction pursuant to the prayer of the bill. The defendants, after the usual time for demurring had elapsed, made a special application for leave to demur, which was refused by Shadwell, V. C., but granted, upon appeal, by Lord Lyndhurst C. The demurrer was filed, and came on to be argued before the Vice-Chancellor on the 2d of June 1835; and on the 9th his Honor ordered the demurrer to stand over for twelve months, and that in the meantime the plaintiff should be at liberty to bring an action. Upon an appeal to Lord Cottenham C. (1st of February 1836), this order was discharged, and the demurrer was overruled (see 1 Mylne & Craig, 373). The defendants then applied to Lord Langdale M. R. for leave to file a double plea to the plaintiff's bill, which was granted (see 1 Keene, 190), and the pleas were filed accordingly; first, denying that the plaintiff had invented any new and improved machinery; secondly, that the alleged invention was not of any public benefit and utility. Upon the case coming on to be argued before the Master of the Rolls on the 19th of March 1836 the plaintiff proposed to waive all objections in point of form, on condition that the defendants would consent to proceed at once to a trial at law of the pleas, without first going into evidence in equity; and this having been agreed to by the defendants, a replication was filed, and a decree made, by the Master of the Rolls on the 2d of June 1836, directing a trial at law upon issues in the terms of the two pleas; and liberty was given to the judge who should try the cause, to indorse special matters on the *postea*. The issues were tried at the Yorkshire summer assizes for 1836, before Parke B., when his lordship expressed an opinion that it was not the intention of the Master of the Rolls in directing the issues, that the question of the legal validity of the plaintiff's patent should be inquired into upon the trial, but only that the facts of the case should be ascertained, leaving the question of law to be afterwards disposed of by the court; whereupon the jury, under his lordship's direction, found a verdict for the plaintiff on both the issues, and the special facts were indorsed on the *postea* (see 5 New Ca. 495). The defendants applied to the Master of the Rolls for a new trial or a special case, on the ground that the learned baron had taken an erroneous view of the nature of the inquiry intended to be submitted to him by the Master of the Rolls, and that the trial ought to have proceeded in the same manner as if an action had been brought at law upon the patent, and the same pleas pleaded in defence to such action, whereby the whole question of the validity of the patent in point of law in respect of the two grounds taken by the pleas would have been tried and disposed of. The motion came on for hearing on the 28th, and again on the 31st, of January 1837, when, at the suggestion of the Master of the Rolls, and with the acquiescence of both parties, an order was made that a case should be stated for the opinion of this court. After some further discussion the case was agreed upon between the parties, argued in this court, and a certificate returned, that the patent was not valid in law (see 5 New Ca. 492; 5 Scott, 501). The cause came on to be heard again for further directions before Lord Langdale M. R. on the 27th and 28th of May, and the 3d of June 1839, when the question as to the validity of the patent was again argued, and on the 16th of July his lordship ordered that the plaintiff's bill should be dismissed with costs (see 1 Beav. 535). The plaintiff appealed to the House of Lords against the two orders of the 31st of Jan. 1837 and the 16th of July 1839*; which appeal was dismissed on the 18th of June 1841.

* The above statement of the principal facts and proceedings is compiled from the printed cases of the appellant and the respondents in the House of Lords.

first of these relates to the discharge of the gum from the silk-waste; the second, to dyeing the silk-waste. It is necessary, therefore, to refer to that part of the specification where the processes of discharging and dyeing are described; and it appears that no new mode of performing either operation is claimed; the only difference being as to the time when the operation is to be performed. These, therefore, are no subject for a patent; and all the eight heads being essential to its validity, and expressly made so by the concluding paragraph of the specification, the destruction of any of them destroys the whole patent.

As to entering a nonsuit, the declaration does not charge, nor was any proof given, that the defendant sold any article for which the plaintiffs had a patent. If the silk, then, is to be considered as made by the defendants (and that point, after what has fallen from the court, is not insisted upon), still the sale of it does not support the charge in the declaration. [Cresswell J. How could the plaintiffs charge a vending? They do not claim any articles of sale; but a mere process; and that may raise another question, whether there can be a patent for any thing that is not vendible.]

As to arresting the judgment, if the specification, as set out by the defendant in his plea, does not disclose the subject-matter of a patent, the action must fail. The construction of the specification is for the court; [196] *Neilson v. Harford* (8 M. & W. 806). In that case it was said by the court (b) that if a specification contained an untrue statement in a material circumstance, of such a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification would be bad, and the patent invalidated, although the jury, on the trial of an action for the infringement of the patent, found that a competent workman acquainted with the subject, would not be misled by the error, but would correct it in practice. In the present case, there is an uncertainty as to the subject-matter of the patent; and it is not sufficiently pointed out which are the new parts and which are the old. *Harmar v. Playne* will not assist the plaintiffs upon this point; for in that case a former patent had been granted to the same patentee, which was recited in the later patent; so that there was a reference from one to the other; but in the present specification there is nothing which refers to any previous information.

TINDAL C. J. This is a rule obtained by the defendant calling upon the plaintiffs to shew cause why the verdict found on the second and third issues should not be entered for the defendant, or why the verdict should not be set aside and a nonsuit be entered, or why there should not be an arrest of judgment.

I will endeavour to answer the two latter points first, which do not involve the main question in the cause.

As to the first of these, a sufficient answer has, in fact, been already given in the course of the argument. The breach alleged in the declaration is, that the defendant had "directly and indirectly made, used, and put in practice the said invention, and every part thereof, and counterfeited, imitated, and resembled the same." [197] The proof in support of this breach was, that an order had been given by the defendant, in England, for the making of silk by the same process as the plaintiffs'; which order had been executed in England; and that is enough to satisfy the allegation in the declaration,—that the defendant made, used, and put in practice the plaintiffs' invention,—though the silk was, in fact, made by the agency of others.

With respect to the last objection, which is taken on arrest of the judgment upon the issue raised by the fifth plea, I think no sufficient ground has been established for that purpose. The plea contains the following allegation as to the specification; that it "did not particularly describe and ascertain the nature of the supposed invention, and in what manner the same were to be performed." The jury have, in effect, found that the specification was sufficient, so that a workman of ordinary skill might understand the process and pursue the plan pointed out, so as to produce the proper result.

This plea goes to the whole declaration, and the issue has been found against the defendant. No authority has been cited to shew that, where a plea has been found to be false in fact, and the verdict has been against the defendant on that part of the plea which is put in issue, he can avail himself of another part, which is not in issue, in order to arrest the judgment. If the defendant had intended to avail himself of

(b) Ib. 824. The point was not decided in that case, as the patent there was held valid.

the insufficiency of the specification, he might have stated that the patent was void in law, and the question might have been raised on the record, and determined on demurrer. But, after having put in a plea which contains a confession of the whole right of action—which plea is found to be false in fact on the point in issue,—the defendant now seeks to use the other portion of the plea, which is not put in issue, not merely as an admission, on the part of the plaintiffs, for the purposes of the plea, but as an [198] answer to the right of the plaintiffs to recover. The plea contains two allegations; first, that the plaintiffs did not inrol any other instrument than the one previously set out in the plea; and, secondly, that such instrument is not sufficiently particular. The issue is taken on the latter of these allegations; and this admits only that no other specification than the one stated had been inrolled; but the defendant has no right to say that the specification is not only defective as to its particularity, but is also bad for other reasons. I think, therefore, that he is not in a situation to call upon us to arrest the judgment.

We come then to the main question in the case, namely, whether the defendant has a right to have the verdict entered for him on the second and third issues. These issues are, first, whether the plaintiffs were the true and first inventors of the process described; secondly, whether the alleged invention was a new invention; and the special finding of the jury upon them is, that the invention was not new, but an improved process, and not a new combination. Now, according to the plain meaning of these words, the jury appear to have found that there was no novelty in the plaintiffs' alleged invention; that it contained no new combination, but that it was only an improvement in an old process; and the question is, whether, if this finding is supported by the evidence, the issue is found for the plaintiffs or the defendant; and it appears to me that it is found for the defendant, and that the verdict ought to be so entered accordingly.

In order to ascertain this point, let us see what it is the patent is taken out for, and what the specification declares to be the nature of the discovery. The invention is said to be "a new or improved process or manufacture of silk, and silk in combination with certain other fibrous substances;" and the nature of the inven-[199]-tion is said to consist in eight different branches or parts of the process of spinning the silk. It appears, therefore, that the patent is taken out strictly and entirely for a process.

It is not necessary, on this occasion, to go into the question, whether or not a patent can be supported for a process only. If the specification were properly prepared, it probably might be considered a fit subject for a patent. Lord C. J. Eyre seems to be of that opinion in *Boulton v. Bull* (2 H. Bla. 463), where his lordship, in giving judgment, says, "When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which though perhaps also new, will be only useful as producing the new substance" (ib. 492). And he adds, "When the effect produced is no substance or composition of things, the patent can only be for the mechanism, if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced" (ib. 493). And there are other passages in the judgment to the same effect. Such also seems to have been the opinion of the court, pronounced by Abbott C. J. in *Rex v. Wheeler* (2 B. & Ald. 345), where this language, carefully guarding against an abuse of the doctrine, is used; "the word 'manufactures' has been generally understood to denote either a thing made, which is useful for his own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument to be employed, either in the making of some previously known article, or in some other useful purpose, as a [200] stocking frame, or a steam-engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufactures. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word." And in a subsequent part of the same judgment it is said, "Supposing a new process to be the lawful subject

of a patent, he may represent himself to be the inventor of a new process, in which case it would seem that the word 'method' may be properly used as synonymous with process. The language of the patent may be explained and reduced to certainty by the specification; but the patent must not represent the party to be the inventor of one thing, and the specification shew him to be the inventor of another; because perhaps if he had represented himself as the inventor of that other, it might have been well known that the thing was of no use, or was in common use, and he might not have obtained a grant as the inventor of it." Now looking at the specification in this case, it appears to me that the patent cannot be supported in law; because the plaintiffs have claimed more than they are in fact entitled to. One cannot read the description of the invention, and the purposes for which it is intended, without understanding it to be a claim of an improvement of certain machinery to produce a certain desired effect. The specification contains eight different parts or heads. (His lordship read them (*supra*, 179-187) over.) Now, dismissing [201] all of the eight from our consideration, but Nos. 6 and 7, I confess I cannot understand those two, except as claiming an improvement of, or a new combination in the throstle-machine. That the patentees meant to claim all the eight parts as forming one whole, is abundantly clear from the latter part of the specification, where they expressly say, "we disclaim those parts of the process or mechanism which were, or may have been, previously to the granting of our patent, well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new and of great public utility." Therefore the patentees are bound to shew that each of the eight parts is new and of public utility. They describe the old method of spinning silk-waste, and then say; "Having thus explained the old or ordinary process of converting silk-waste into yarn, we will proceed to describe our novel process, by which we produce a new or improved manufacture of yarn or thread." The claim therefore is clearly in respect of a novelty; and it must be a novelty, either in the process or in the machinery. Now the jury have found that the subject of the patent is not a new invention, or a new combination; but that it is an improved process; and if the specification had stopped at this point, it might perhaps have been a hard measure to deal to the party, to say this was a claim of new machinery, though I am inclined to think it would be so considered. But they then go on, and, after describing the improvements in the method of obviating the supposed necessity of cutting or shortening the filaments of silk-waste, in discharging the gum and dyeing the silk, they say, "Having now explained the nature of the drawing and roving machinery which we have found to answer best, and the several processes of drawing and roving silk-waste alone, and of silk-waste in combination with wool and with [202] flax, we will proceed to describe the spinning-machine by which the rove is drawn or elongated into strands to be spun into yarn or thread. The annexed drawings, for the most part, represent the well known spinning-frame called a throstle on the principle of the long-ratch as employed in the spinning of flax, which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres into yarn or thread from rove, either in the gum or discharged or dyed, as before mentioned; and also of rove made from silk-waste of long fibres in combination with flax or with wool." They profess therefore to describe the machine to be used for this purpose by drawings; and the expression that these drawings "for the most part represent the well known spinning frame called a throstle," implies that some new part in the machine represented, has been discovered by them. They then go on to explain the meaning of the drawings, and the use of the brass bosses, the throstle-frame, and the application of water. (His lordship here read that portion (*supra*, 185) of the specification.)

I confess I feel it impossible to apply all this language otherwise than to a substantive claim to an invention of a new machine, or a new combination of the parts of an old machine: the jury, however, have by their special finding negatived both; and, unless we could see from the evidence that they were decidedly wrong, the matter must rest there. I think, upon the finding of the jury, there is sufficient to entitle the defendant to have the verdict entered for him on both the second and the third issues; and, upon the evidence, I see no reason to be dissatisfied with that finding.

COLTMAN J. I also think that the verdict must be entered for the defendant on the second and third pleas.

[203] The verdict specially found by the jury is clearly not in favour of the plaintiffs; as it, in terms, negatives the allegation in the declaration that the alleged invention was a new invention. And I think that unless each of the eight points in the specification is new, the plaintiffs are not entitled to have the verdict entered for them.

It is not necessary to consider what the verdict should have been, but what, in fact, it is. The jury have found that the invention was not new; that there was no new combination; but that there was an improved process. Now I am not prepared to say that an improved process may not be considered a manufacture within the meaning of the statute (21 Jac. 1, c. 3); and if the jury had only found that the patentees had discovered an improved process, I should have been under some difficulty as to the effect of their finding; but they have negatived both novelty in invention and in combination.

Then, looking at the verdict as being in favour of the defendant on the third plea, we may still examine the evidence to see whether there was such proof of novelty as would, in fact, amount to a new invention; as that might have been a ground for a new trial. But looking at the evidence, I cannot find any novelty in the process so as to satisfy my mind that the jury ought to have found that there was a new process. It seems, in fact, to have been the application of an old machine to a new process, without any material variation in the combination, or any new combination of the parts of the old machine.

It appears from the specification itself that the processes of dyeing and of discharging the gum were performed, in a different stage, it is true, but altogether in the same mode that was formerly known—the only alteration being in point of time.

Looking then at the evidence and the finding of the jury, I think they meant that a better article was pro-[204]-duced by the patentees; but that there was no novelty of combination and no invention employed in bringing about this result.

This, then, disposes of the third issue. As to the point arising on the first issue, it has already been disposed of during the argument.

With regard to the point urged in arrest of judgment, I have not fully made up my mind upon the subject; but after the decision upon the two other points, it does not seem material to consider it.

ERSKINE J. The jury in this case have found on the first, second, fourth, and fifth issues for the plaintiffs. On the second and third issues there has been a special finding, on an understanding between the parties that the court should decide for whom the verdict should be entered.

As to the first issue, on which there was an application for a nonsuit, the point was given up by counsel, in consequence of an intimation by my lord in the course of the argument.

The second and third issues raise the question, whether the process for which the patent was taken out was a new invention. The jury have, in distinct terms, negatived both these issues in the first branch of their special finding; but they have added something upon which the plaintiffs rely, as being, in substance, in their favour. It is contended, on their part, that the meaning of the special finding is, that the patentees had invented a new process, which, in point of law, would amount to a new invention; and that, looking at the whole of the evidence, and comparing it with the special finding of the jury, it is, in substance, found that there was a new and improved process, and, consequently, that the plaintiffs were entitled to the verdict on these issues. But it appears that the plaintiffs have not made out [205] such a case of an improved process as would entitle them, as inventors, to sustain their patent. I think there was no evidence to warrant a different finding from that at which the jury have arrived; and even though there may be a new patent for a new process as being a new invention, or rather a "new manufacture" within the terms of the statute, yet I think upon the evidence, there was clearly no such novelty here.

The alleged invention is divided into eight heads; the fourth and fifth of which it is not necessary to consider. The patent is claimed in respect of all these eight points; they are all branches of one process; the plaintiffs must therefore shew that the whole process was new in all these parts. Now, undoubtedly, an argument may be raised that there was, at least, some degree of novelty as to the change of the process in which the discharge of the gum, or the dyeing, was effected, as mentioned in the first two heads; but if the substantial parts of the process were not new, then, I think, the plaintiffs must fail.

The third head is said to consist "in a part of our process by which we spin yarn from dressed or heckled silk-waste of long fibres, either in the grain or discharged;" and this clearly does not include either of the first two heads. But what novelty of process is there under this third head? It appears that the process of spinning silk-waste with an uncut fibre, had been before practised. It is said, indeed, that this was done in secret, and that it had not been made public; and undoubtedly if that fact were made out, I should agree with the plaintiffs that this would be no objection to the patent; inasmuch as there must be publicity of a previous invention in order to avoid a patent subsequently taken out for the same thing. But I think there was abundant evidence to shew that to some extent—and, indeed, to a considerable extent [206]—this process had been publicly practised before the patent was taken out, although it had not been carried to such a state of perfection as it was under the plaintiffs' patent.

I come therefore to the conclusion, on this point, that there was nothing new in the process, or in the machinery, by which the silk-waste was spun; and the whole of the plaintiffs' claim amounts to this, that they have applied the old machine and process more skilfully than others have done before them. The result of such application may be useful to the public; and, indeed, the jury have found that it is so; but that is not what the plaintiffs have claimed. They have claimed the particular use of a machine, which had been, in fact, used in a similar manner before.

As to the other heads of the specification, they are not proved, on the evidence, to be new; on the contrary, they are shewn to have been previously known and practised by others.

Upon the whole, therefore, I am of opinion that the verdict should be entered for the defendant on the second and third issues.

CRESSWELL J. I also am of opinion that the verdict should be entered for the defendant, on the second and third issues.

The patent right claimed in this case is undoubtedly of rather a singular character. It is not a claim in respect of any article produced—it is not a claim for any machine for the production of an article—it is not a claim for any particular ingredient—but it is a claim for a mere process.

There are dicta, but there is no distinct decision to be found in the books, that the omission of part of a previously known process may be the subject of a patent; that is a point to which I shall be prepared to [207] give my consideration when it arises, but it is not the present case.

I do not consider it necessary to go into the evidence in this case; no fault is found with the verdict; but each party claims to have the verdict entered for them upon the special finding of the jury. Now they have found that the subject of the patent is not a new invention, and that it is not a new combination, but that it is an improved process. Then the question is, have the plaintiffs claimed a new invention, or a new combination? For if they have, the jury have found that there was neither. The specification states that the subject of the patent is an "invention of a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances;" and the patentees then declare that the nature of their said invention consists in eight parts or heads, which are then set forth. And if there could be any doubt as to the intention of the patentees to claim all the eight parts, such doubt would be removed by the concluding passage of the specification, where they say "we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new, and of great public utility."

Then does it appear that the patentees claim any novelty of mechanism? I think it clear that they do. I have considerable doubt, whether under the sixth head mentioned in the specification, they mean to claim the throstle-machine on the principle of the long ratch as an invention, or merely the improved use of it: and if there were any question on the ambiguity of the specification, I should be disposed to think this difficult for the plaintiffs to get over. Under the seventh head the plaintiffs clearly claim certain improvements in the throstle machine, as their own; but the jury have said there was no new invention; and this is equally fatal to [208] the plaintiffs, whether they claim a part only of the machine or the whole of it, as a new invention. If they mean to claim a new combination, the jury have found there was none.

But I think it clear that the plaintiffs intended to claim a novelty of mechanism.

It is immaterial therefore to inquire what may be meant by the term "improved process;" for, whatever it may mean, it does not relieve the plaintiffs from the difficulty they labour under,—of having claimed a new invention, which claim, in fact, is distinctly found against them.

Rule absolute, to enter the verdict for the defendant, on the second and third issues.

Bompas Serjt., then proposed to argue the cross rule that had been obtained by the plaintiffs for a new trial; but

The court said, that the former part of that rule (to enter the verdict for the plaintiffs on the second and third issues) had been disposed of by the judgment just pronounced: and that the latter part (to grant a new trial) was only conditional—upon the court being of opinion, that the verdict was incongruous and could not be entered for either party.

Rule for a new trial discharged.

[209] SANDERSON AND OTHERS v. COLLMAN AND ANOTHER. April 22, 1842.

[S. C. 4 Scott, N. R. 638; 11 L. J. C. P. 270.]

Matter of estoppel in pais may be pleaded.—The acceptor of a bill cannot, in an action against him by an indorsee, dispute the handwriting of the drawer; and if he do so by plea, the plaintiff may reply the acceptance by way of estoppel.—In a declaration upon a foreign bill drawn by A. upon the defendants, payable sixty days after sight, it was alleged that the defendants, "more than sixty-three days before the commencement of the suit, to wit, on, &c., had sight of the said bill, and then accepted the same." Plea, that A. did not make the bill; replication (by way of estoppel) that at the time the defendants accepted the said bill, as in the declaration mentioned, the same purported to have been made by A., and to have been signed by A. as drawer; and that the plaintiffs, at the time the bill was so indorsed as in the declaration mentioned, had no notice or knowledge that it was not made by A., and that they gave value for the same upon the faith and credit of the defendants' acceptance:—Held, coupling the replication with the declaration, that sufficiently appeared that the defendants had sight of the bill before acceptance, and therefore that the estoppel was pleaded with sufficient particularity.—Per Coltman J. That it was not material to allege that the acceptors had sight of the bill.—Per Cresswell J. That the plea contained no answer to the declaration.

Assumpsit. The first count of the declaration stated, that whereas certain persons using the name, style and firm of Dæniker and Wegmann, on, &c., in parts beyond the seas, to wit, at Rio de Janeiro, made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay that their first of exchange, second and third not paid, to the order of a certain person, therein named and described as A. V. Bahlsten, Esq., 600l. sterling, sixty days after the sight thereof; that the defendants, more than sixty-three days before the commencement of the suit, to wit, on, &c., had sight of the said bill, and then accepted the same, payable at Messrs. Jones, Loyd and Co.; that the said person, so named and described in the said bill as A. V. Bahlsten, Esq., then indorsed the said bill, by and in the name of A. V. Bahlsten, to the plaintiffs; of which the defendant then had notice, and then promised the plaintiffs, to pay them the amount of the said bill, according to the tenor and effect of the bill, and of the said acceptance. Breach, non-payment.

[210] The second count was upon a similar bill for 1000l., drawn by the same parties, in the same manner, upon, and accepted by, the defendants.

First plea, that the said D. and W. did not make the said bills of exchange in the said first and second counts of the said declaration respectively mentioned, or either of them, *modo et formâ* (a).

Replication to the first plea, so far as it related to the first count, that the defendants ought not to be allowed to plead or say, that the said D. and W. did not make the said bill in the said first count of the declaration mentioned, because the plaintiffs say

(a) There were other pleas traversing the acceptance and indorsement of the bills, upon which issue was joined.

that, at the time when the defendants accepted the said bill of exchange as in the said first count mentioned, the same bill purported to have been made and drawn by the said D. and W., and to have been signed by them as the drawers thereof; and that the plaintiffs, at the time when the last-mentioned bill was so indorsed to them as in the said first count mentioned, had no notice or knowledge that the said bill had not been made by the said D. and W., and they, before the said bill of exchange became due and payable according to the tenor and effect thereof, gave value for the same, upon the faith and credit of the defendants' acceptance thereof. Verification; and prayer of judgment if the defendants ought, contrary to their said acceptance of the said bill in the said first count mentioned, and to their acknowledgment thereby, to be admitted to say that the said D. and W. did not make the said bill in the said first count mentioned.

There was a similar replication to the first plea, so far as it related to the second count.

Special demurrer to the replication to the first plea, so far as it related to the first count, assigning for causes, [211] that the subject-matter of the said replication was matter of evidence only, and did not, by law, constitute an estoppel to the defendants' pleading the said plea to the first count; that the replication was a departure from the first count, wherein it was alleged that D. and W. made the bill therein mentioned, whilst it was admitted by the replication that they did not make any such bill; that the replication was inartificially and improperly pleaded, and without the certainty required by law in a plea of estoppel, in this, that it did not affirmatively and precisely state, by positive and direct averments, the facts which were necessary to constitute the alleged estoppel, namely, that there was such a bill as that alleged in the said first count, that the defendants did accept such bill, that they had sight of it, and that the acceptance was written upon a part of the said bill, whereon were written the names of D. and W. as drawers.

There was a similar demurrer to the replication to the plea so far as it related to the second count.

Joinder in demurrer.

Channell Serjt., in support of the demurrers. Three questions are raised in this case; first, whether the defendants, after having accepted the bills, are at liberty to shew that the names of the drawers have been forged, and that the bills were not, in fact, drawn by the parties by whom they purported to have been drawn; secondly, whether the plaintiffs can reply the acceptance by the defendants, by way of estoppel; and, thirdly, supposing they can do so, whether the estoppel has been pleaded with all the necessary circumstances.

It may be admitted, that the plaintiffs make out a *prima facie* case by shewing the acceptance of the bills by the defendants; but they must rely upon the acceptance, either as a declaration by the defendants that [212] the bills were properly drawn, or as an act done by the defendants to the same effect. In either case it is competent to the defendants to rebut the presumption. In *Wilkinson v. Lutwidge* (1 Stra. 648), which was an action against the acceptor of a bill, it was objected that the plaintiff should not be admitted to prove the acceptance, until he had proved the hand of the drawer; but Lord Raymond C. J. was of opinion, that proof of an acceptance was a sufficient acknowledgment on the part of the acceptor, who must be supposed to know the hand of his own correspondent; but he said it would not be conclusive evidence; and, therefore, if the defendant could shew the contrary, the reading the bill on behalf of the plaintiffs should not prelude him. So, in *Cooper v. Le Blanc* (2 Stra. 1051), which was an action against an indorser of a note, the Chief Justice (Lord Hardwicke) refused to let the defendant in, to shew forgery by similitude of hands, since it would tend to destroy all negotiation of notes and bills. But he seemed inclined to allow proof of actual forgery, if the defendant could have shewn it. In *Jenys v. Fowler* (2 Stra. 946), indeed, where the action was by the indorsee against the acceptor of the bill, Lord Raymond C. J. would not admit the defendant to prove forgery, by calling persons acquainted with the hand of the drawer, who would swear they did not believe the bill to be in his hand. And his lordship strongly inclined, that even actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee. This case does not appear reconcilable with *Wilkinson v. Lutwidge*, unless (as is suggested by Mr. Nolan, in a note to *Jenys v. Fowler*), "a distinction arises where the action is brought by the payee against

the acceptor, (as that case—*Wilkinson v. Lutwidge*—[213] seems to have been), and where it is brought by an indorsee for a valuable consideration, as in the present, (*Jenys v. Fowler*).” The dictum of Buller J., in *Smith v. Chester* (1 T. R. 654, 655), will probably be relied on by the other side. His lordship said, “when a bill is presented for acceptance, the acceptor only looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged;” but that dictum was not necessary for the decision of the case. There is a similar dictum by Dampier J. in *Bass v. Clive* (4 M. & S. 13, 15), but which also was extra-judicial. *Price v. Neal* (3 Burr. 1354, 1 W. Bl. 390), in which *Jenys v. Fowler* was cited (3 Burr. 1356), will likewise be relied on; but it does not bear upon this case; the only question there being, whether, under the circumstances, an action for money had and received could be maintained.

Secondly, even supposing the defendants were concluded from disputing the drawing of the bills, such matter is not pleadable by way of estoppel. The plaintiffs have endeavoured to put matter of evidence upon the record; which is contrary to one of the first rules of pleading. A defendant, in his plea, may always traverse a material allegation made by the plaintiff in his declaration. In an action against a drawer of a bill, although the bill has been accepted, it is not necessary to aver the acceptance (e); but, in a declaration against the acceptor, it is necessary to allege the drawing; and that allegation, therefore, may be traversed. It does not follow that what may be conclusive as evidence, can be pleaded by way of estoppel. In the instances of land-[214]-lord and tenant, and several other cases, one party is estopped from disputing certain things, but the estoppel is not pleadable. In an action by landlord against tenant, if the defendant plead *nil habuit*, the plaintiff may demur (a). If the lease be by deed, the plaintiff may certainly reply that fact by way of estoppel, because the demise is by indenture.

Thirdly, if the estoppel here was pleadable, it has not been properly pleaded. Although this is a technical objection, it is entitled to consideration. Matter of estoppel must be pleaded with every particularity. In order to raise an estoppel in this case it should have been shewn that the defendants had an opportunity of inspecting the bills when, or before, they accepted them. But the replications here have not stated the circumstances necessary to give rise to such an estoppel. They do not allege that the defendants had sight of the bills, and accepted them in writing; and the language of the declaration does not help the omission. Both counts of the declaration, indeed, state that “the defendants had sight of the said bill of exchange, and then accepted the same;” but the defendants had no opportunity of traversing the allegation that they had sight of the bills. The statute (1 & 2 G. 4, c. 78, s. 2), having made no alteration with respect to the acceptance of foreign bills, a foreign bill may still be accepted by parol, or by a writing not on the face of the instrument. The allegation in the declaration—that the defendant had sight of the bills,—was therefore immaterial, and consequently not traversable. The allegation in question is, in fact, made with reference to the sixty days which are computed from the day of sight; and any thing tantamount, that would have fixed the day of [215] payment, would have answered the purpose, as well as a reference to the day of sight.

Bompas Serjt. in support of the replications. The first question in this case is, whether the acceptance of the bills would be conclusive, in evidence, so as to preclude the acceptors from setting up that the bills were not drawn by the alleged drawers. In *Wilkinson v. Lutwidge* there was no decision on the point; and if it is to be taken to have been decided in *Cooper v. Le Blanc*, that case is contrary to the rest of the authorities. In *Jenys v. Fowler* the judge refused to admit evidence of the forgery. The language of the judges in *Smith v. Chater* and *Bass v. Clive* is very strong in support of this position. So, in *Cooper v. Meyer* (10 B. & C. 468, 5 M. & R. 387),

(e) Unless the bill be accepted, payable at a particular place, in which case it is necessary to account for, as well as to shew, the special presentment at that place for payment, and the allegation is traversable.

(a) This would only be so where the declaration stated the demise to be by indenture. If the demise were so in fact, but it was not stated in the declaration, the plaintiff should reply the indenture by way of estoppel; for if he plead over, he loses the benefit of the estoppel. See 1 Wms. Saund. 325 a., n. (4).

Lord Tenterden C. J. said, "The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it" (b)¹.

Secondly, there being an estoppel in fact, it may be pleaded. [Tindal C. J. Is there any case in which matter of evidence has been pleaded by way of estoppel?] A deed is an instance; for that is a matter of fact which is pleadable by way of estoppel (c). In *Veale v. Warner* (1 Wms. Saund. 323 c., 326; 2 Keble, 568) the declaration was in debt on bond; the defendant having set out the bond on oyer, which was conditioned to perform an award, pleaded an award made that he, the defendant, should pay a certain sum, and averred payment; the plaintiff in his replication traversed the payment; whereupon the defendant rejoined, by way of estoppel, that the plaintiff had given a receipt for the money, and prayed judgment—if the plaintiff, against his own acknowledgment, ought to be admitted to deny payment of the money. Upon which [216] Serjt. Williams remarks in a note (1 Wms. Saund. 325 a., n. (4)), "This rejoinder, though a frivolous one, and pleaded with a view to entrap the plaintiff, is, however, in the nature of an estoppel in pais; viz. that the plaintiff, after acknowledging in writing that the defendant had paid him the money, ought not to be admitted to deny the payment of it; like the case of an estoppel by acceptance of rent (b)² in Co. Litt. 352 a., and therefore properly concludes with relying upon the estoppel; according to the rule of pleading, that every plea ought to have its proper conclusion,—as a plea to the writ, to conclude to the writ; a plea in bar, to conclude to the action; an estoppel, to rely upon the estoppel." The definition of an estoppel given in the *Termes de la Ley* (tit. Estoppel, p. 330, ed. 1667) is as follows; "Estoppel is, when one is concluded and forbidden in law to speak against his own act, or deed, yea though it be to say the truth;" and several instances are there given. The plaintiffs here contend that the defendants by their own act—namely, by having accepted the bills—are concluded from disputing the fact that they were drawn by Dæniker and Wegmann. Not only was it competent to the plaintiffs to rely on the acceptance as an estoppel, but it was requisite that they should do so; for there are instances where a matter, which is sufficient as an estoppel, if so pleaded, is not conclusive as evidence; as, for example, a judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel; *Doe v. Huddart* (d); neither is a recital in a deed; *Bowman v. Rostrom* (e).

[217] Thirdly, the estoppel here is sufficiently pleaded. It was not necessary for the plaintiffs to shew that the defendants had sight of the bills before they accepted them. If they, in fact, accepted them, it is immaterial whether they had sight of them or not. If this be not so, the avowment in the declaration, that the defendants had sight of the bills, and then accepted the same, is material. The allegation in the replication that the plaintiffs, at the time the bills were indorsed, had no notice or knowledge that they were not drawn by Dæniker and Wegmann is probably immaterial; but that will not affect the validity of the replication. At any rate, if the replications be bad in form, the plea is bad also; for the validity of both depends upon the same question. To deny that Dæniker and Wegmann drew the bills, is no answer to the declaration.

Channell Serjt. in reply. The plea undoubtedly depends upon the same question as the replications. The note of Mr. Serjt. Williams to *Veale v. Warner*, which has been cited, only means that the estoppel was rightly pleaded in point of form, though it was bad in substance (a). *Doe v. Huddart* does not apply to the present case; for

(b)¹ See also *Schultz v. Astley*, 2 N. C. 544.

(c) If by deed indented, Plowd. 434 a. *W. Jones*, 317, 459; 4 N. & M. 29.

(b)² This is in the realty.

(d) 5 Tyrwh. 846, 2 C. M. & R. 316. See also *Doe v. Wright*, 10 A. & E. 763, 2 P. & D. 672. A judgment, generally speaking, is no estoppel, unless so pleaded; see *Outram v. Morewood*, 3 East, 346; *Vooght v. Winch*, 2 B. & A. 662. See also *Megrath v. Hardy*, 4 N. C. 782, 6 Scott, 627.

(e) 2 A. & E. 295, n. 4 N. & M. 551. See also *Carpenter v. Buller*, 8 M. & W. 209; and *Bowman v. Taylor*, 2 A. & E. 278, 4 N. & M. 265.

(a) This was, at least, not so decided. The rejoinder was probably pleaded to provoke the demurrer which ensued; but the question turned upon the validity of the award as set out in the plea; the defendant's counsel having purposely omitted part of the award so as to make it appear insufficient: and the plaintiff, by pleading

it may be admitted that matter of estoppel by record or by deed, is not conclusive unless pleaded; but it is not so with matters in pais. It is laid down in Chitty on Pleading (vol. i. p. 603) that "where the demise is not by deed, there can be no pleading by way of estoppel; especially as [218] the declaration may, by virtue of the statute 11 G. 2, c. 19, be in the general form for use and occupation; but it must be remembered that in general, even in such case, the party to whom the premises were let, or his assignee, shall not be permitted to dispute the title of the landlord by whom the former was let into possession, or the title of the assignee of such lessor." [Cresswell J. Suppose it appeared from the declaration that the plaintiff had let the defendant into possession of the premises as tenant.] Unless it appeared that it was by deed (a), it is submitted, it could not be pleaded as an estoppel (b)¹. The instances given in the *Termes de la Ley* appear to be all of estoppel by deed or by matter of record.

TINDAL C. J. The first point in this case is, whether the drawee, after accepting and thereby giving an apparent validity to a bill, has a right, in an action against him as acceptor, to set up as a defence that the name of the drawer was forged, or other matter invalidating the bill. And it appears to me that he has no such right. It certainly does seem that, in the two authorities cited from *Strange* (c), there was a readiness on the part of the judges to admit evidence of forgery; but subsequent cases have excluded such a line of defence. Most of these have been mentioned in the argument; but I will refer to two others which appear to me very strong upon this point. *Drayton v. Dale* (2 B. & C. 293, 3 D. & R. 534) was an action by the indorsee, against the maker, of a promissory note, made payable to one Clarke or his order; the defendant, by his second plea, pleaded that Clarke before the making of the note, became a bank-[219]-rupt and that his property was duly assigned to assignees, whereby the interest, title and right to indorse the promissory note, before the time of indorsement, became vested in the assignees; whereby the indorsement by Clarke was void, and created no right in the plaintiffs to sue. The plaintiff replied that the indorsement was made with the consent of the assignees; and issue was taken on that allegation; upon which a verdict was found for the defendant. But the court held that the plaintiff was entitled to judgment non obstante veredicto, because the defendant, who had made the note payable to Clarke or his order, was estopped from saying that Clarke was not competent to make an order. In *Pitt v. Chappelow* (8 M. & W. 616), which was an action by the indorsee against the acceptor of a bill drawn by one Baker, payable to his own order, there was a somewhat similar plea, but setting forth a second commission of bankruptcy against the drawer, under which 15s. in the pound had not been paid, and alleging that thereby the bill vested in the assignee under such second commission, and that Baker had no right to indorse; but the court held there also that the defendant was estopped by his acceptance of the bill, payable to Baker's order, from saying that Baker was incapable of transferring the bill by indorsement (b)². The only difference I can see between these two cases, is, that in the former, the objection was taken after verdict; in the latter, upon demurrer, as in the present case. These are both strong authorities to shew that an acceptor having once acknowledged the right of a party to indorse, cannot afterwards deny that right; and I think they are equally strong, by inference, to establish, that an acceptor cannot set up a want of authority, or a want of identity, as to the party by whom the bill professes to have been [220] drawn. And this doctrine is of the greatest importance as applicable to bills drawn abroad, which obtain their credit and currency here on the faith of the acceptance, and not on the signature of the drawer, who generally is a stranger.

The question then arises,—whether the plaintiffs can set this up by way of estoppel. It is said that this may be evidence—and even conclusive evidence—against the defen-

over, instead of setting out the real award, having admitted the award as set out to be the true one. It was for this "trick," and "subtle pleading," that Saunders, the defendant's counsel, was "reprehended" by Kelynge C. J.

(a) I.e. by deed indented.

(b)¹ See 1 Wms. Saund. 325 a., n. (c); 6 N. & M. 641, 643. Ante, vol. i. 129, 142; vol. ii. 843; vol. iv. 147, n.

(c) *Wilkinson v. Lutwidge*, 1 Stra. 648; *Cooper v. Le Blanc*, 2 Stra. 1051.

(b)² See *Mackay v. Wood*, 7 M. & W. 420.

dant, but that the plaintiffs cannot avail themselves of it as an estoppel. If, however, we find upon the record, a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais (Co. Litt. 352 a.). If, by the last branch, it is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. No very precise instances are given in the books where matter of this sort has been pleaded. But it is to be remembered that under the old system of pleading, almost every defence might have been given under the general issue; and the plaintiff, therefore, could not have known that a defence would be attempted to be set up which the defendant was estopped from making (b). Lord Coke in Co. Litt. 352 a., speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury.

[221] With regard to the third objection, it appears to be answered by the declaration, which, after setting out each bill of exchange, alleges that the defendants had sight thereof, and then,—that is after having had sight of the bill,—accepted the same. Upon the whole I think there must be judgment for the plaintiffs.

COLTMAN J. I am of the same opinion. Notwithstanding some of the earlier cases, I think it may be taken as settled, that the acceptor of a bill of exchange is not at liberty to shew that it was not drawn by the party who appears to be the drawer. My brother Channell has argued that this is not a matter of plea, but matter of evidence, and that matter of evidence cannot be pleaded. But the meaning of that rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be inferred. But here the defence itself is pleaded. Then it is said that matter in pais cannot be pleaded by way of estoppel. *Veale v. Warner* is certainly no authority for such a mode of pleading. I think, however, that if a party has a legal defence to that which is set up against him, he cannot be precluded from pleading such defence. Then, it is argued that, at any rate, the estoppel is not sufficiently pleaded, inasmuch as it does not appear in the replications, that the defendants had sight of the bills. But if the bills were accepted by the drawees, it is not material whether they saw them or not. It is of immense importance that it should be understood as settled that a party who accepts a bill, is thereby precluded from disputing the drawing of that bill. Bills are received by bankers and bill-brokers upon the faith of the acceptance by the drawees, who must be presumed to have sufficient means of satisfying themselves as to the authenticity of the instruments.

[222] ERSKINE J. If this action had been brought before the new rules came into operation, the question would have arisen *ad nisi prius*; for under the plea of non assumpsit, the defence now raised by the second plea, would have been set up in evidence. And the question is, would the matter now replied have been a good answer to such defence, if raised under the general issue. Though former cases tend to shew that an opinion existed that forgery of the drawer's signature might be given in evidence in an action against the acceptor, the later authorities all concur in deciding that this cannot be done. In addition to those already cited, I will mention the case of *Leach v. Buchanan* (4 Esp. N. P. C. 226), which was an action against the acceptor of a bill, and where Lord Ellenborough held, that the defendant could not be allowed to shew that the acceptance was a forgery after he had accredited the bill and induced the plaintiff to take it, by saying that the acceptance was his, and that the bill would be duly paid. I am, therefore, of opinion that if this question had arisen upon evidence given at the trial, the plaintiffs would have been held not to be at liberty to dispute the regular drawing of the bill.

Then comes the next question, whether this answer to the defence set up, is pleadable by way of estoppel. Since the new rules, the defence itself could clearly not have been given in evidence under the plea of non assumpsit. The defendants therefore have pleaded that Dæniker and Wegmann, the alleged drawers, did not make the bills. The plaintiffs, in their replications, add, as a further fact,—that which Lord

(b) This was so for more than a century preceding the rules of H. 4 W. 4, in actions of assumpsit and case. Matter of estoppel, however, arose more frequently in actions of trespass and replevin, in which, practically, there was no general issue.

Ellenborough considered material in *Buchanan v. Leach*,—namely, that they took the bills upon the faith of the defendant's accept-[223]—ance thereof. Why should that not be pleaded? It is laid down that an estoppel may be by act of record, by deed, or by act in pais. In the present case the estoppel arises by an act done by the defendants, which is neither of record nor by deed. It is difficult to say that at the trial the judge might have admitted evidence to prove that the drawing of the bills had been authenticated by the defendant's acceptance; but that the fact could not be pleaded.

But then, it is contended, that if the matter be pleadable, it is not well pleaded; for it is said, it does not appear, on the face of the replications, that the bills were accepted after the drawees had had an opportunity of seeing the handwriting of the drawers. But it appears to me that each of the answers given by my brother Bompas to this objection is sufficient. It is alleged in the declaration, and admitted by the plea, that the defendants accepted the two bills in question; for the admission is, not that the defendants accepted some bills, but that they accepted these very bills (a)¹. Besides which, taking the replications and the admitted parts of the declaration together, it appears that the defendants had sight of the bills purporting to be drawn by Dæniker and Wegmann, before the acceptance.

CRESSWELL J. I also think that there must be judgment for the plaintiffs upon this record. The declaration states that certain persons using the style and firm of Dæniker and Wegmann, in parts beyond the seas, made [224] their bills of exchange in writing, and thereby required the defendants to pay to Bahlson or order, 600l. and 1000l., at sixty days' sight; and that the defendants had sight of the said bills of exchange, and then accepted the same. The defendants plead that Dæniker and Wegmann did not make the bills in the declaration mentioned. The first question is,—does this plea disclose any legal defence to the action? It is a very common method of testing the validity of a defence set up at nisi prius, to inquire how the evidence would look if expanded on the record. Supposing, under the old plea of the general issue, it had been admitted, or proved, that the bills declared on had been accepted by the defendants, and evidence had been then tendered on the part of the defendants that the bills were not drawn by the alleged drawers, there can be no doubt that the evidence would have been immediately rejected. Then why should a party be allowed to allege on the record that which he would not be allowed to prove? *Drayton v. Dale* was even a stronger case than the present. There, a defendant, who had made a promissory note payable to A., or his order, was held to be estopped from saying that A. had not legal capacity to indorse the note. In *Taylor v. Croker* (4 Esp. N. P. C. 187) the acceptor of a bill drawn by two infants, payable to their own order, was held to be estopped from saying that the drawers, by reason of their infancy, were not competent to indorse. It has been ingeniously suggested that the acceptance, in this case, may have been by letter. To this it is sufficient to say, that the acceptance is admitted as it is alleged. As the fact is stated in the declaration, I think the plea is clearly bad; because it sets up as a defence, an allegation which, if true, is no answer to the action. I will merely add that I see no reason why the matter upon which [225] the plaintiffs rely should not be replied by way of estoppel (a)².

Judgment for the plaintiffs (b).

(a)¹ If the defendants, without seeing the bills held by the plaintiffs, had agreed verbally or in writing to accept two bills for 600l., &c., drawn by D. & W., and the bills held by the plaintiffs (and produced at the trial), had been forgeries, the proper plea would seem to have been,—not that the bills accepted by the defendants were not drawn by D. & W., but that the bills held and sued on by the plaintiffs were not accepted by the defendants.

(a)² The plaintiff might, it would seem, have demurred to the plea, the matter of estoppel appearing on the face of the declaration (vide ante, p. 209), and the plea containing no answer to the action.

(b) And see *Lainson v. Tremere*, 1 A. & E. 792, 3 N. & M. 603.

HENRY PRICE (suing by George, his Guardian) v. JAMES EDWARD DUGGAN.
May 6, 1842.

To bring a party into contempt for not paying the amount of taxed costs, pursuant to the master's allocatur, where payment is demanded under a power of attorney, it is necessary to leave a copy of the power of attorney at the time of the demand.

Costs having been taxed for the defendant, upon the verdict obtained by him (a)¹, the amount of the master's allocatur was demanded under a power of attorney.

Channell Serjt. moved for an attachment against the guardian, for his contempt in not paying the amount of the allocatur. The allocatur had been served upon the guardian, by shewing it to him and leaving with him a copy thereof. The power of attorney had also been shewn to the guardian; but of this it did not appear that any copy had been left. He contended, that although in the case of an award, the service would have been insufficient, the same strictness is not required in the case of a refusal to pay costs after taxation. The party was bound to pay the moment the demand was made.

TINDAL C. J. The reason is the same in both cases. The object for which the delivery of a copy of the [226] power of attorney is required, is to afford an opportunity of ascertaining whether the party who demands the costs really has authority to receive them.

Rule refused.

BRANCKER AND ANOTHER, Assignees of C. Humberston and Another,
Bankrupts, v. E. MOLYNEUX. May 6, 1842.

An order was made by the court of Review substituting another debt in lieu of that of the petitioning creditor (under 6 G. 4, c. 16, s. 18), stating that the court "doth declare that the debt of the said T. R. (the petitioning creditor), &c., is an insufficient debt to support the fiat, &c.; and it appearing that the debt of the said petitioners, proved by them under the said fiat, &c., was incurred not anterior to the said debt of the said T. R." &c. An action having been subsequently brought by the assignees, the order was amended by the court of Review, on the eve of a new trial, by introducing a recital contained in the petition upon which the order had been made, "that the said petitioners had duly proved a debt under the said fiat;" but no statement to that effect was inserted in the mandatory part of the order. The amendment was made without notice to the defendant:—Held, that it was not necessary to give notice of the amendment to the defendant.—Held also, that the amended order must be taken to operate from its original date, and not from the date of the amendment.—But held further, that such amended order was insufficient, inasmuch as it did not adjudicate, as required by the statute, that the debt of the petitioners had been proved prior to their petition.

Trover for 400 bales and 400 bags of cotton, of the plaintiffs, as assignees (a)².

The third trial of the cause (b) took place before Lord Denman C. J., at the summer assizes for the southern division of Lancashire, in 1841. The defend[227]-ant had given notice to dispute the bankruptcy. It was proved that the fiat issued against the bankrupts on the 9th of June 1837, on the petition of one Roberts; and that the plaintiffs were appointed assignees on the 12th of July following. The plaintiffs also put in the following order of the court of Review, dated the 25th of March 1839 (before action brought), substituting (under the 18th section of the 6 G. 4, c. 16 (a)³),

(a)¹ Vide ante, vol. ii. p. 641.

(a)² See the pleadings, ante, vol. i. p. 710.

(b) The rule was made absolute for the first new trial in Trinity vacation, 1840, ante, vol. i. 710; for the second new trial, in Trinity term, 1841, ante, vol. iii. p. 84.

(a)³ Which enacts "that if, after adjudication, the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the

a debt due to Fletcher and Cravy, for that owing to Roberts. In this order, as originally framed, the clauses printed below in italics were not inserted. About ten days before the third trial, however, upon an application to the court of Review, the order was amended by inserting those clauses, and erasing the words placed between brackets. No notice of the application or of the amendment, was given to the defendant.

"In the Matter of C. Humberston and S. Frodsham, bankrupts.

"Whereas Robert Andrew Fletcher, of Liverpool, in the county of Lancaster, merchant, and Edward Charles Cravy, of Flushing, in the state of New York, in the United States of America, merchant, and late copartners, did, on or about the 4th of May instant, prefer unto this court their petition in the above matter, *setting forth, among other matters, that a fiat in bankruptcy, bearing date the 9th day of June 1837, was, on the petition of Thomas Roberts, duly awarded and issued [228] against the said bankrupts, under which they were duly found and declared bankrupts, and that the said petitioners had duly proved a debt under the said fiat, and were creditors of the said bankrupts, for the sum of 150l., being the balance of an account for money lent and advanced to the said bankrupts, by the said petitioners, on the 13th day of May 1837; and that the same debt was incurred by the said bankrupts not anterior to the debt of the said petitioning creditor under the said fiat; and praying that this court would be pleased to order and allow the debt of the said petitioners to be substituted for that of the said Thomas Roberts, [in the said petition mentioned] in the proceedings under the said fiat [therein also mentioned], and that it might be proceeded in and deemed valid, and that the costs of the said application might be paid out of the estate and effects of the said bankrupts: now, upon hearing the said petition, and the affidavit of Robert Frodsham, gentleman, filed in support thereof, read, and what was alleged by Mr. S. of counsel for the said petitioners, and upon reading the affidavit of Frederick Frodsham, also filed in this matter, of the due service of the said petition upon the said Thomas Roberts, and also upon the said bankrupts, and upon Thomas Brancker the younger, and Thomas Martin, the assignees of the estate and effects of the said bankrupts; and no person appearing before this court on their behalf, this court doth declare that the debt of the said Thomas Roberts, and on which the adjudication of the bankruptcy of the said C. Humberston and S. Frodsham was made, is and was an insufficient debt to support the fiat issued against the said bankrupts; and it appearing to the court that the debt of the said petitioners Robert Andrews Fletcher and Edward Charles Cravy, proved by them under the said fiat, or so much thereof as is sufficient to support such fiat, was incurred not anterior to the said debt of [229] the said Thomas Roberts, and is an existing and sufficient debt to support such fiat: the court doth order that the said fiat be proceeded in, and that the costs of and occasioned by this application be paid out of the estate of the said bankrupts, being first taxed by the commissioners under the said fiat; but this order is not to prejudice any action pending under such fiat."*

It was contended on the part of the defendant—first, that this order was inoperative against him, inasmuch as it had been made without notice to him; secondly, that, as then produced, it must be taken to speak from the time of the amendment, and not from the original date; and thirdly, that it contained merely a recital, and not an adjudication, that the substituted creditors had proved a debt under the fiat previously to their petition; and that, for these reasons, no sufficient petitioning creditor's debt was made out to support the fiat. His lordship declined to direct a nonsuit, but he reserved leave to the defendant to move to enter a nonsuit; and the case having gone to the jury, a verdict was returned for the plaintiffs, with 2086l. damages.

Channell Serjt., in last Michaelmas term, obtained a rule nisi, pursuant to the leave reserved, or for a new trial. He cited *Muskett v. Drummond* (10 B. & C. 153, 5 M. & R. 210), *Aireton v. Davis* (9 Bingh. 740, 3 Moo. & Scott, 138), *Christie v. Unwin* (11 A. & E. 373, 3 P. & D. 204), and *In re Clarke* (3 Mont. & Ayr. 609).

Bompas Serjt. now shewed cause. First, it sufficiently appears on the face of the order, that the substituted debt had been proved previously to the petition. In

petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall, by such order, be deemed valid."

By the 1 & 2 W. 4, c. 56, the general jurisdiction of the Lord Chancellor in bankruptcy, is transferred to the court of Review.

Muskett v. Drummond (10 B. & C. 153, 5 M. & R. 210) the plaintiff produced an [230] order made by the lord chancellor under the section in question, whereby, after reciting a petition to him by M., he ordered, that, if the commissioners should be satisfied that M. had proved, under the commission against the bankrupt, a debt sufficient to support the commission, contracted not anterior to the petitioning creditor's debt, the petition should be proceeded in. That order was held to be invalid, inasmuch as it did not find, or call upon the commissioners to find, that the original petitioning creditor's debt was insufficient. That fact, however, is found in the present order. The decision in that case shews what the chancellor considered to be the proper construction of the act. He thought the debt must be proved to his satisfaction. A party may be entitled to prove a debt against the estate, when he could not support a fiat. In *Aireton v. Davis* (9 Bingh. 740, 3 Moo. & Scott, 138), although the question came before the court, there was no decision upon that point. [Erskine J. "Having proved," must mean "having proved before the application is made."] It means having proved a debt before the commissioner to the satisfaction of the chancellor. [Tindal C. J. It means having proved a debt of 100l. Erskine J. It may be a legal debt, or an equitable debt.] In *Christie v. Unwin* (11 A. & E. 373, 3 P. & D. 204) it was certainly held, that it must appear on the face of the order, that the creditor applying to have his debt substituted for that of the petitioning creditor, had proved a sufficient debt before making the application. But in that case, the order of the lord chancellor did not, in any way, shew that the debt proposed to be substituted had been proved; but the present order does; for it states that it appears "to the court that the debt of the said petitioners proved by them under the fiat, or so much thereof as is sufficient to support such fiat, was incurred [231] not anterior to the said debt of the said Thomas Roberts (the petitioning creditor,) and is an existing and sufficient debt to support the fiat" (a). [Erskine J. It was formerly usual to recite the whole of the petition in the order of substitution; but it was ordered by the court of Review (b) "that it shall not be necessary to recite such petitions at length in any order pronounced by the court thereon."] It will be sufficient if every material fact appears in the petition as recited; the petition in this case, as recited in the order, states "that the petitioners had duly proved a debt under the fiat, and were creditors of the bankrupts for the sum, &c.," so that the debt must have been proved before the petition was presented. [Erskine J. The order merely recites that the petitioners so state in their petition; it does not even recite the fact itself, still less adjudicate it.] Every thing that is necessary to give jurisdiction to the court appears on the face of the order. [Erskine J. The objection is, not to the jurisdiction, but that the order does not shew an adjudication, by the court, that the debt had been proved, as required by the statute. Coltman J. It is like an order of removal under the poor-law, which must contain an adjudication that the pauper had become actually chargeable (c).] But, generally speaking, the court will intend that the justices have done right, if the contrary does not appear on the face of their order; as in *Rex v. Cornish* (2 B. & Ad. 498), where an order of justices directing A. to pay the churchwardens and overseers of the poor of a [232] parish a weekly sum for the maintenance of B. and C., his grandsons, as long as they should be chargeable to the parish, was held to be sufficient, without stating that the father was unable, absent or dead (see *Regina v. Read*, 1 P. & D. 413). In inferior courts it is necessary that the jurisdiction should appear on the face of the proceedings; but that is not so with regard to superior courts, such as the courts of the county palatine of Durham, or of Chester, or the courts of great session in Wales, or the court of Ely; *Peacock v. Bell* (1 Wms. Saund. 73, 1 Siderf. 330, 2 Keb. 182, 226), *Pigge v. Gardner* (1 Lev. 208). [Coltman J. It may make some difference that this is a parliamentary authority, and therefore that it must be shewn to have been properly exercised.] But will the court presume that it has been improperly exercised? The authority of the justices at

(a) An order of the same form as in this case was set out in the replication in *Eyers v. Southwell*, 6 New Cases, 39, and the replication was held sufficient, on demurrer.

(b) General rules and orders for regulating the practice of the court of Bankruptcy. R. 30, A.D. 1830.

(c) See *Stallinborough v. Hooley*, 1 Sess. Ca. 131; *Rex v. Fisherton Delamere*, ib. 45; *Rex v. Maulden*, 8 B. & C. 78, 2 M. & R. 146.

sessions, with regard to the poor-rates, is derived from statute; but in *Rez v. The Aire and Calder Navigation* (2 T. R. 660), it was held, that they were the proper judges of the equality of poor-rates, and that the court of King's Bench would not interfere, upon the ground of the rates being unequal, unless the inequality were manifestly apparent on the rate. In this case it may surely be presumed that the court of Review would not have made the order, without proof of the matters set forth in the petition.

Secondly, as to the necessity of notice of the amendment. If the court of Review had thought that the defendant was entitled to such notice, they would have directed it to be given to him. It will hardly be contended that every debtor to the estate was to receive notice; and the defendant was not more entitled to receive it than any other debtor; for the pendency of the action would make no difference, the original order [233] having been made before the action was commenced. This court will not entertain any question as to the propriety of the amendment made by the court of Review, or as to the practice of that court with regard to what notice thereof should be given; any more than a court of error will inquire into the propriety of rules made by the court below for amending the pleadings, striking out pleas, or the like. *Gully v. The Bishop of Exeter* (10 B. & C. 584, 5 M. & R. 457, in the King's Bench. S. C. in Chancery, 5 M. & R. 499).

Thirdly, the order, as amended, must be taken to speak from its original date, and not from the date of the amendment only. In all cases of amendment, as of a writ of summons, of a declaration, of pleading, by a judge at the trial, of a record after judgment and writ of error, and in various other instances, the amendment would be wholly nugatory if it were only to operate from the date of such amendment. Where a correct memorial of an annuity had been inrolled incorrectly, and some years after the officer of the inrolment office discovered and rectified the error before any proceedings were had to vacate the annuity, this court, finding the inrolment right when they called for it, would not inquire when the entry was made; though it was a high misprision in an officer to alter the inrolment without the sanction of the court of Chancery. [Tindal C. J. That was the setting right of a mistake made by the officer.] So, where a fine is amended, it continues to be a fine of the term in which it was originally levied. [Tindal C. J. Otherwise, the five years and nonclaim would be of no avail.] Here, no amendment of the mandatory part of the order is required. It is a mere formal amendment. In *Garrick v. Williams* (b) an amendment was allowed after error brought; and the court ordered the transcript to be amended. In trespass, a verdict finding [234] that the defendant is guilty, means that he is guilty as alleged in the record. So here, "as proved," means as stated in the petition. It means so proved, as it is contended on the part of the defendant that it ought to be proved. [Tindal C. J. I understand that the objection is, that it is not alleged to be the said debt. Erskine J. I suppose the objection is, that it does not appear that the court has decided. At the trial it was objected that the court had not adopted the statement of the petition.] A judgment in an inferior court does not state that the party was indebted, or that he promised, within the jurisdiction. [Cresswell J. There it is admitted by the pleadings, that the cause of action arose within the jurisdiction. Erskine J. Non assumpsit modo et formâ puts in issue the allegation that the cause of action arose within the jurisdiction; therefore a verdict, quod assumpsit modo et formâ, shews that the cause of action arose within the jurisdiction (vide 1 Wms. Saund. 74 a.). Tindal C. J. The court by which this order was made, is an inferior court.] Here, this court is placed in the situation of a jury. It was shewn that an affidavit was filed in support of the petition. [Erskine J. It does not appear what the affidavit stated.] The court will take notice of the affidavit as an affidavit verifying the allegations of the petition which it is filed to support.

Channell Serjt. (with whom was Crompton) in support of the rule. The order is clearly bad. The court will look at the order as it stands; for it appears, by decided authorities, that no intendment in favour of its sufficiency will be made. The provisions of the act under which it was made, bear very hardly upon parties who contest a fiat, and ought therefore to be construed with great strictness. The order must shew [235] upon the face of it, all the facts necessary to give jurisdiction to the court of Review—all those facts which are required by the eighteenth section of the 6 G. 4, c. 16; without which the court of Review, which now exercises the functions of the

(b) 3 Taunt. 540. See *Doe dem. Williams v. Lloyd*, ante, vol. i. p. 671.

lord chancellor, in matters of bankruptcy, would have had no jurisdiction. These orders, therefore, must be construed by the same rules that are applicable to the order of justices in matters regulated by act of parliament (see *Brook v. Jenney*, 2 Q. B. Rep. 265). Now there are four conditions imposed by the bankrupt act (6 G. 4, c. 16, s. 18), which must be complied with before the court of Review can pronounce a valid order; first, the petitioning creditor's debt must be sufficient to support the commission; secondly, the creditor, whose debt is to be substituted for that of the petitioning creditor, must, prior to the application, have proved a debt sufficient to support the commission; thirdly, such debt must not have been incurred anterior to the debt of the petitioning creditor; and fourthly, the party applying for the substitution, must himself have proved a debt against the estate. All these facts must appear, on the face of the order, to have been adjudicated by the court. Now the present order adjudicated only the first and third of these; the second and fourth being mentioned merely by way of recital in the petition. The cases cited when the rule was obtained, especially *Muskett v. Drummond* and *Christie v. Unwin*, are strong authorities to shew that the order is invalid. *Muskett v. Drummond* is also important, as shewing that the present order, as amended, is not binding upon the defendant, no notice of the amendment having been given to him. In that case it was unnecessary to decide whether the order itself was valid; but it was considered that the order was bad, in not shewing that the former debt had been adjudged to be invalid. The [236] court, in giving judgment, intimated a doubt whether even "a valid order of the lord chancellor, under the above-mentioned act, would support a commission, by relation, in an action already commenced, and especially when the opposite party in that suit had no notice of such a proceeding" (10 B. & C. 161). Now, in this case, though the order was originally made after action brought, yet the amendment was not made till after two trials had in fact taken place, and upon the eve of a third trial. In *Aireton v. Davis* (9 Bingh. 740, 3 Moo. & S. 138) the decision turned upon another point; but the court expressed itself, as strongly as could be expected, in favour of the objection. [Tindal C. J. In that case a new title was made pending the action. Here, the parties are the same. There, the defendant might come down prepared to contest the original petitioning creditor's debt; but that cannot have been the case here. Erskine J. The court of Review will either require an affidavit stating that no action is pending, or restrict the order to the particular action.] In *Ex parte Watson, In re Clarke* (3 Mont. & Ayr. 609), where a debt was substituted for that of the petitioning creditor, the court, when making the order, expressly said, that notice thereof must be given to the defendant in an action which had been previously commenced, and in which the validity of the petitioning creditor's debt was disputed. The same principle which would apply to an original order, will apply to an amended order; otherwise the greatest injustice may be produced. The order in this case was clearly bad before the amendment, and was in fact admitted to be so; otherwise the amendment would not have been sought for. But the amendment is confined to a recital in the petition to obtain the order, stating that the petitioner had alleged that there was a debt; and no alteration has been made [237] in the mandatory or adjudicating part. It is consistent with every thing that appears upon the face of the order, that the substituted debt may have been proved only the day before the order was made. It is said on the other side, that you may look at the recital to explain the mandatory part. But if the allegation is not direct in itself, it must be so by necessary inference. The insertion of the word "said" in the mandatory part might have connected the order with the recital, and have given the plaintiffs a case. It has been said that this is like a verdict upon a plea of not guilty in an inferior court. To make the cases parallel, it should be supposed that the jury merely found that the plaintiff had said that the defendant was guilty. In *Ex parte Hall, In re Elliott* (1 Mont. Deac. & De Gex, 217) the order, which had been held invalid in *Christie v. Unwin*, was amended by the court of Review in the following form, prepared by Sir George Rose—after reciting the substance of the petition—"and it appearing to this court, upon due proof thereof laid before it, that, after the adjudication of the bankruptcy of the said Thomas Elliott, and before the presenting the aforesaid petition, the debt of the said J. C., the petitioning creditor, and on which the adjudication of the bankruptcy of the said T. E. proceeded, was duly found to be, and is, an insufficient debt to support the said fiat against the said T. E.; and that, before and at the time of presenting the said petition, the said Northern and Central Bank (the petitioners) had, by one of their public

registered officers, proved a debt under the said fiat against the said T. E., sufficient to support the same; and such debt of the Northern and Central Bank is an existing debt, and was incurred not anterior to the debt of the said J. C., the petitioning creditor under the said fiat; this court doth order that [238] the said fiat issued against the said T. E. be proceeded in." The order in the present case should have been amended pursuant to that form. If, instead of adopting such form, reliance is placed on the recitals, these recitals should be distinctly referred to. In *Byers v. Southwell* (ante, 231 (a)), the replication expressly stated, before setting out the order, that the substituted creditors "having then due and owing to them from the said J. C. (the bankrupt), and having before then proved under the fiat, debts sufficient to support the said fiat, the debts so due and owing from J. C. to J. S. and J. S. (the petitioners) having been incurred not anterior to the debt of any of them the said W. B., &c. (the petitioning creditors), did duly present their petition," &c. This replication was held to be bad.

TINDAL C. J. (b). This case comes before us upon a rule for a nonsuit, or for a new trial, upon certain objections that have been taken to an amended order made by the court of Review, for substituting a new debt in lieu of that of the petitioning creditor, under the provisions of the statute 6 G. 4, c. 16, s. 18. But though I think that upon one of these objections the defendant may be entitled to succeed, he ought not to be allowed to enter a nonsuit. I think he ought to have a new trial on payment by the plaintiffs of the costs of the last trial.

The objections are three in number, and may be taken in the following order—first, that the amendment in the order of the court of Review was improperly made—or, at least, that it cannot affect the defendant, as no notice of the application to make such amendment had been given to him—; secondly, that the amended [239] order must be considered as speaking from the date of its amendment, and not from its original date; thirdly, that the order, even as amended, does not follow the power given by the act of parliament, inasmuch as it does not adjudicate that the substituted debt had been proved under the fiat before the application which resulted in such substitution.

I cannot agree in the remark that there is any hardship in the provision of the statute, which empowers a good debt to be substituted for that of the creditor upon whose petition the fiat originally issued, but which has been found insufficient to support it; on the contrary, the provision appears to me to be both remedial and extremely beneficial, by putting an end to great expense in useless proceedings at law which formerly ensued from the absence of such a power. The object of the enactment is, that where a fiat has issued upon a debt which is afterwards found to be insufficient, the fiat shall not wholly fail upon that account, but that another debt shall be substituted which shall be sufficient to support the fiat; and this is to be done, under the proper and just restriction, that such substituted debt shall not have been incurred prior to that of the petitioning creditor; thereby preventing the fiat from having a greater reach than it would originally have had (a).

[240] With regard to the want of notice of the application to the court of Review

(b) It had been suggested by the lord chief justice, but not acceded to, that the order of the court of Review might be included in a bill of exceptions which had been tendered and was pending.

(a) By the French Code de Commerce, as amended by the law of the 28th of May 1838, the inception of the bankruptcy (faillite) may be carried back by a judgment of the commissioner (juge commissaire) on the application of any party interested, such application being open to opposition on the part of the bankrupt (le failli) within a week, and on the part of any other person interested, within a month, after the application has been affixed and published in the newspapers.—Articles 442 and 580. But no such application can be made after the expiration of the time allowed for the proof of debts.—Article 581. From this, as well as from other decisions of the commissioner, an appeal is given, the period for bringing which (in ordinary cases fifteen days), varies according to the distance of the domicile of the appellant from the place at which the judgment is pronounced, one additional day being allowed for every five myriameters (31 miles and 120 yards) in distance. Art. 582.

The same varying scale is adopted in the Code de Commerce pour les Etats de S. M. le roi de Sardaigne of 30th December 1842.

to amend the order, I am not aware that any necessity existed for giving such notice. Indeed, it is not easy to see to whom such a notice ought to be given. Is notice to be given to the whole body of debtors to the estate? or to all against whom actions may be pending? There might be a case, undoubtedly, in which it would be unjust to make such an order behind the back of a defendant in a pending action; as where the defence was founded upon the insufficiency of the petitioning creditor's debt; for, in the absence of such notice, the defendant might be taken by surprise and thrown out of his line of defence. In that case notice would be just, if not necessary; and probably some order would be made to prevent parties who had proceeded without giving notice, from recovering full costs of suit. The order in *Ex parte Hale*, may have been framed with reference to some such state of facts. Here, no such circumstances are suggested.

The second objection relates to the time from which the amended order is to take effect. I think that upon the principle upon which every amendment is allowed in legal proceedings, from the commencement to the end of the suit, it must be taken to be made *nunc pro tunc*, and that the order, as amended, must be read as though it had originally been drawn up in the state in which it appears. The amendment is confined to the recital, and must have been introduced to supply a misprision of the officer in drawing up the original order; and that, in a particular which must have been known to the [241] defendant, whose situation could in no way be changed by the amendment. The supposed hardship upon the defendant might be urged in every case of amendment. It frequently happens that defendants go down to trial in the hope of tripping up plaintiffs upon slight variances.

But, the third objection, namely, that the order, even in its amended state, does not shew that the substituted debt had been proved, under the fiat, before the application was made for its substitution, I am afraid must prevail; though, I own, I have anxiously endeavoured to extract from the order a declaration to that effect. It is certainly stated in the petition, as recited in the order; but that is merely the allegation of the petitioners. It is necessary that the precise fact should appear to have been adjudicated by the court of Review; but there is no finding or adjudication upon the subject. The court has thought it necessary expressly to adjudicate that the petitioning creditor's debt was insufficient, and that the substituted debt was incurred not anterior to such petitioning creditor's debt; and the fact of these two matters having been adjudicated upon in precise terms, strengthens the objection arising from the omission of the third. I fear, therefore, that we should trench upon the authority of *Christie v. Unwin*, if we were to hold this order sufficient. But as the objection is *inter extremos apices juris*, I cannot, as I before stated, consent that a nonsuit should be entered. The case should go down to a new trial upon payment of costs by the plaintiffs.

COLTMAN J. I admit the validity of the last objection with extreme reluctance. It seems to me that this objection lies in a very narrow compass. The order contains no allegation to satisfy us as to the time at [242] which the debt was proved. It does not say that the said debt was proved. Consistently with all that appears upon the face of the order, the debt of the petitioners may have been proved immediately before the order was made.

ERSKINE J. I am of the same opinion. I think the order must clearly be taken to speak from the time of its original date, and not from the time of the amendment; upon the principle which governs all cases in which an amendment is made. In substance and in effect, the original and the amended order are one and the same order. The only alteration is, the insertion of that which the officer should have inserted originally. I see neither injustice nor hardship in holding this, as the original order was made before the action was commenced. If the object had been after action brought to substitute a new debt for that of the petitioning creditor, there might have been some ground for opposing the alteration at the time, or for now taking an objection upon the want of notice; but that is not the case; for the order expressly provides, as is usual, that it shall not prejudice any action pending under the fiat.

As to the form of the order, it seems to me that it does not sufficiently appear upon the face of it, that the substituted debt had been proved at the time the petition was presented. It is so stated in the petition, as recited; but that statement is not adopted by the court in the mandatory part of the order. It might be, that the debt of the petitioners, though proved at the time when the order was made, had not been

proved, as the statute requires, when their petition was presented. For this reason I think the order is invalid. I concur, however, in thinking that this is not an objection upon which the plaintiffs should be nonsuited, but that there should be [243] a new trial on payment by them of the costs of the last trial (a).

Rule absolute for a new trial on payment by the plaintiffs of the costs of the last trial, before the last day of next term (b).

NORMAN v. CLIMENSON, BROWN, AND TIFFIN. May 7, 1842.

[S. C. 4 Scott, N. R. 735 ; 1 D. N. S. 718 ; 11 L. J. C. P. 191. Discussed, *M'Cormack v. Ross*, [1894] 2 Ir. R. 549.]

To an action of trespass, by A. against B., C., and D., the three defendants pleaded jointly, and appeared by the same attorney and counsel. A. recovered a verdict against B. and C. on all the issues ; and D. had a verdict against A. on all the issues.—Held, that, in the absence of special circumstances, D., the successful defendant, was entitled to a third part of the costs of the joint defence ; and that such third part might be set off against, and deducted from, the costs of A. against the other two defendants.

This was an action of trespass. The writ of summons was served on each of the three defendants, and a joint appearance was entered for them pursuant to the statute. The three defendants pleaded jointly by the same attorney, and the same counsel appeared for them at the trial. A verdict was obtained by the plaintiff against Climensson and Brown, and by Tiffin against the plaintiff, upon the whole of the issues. On the taxation of costs, the attorney for the defendants claimed to have one third of the general costs of the defence deducted from the costs to be allowed to the plaintiff ; but the master refused to make such deduction, and only disallowed out of the plaintiff's costs, those costs which exclusively referred to Tiffin, as the service of the writ of summons upon him, &c.

Bompas Serjt., on a former day in this term, obtained a rule nisi for the master to review his taxation upon [244] an affidavit of the defendants' attorney, who stated that he had been employed by the defendants separately to defend the action, and that Tiffin, as well as the others, was liable to him for the costs of the defence. He cited *George v. Elston* (1 New Cases, 513 ; 1 Scott, 518) and *Griffiths v. Jones* (5 Tyrwh. 1092 ; 2 Cr. M. & R. 333).

Channell Serjt. now shewed cause. This is not a case in which some issues have been found for the plaintiff, and some for the defendants, in which case the master, pursuant to the rule of H. T. 2 W. 4, r. 74, would have been bound to deduct the costs of the issues found for the defendants from the plaintiff's costs. Neither is this an application to allow the costs of the defendant Tiffin ; for the rule seeks to have a certain amount of costs deducted from the plaintiff's costs, in favour of all of the defendants. [Tindal C. J. By the thirty-second section of the 3 & 4 W. 4, c. 42, "where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action, shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried, shall certify upon the record under his hand, that there was a reasonable cause for making such person a defendant in such action."] There is no doubt that Tiffin may recover costs from the plaintiff. But no foundation has been laid for the application to review the taxation of the costs to which the plaintiff is entitled from the two other defendants ; for, in order to obtain leave to set-off Tiffin's costs against the plaintiff's, some special circumstances should have been shewn ; as in *George v. Elston*, where it was alleged that the plaintiff was insol-[245]-vent, and unable to pay the costs of the successful defendant. [Tindal C. J.

(a) Cresswell J. having been counsel in the cause, declined giving any opinion.

(b) The objection was one of a most formal character. If, however, the order was bad, ex quacunque causa, it would seem that the defendant was entitled at the trial to a verdict upon the second issue,—that issue being taken in connection with the notice to dispute,—unless the plaintiffs elected to be nonsuited.

I cannot see what objection there can be to the course proposed, except on the part of Tiffin, who might not like to have the costs to which he is entitled, swallowed up by their being deducted from those of the plaintiff against the two other defendants.] Here, the defendants pleaded jointly, and appeared by the same attorney and counsel. In *Hughes v. Chitty* (2 M. & S. 172), where, on a joint plea of not guilty to trespass and assault, one defendant was found guilty, with 1s. damages, and 1s. costs, and the other was acquitted, it was held that the latter was only entitled to 40s. costs; Le Blanc J. and Dampier J. observing, "that if the defendants had pleaded separately it might have been different, but, as they had pleaded jointly, it would be making the plaintiff pay the costs of the other defendant, to allow increased costs to this defendant." Undoubtedly since then the rule has been laid down in *Gambrell v. Earl Falmouth* (5 A. & E. 403; 6 N. & M. 859), that a successful defendant is *prima facie* entitled to his separate costs, and to his proportion of the joint costs. There, it was said by Lord Denman C. J. "We have considered the matter, and think ourselves bound by the rule laid down by Mr. Baron Bayley in *Griffiths v. Kynaston* (2 Tyrwh. 760), and afterwards confirmed in *Griffiths v. Jones* (5 Tyrwh. 1092; 2 Cr. M. & R. 333; 4 Dowl. P. C. 159), viz. that the successful defendant is to be allowed all his separate costs, and, *prima facie*, an aliquot part of the joint costs, unless the master is satisfied that some smaller proportion should be allowed, by reason of any other special circumstances." Here, the special circumstances, on which the master seems to have decided, are, that the defendants had but one attorney and one counsel. In *Gambrell v. Earl Falmouth*, there were separate at-[246]-torneys and separate counsel. Here, the claim to deduct one third of the costs is made, not for Tiffin, but for the three defendants jointly. The two unsuccessful defendants would have been put to the same expense for the briefs, witnesses, &c., supposing Tiffin had not been included in the action. [Cresswell J. In case Tiffin had been the only defendant, the expense of the defence would have been the same, and the plaintiff would have had to pay the whole. You must look at it in both ways.]

TINDAL C. J. It seems to me that the correct rule is laid down by the court of Queen's Bench in *Gambrell v. Earl Falmouth*. Let it therefore be referred to the master to see if there are any special circumstances in this case to take it out of that rule; for if not, then Tiffin will be entitled to a deduction of one third of the costs of the joint defence.

The rest of the court concurred.

Rule absolute accordingly.

Bompas Serjt., who was to have supported the rule, referred also to *Starling v. Cozens* (5 Tyrwh. 823; 2 C. M. & R. 445; 3 Dowl. P. C. 782; *Starving v. Cousins*, 1 Gale, Exch. 159), *Lees v. Reffitt* (3 A. & E. 707; *Lees v. Kendall*, 5 N. & M. 340), and *Bartholomew v. Stephens* (5 M. & W. 386).

[247] PRYME v. BROWNE. May 7, 1842.

Upon an application to set aside a certificate for costs granted by the sheriff under the 3 & 4 Vict. c. 24, s. 2, on the ground that he at first refused to grant it, and afterwards gave it, out of deference to the wishes of others, the court will require the facts to be proved beyond all doubt.—The proper course in such a case, seems to be, for the party making the application to ascertain what occurred, from the sheriff himself.

This was an action for a libel published in the *Cambridge Chronicle*. The defendant having suffered judgment by default, a writ of inquiry was executed before the undersheriff of Middlesex, when the jury assessed the damages at a farthing. The undersheriff having certified that the "grievance in respect of which the action was brought was wilful and malicious," under the 3 & 4 Vict. c. 24, s. 2, in order to give the plaintiff his costs, the same were taxed and paid by the defendant under protest.

Channell Serjt., on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the certificate, the taxation of costs, and the allocatur should not be set aside, and why the costs paid should not be repaid to the defendant, or to his attorney. The affidavits, on which the motion was grounded, stated, that on the verdict being returned, the plaintiff's counsel applied to the undersheriff to certify; when, after hearing the defendant's counsel, the undersheriff refused the

application, and the defendant's counsel indorsed his brief accordingly, and was in the act of leaving the court, when the plaintiff's counsel appealed to the undersheriff to alter his decision, suggesting that the jury, in finding the verdict they did, were evidently influenced by the belief that such verdict would carry costs; that the undersheriff immediately, and without reference to the defendant's counsel, turned to the jury and asked them if such had been their impression; that one of the jury replying in the affirmative, the undersheriff ob-[248]served that he was desirous of carrying out their view, and should therefore certify.

Bompas Serjt. now shewed cause upon affidavits, which stated that the certificate was granted within two or three minutes after the verdict was pronounced, some discussion having taken place as to whether or not the under-sheriff had power to certify; that the under-sheriff never did, in fact, refuse to certify, or appeal to the jury, as suggested in the affidavits on the other side; though it was admitted that the jury had intimated their understanding and intention that the verdict they gave should carry costs; and that the defendant had since been informed by the undersheriff that he did not at any time refuse to certify.

Channell Serjt., in support of the rule, submitted that the affidavits on the part of the defendant were not answered, as the counter-affidavits contained no distinct denial that the undersheriff had altered his decision in consequence of what fell from the jury.

TINDAL C. J. Upon the affidavits the case is left in some degree of uncertainty, whereas, considering the nature of the application, the facts should have been placed beyond all doubt. The defendant, when about to make the present motion, should have applied to the undersheriff, and ascertained from him distinctly whether he had ever refused to grant the certificate. As the case now stands, I do not think that we ought to interfere.

COLTMAN J. The granting of the certificate was a matter entirely in the discretion of the undersheriff; and very strong evidence should be given before we set it aside.

[249] ERSKINE J. The ground on which the rule was granted was, that the undersheriff had exercised his own discretion, not in granting, but in refusing the certificate; and that he subsequently granted it only out of deference to the wishes of other parties. If that had been so, the court would have set the certificate aside, on the ground that he had not exercised his own judgment. But, according to the affidavits on the part of the plaintiff, the hesitation of the undersheriff proceeded, not from any doubt as to whether the certificate ought to be granted, but as to whether he had the power to give it. I think that a sufficient ground has not been laid for the court to interfere with the discretion of the presiding judge.

CRESSWELL J. concurred.

Rule discharged, with costs.

WILSON v. NISBETT. May 7, 1842.

Where upon a writ of trial the issue is delivered with blanks for the teste and return of the writ of trial, and the defendant retains it without making any objection, he cannot afterwards complain of the omission, even supposing the blanks in the issue to amount to an irregularity.—A notice of trial by continuance before the sheriff, need not specify the place or hour, as it will be taken to refer to the place and hour mentioned in the original notice.

Assumpsit, against the defendant, as the acceptor of a bill of exchange for 12l. 12s., and on an account stated.

The defendant denied his acceptance of the bill of exchange; and, to the second count, pleaded non assumpsit; whereupon issue was joined.

The plaintiff's attorney having obtained an order to try the cause before the sheriff of Middlesex, on the 7th [250] of April 1842, delivered the issue in the form prescribed by the rules of H. T. 4 W. 4, the teste and return of the writ of trial being left in blank, as follows:—

“And inasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20l., hereupon on the day of 1842, pursuant to the statute in that case made and provided,

the sheriff is commanded that he summon twelve, &c. and who neither, &c. who shall be sworn truly to try the issues above joined between the parties aforesaid, and that he proceed to try such issues accordingly; and when the same shall have been tried, that he make known to the court here what shall have been done by virtue of the writ of our Lady the Queen to him in that behalf directed, with the finding of the jury thereon indorsed, on the day of April," &c.

The following notice of trial, bearing date on the 7th of April 1842, was indorsed on the issue.

"Take notice that the issues joined in this cause will be tried on Tuesday, the 19th day of April instant, at eleven o'clock in the forenoon, before the sheriff of Middlesex, at the Sheriff's Office, No. 24 Red Lion Square, in the said county of Middlesex, pursuant to the statute in such case made and provided."

On the 16th of April the defendant's attorney was served with this further notice:—

"I do hereby continue the notice of trial in this cause to Thursday next, the 21st day of April instant."

The defendant's attorney, considering this notice as insufficient, did not appear at the trial, and the plaintiff had a verdict for the amount of the bill of exchange mentioned in the declaration.

Bompas Serjt. on a former day in this term obtained a rule calling on the plaintiff to shew cause why the issue, and all subsequent proceedings, should not be set [251] aside with costs, for irregularity. He contended that the omission of the date of the teste and return of the writ of trial in the copy of the issue delivered, was a variance from the writ of trial; and also that the notice of trial by continuance was a nullity, from not stating the place and hour at which the cause was to be tried.

Talfourd Serjt. now shewed cause. With respect to the first objection, the issue was perfectly regular. The issue is always delivered in blank; nor can it be delivered otherwise; as the practice is, not to sue out the writ of trial until two or three days before the trial takes place; consequently the blanks cannot be filled up at the time when it is necessary to deliver the issue. Moreover, if there was any irregularity, it has been waived by retaining the issue. If the defendant meant to object to it, he should at once have returned it, and not have left the plaintiff to infer that it had been treated as valid.

TINDAL C. J. The plaintiff might have given the defendant notice of trial after the delivery of the issue. The latter could not be injured by the delivery of the issue in blank, for he must have notice of trial of a precise date. Then what do you say to the other answer which has been given? If the defendant objected to the issue, should he not have returned it?

Bompas Serjt. In *Lycett v. Tenant* (4 New Cases, 168; 5 Scott, 479), the omission of the date of the writ of summons in the issue delivered, was held to be an irregularity, and the writ of trial was set aside with costs. So, in *Ward v. Peel* (1 M. & W. 743), an issue which did not follow the form given by the rule of court, was set aside as irregular. It cannot be said [252] when the courts give a form, as they necessarily must, with blanks for the dates, that a plaintiff is not to fill them up. Here, if the plaintiff had delivered the issue incorrectly, he might have given the notice of trial at the regular time, and have filled up the blanks in the issue.

TINDAL C. J. The case last cited is very different from the present. There, it was a trial before a judge; here, it is before the sheriff. The defendant received this issue and retained it, without making any objection. Ought we to interfere in such a case?

Talfourd Serjt. With respect to the objection to the notice of trial by continuance, no such notice was necessary. The practice is the same as to cases before the sheriff as at the sittings in Middlesex and London. [Tindal C. J. The cases are not exactly parallel. In the country sheriffs do not sit at regular periods.] At any rate, it cannot be doubted that the notice by continuance embodied, by reference, the place mentioned in the original notice of trial. But further, if the notice was irregular, it should have been objected to and returned at the time.

Bompas Serjt. The cause not having been tried pursuant to the original notice of trial, the defendant was entitled to a second eight-days' notice of trial, which should have contained the same particulars, as to the place and hour, as were given in the former notice. The defendant could not assume that the trial would take place at the

same hour. It is well known that the times of sitting in sheriffs' courts vary throughout the country. [Erskine J. A form of a notice of trial by continuance upon a writ of inquiry, is given in Chitty's Forms, 339, 5th ed., which specifies the time.] That shews that this notice is irregular.

[253] COLTMAN J. In *Jones v. Chune* (1 B. & P. 363), a motion to set aside a writ of inquiry, on the ground that the notice of continuance made no mention of the hour or place at which the writ of inquiry would be executed, was discharged with costs. Eyre C. J. there said, "I think that if an original notice be given, specifying the hour and place as well as the day, and that notice be afterwards continued with an alteration of the day only, the latter will refer to the former, and incorporate the hour and place; and that it would be an irregularity in the plaintiff to execute his writ of inquiry at any other hour or place than those mentioned in the original notice."

Bompas Serjt. admitting that he could not contend against the authority of that case—the rule was

Discharged with costs.

CHARLES WYNNE v. JULIUS WYNNE AND SARAH his Wife.

May 27, 1841; May 7, 1842.

[S. C. 3 Scott, N. R. 435; 9 D. P. C. 901; 10 L. J. C. P. 301; 1 D. N. S. 723; 11 L. J. C. P. 206.]

A rent-charge is devised to B., the wife of A., not saying for her separate use. In replevin an avowry is made in the names of A. and B. for arrears of the rent-charge; and issue being joined upon the title to such rent-charge, the cause and all matters in relation to the rent-charge are referred to D., who awards that the arrears of the rent-charge, including as well those due when the action was brought, as arrears which accrued between the bringing of the action and the date of the reference, shall be paid to B. This is not an excess of authority, either by reason of the arrears accruing subsequently to the action being included in the sum awarded, or by reason of the payment being directed to be made to B. only.—The plaintiff having refused to pay the arrears to the wife, on the ground that the money had been demanded by and paid to the husband, the court made absolute a rule for an attachment against him.

Replevin. The defendants, in right of the defendant Sarah, avowed in respect of an annuity or rent-charge of 20l. given and bequeathed by the will of one Robert Watkin Wynne out of the mansion in which, &c. [254] "to the said Sarah the wife of the said Julius, during her life, or so long as her conduct and behaviour should be discreet, and meet with the approbation of the testator's wife, or which, in case of her death, should be approved of by the survivors or survivor of his said trustees;" alleging a compliance with the condition (a), and avowing the taking of the goods, as a distress for 50l., being arrears of the annuity for two years and a half, ending the 2d of March 1839.

Pleas in bar: first, that after the death of the testator and before the accruing due of the arrears, the conduct and behaviour of the said Sarah was not discreet, but on the contrary thereof, on the 2d of March 1816, and from thence, &c. she the said Sarah was living in open, avowed, and notorious adultery, and in a state of polygamy with one J. R. Hutton, &c. Verification.

Secondly, that after the death of the testator and his wife, and before the accruing due of the said arrears, the conduct and behaviour of the said Sarah was not discreet, nor was the same approved of by the surviving trustee; and that before the taking of the distress, the surviving trustee disapproved of the conduct of the said Sarah; whereby the annuity wholly ceased; concluding to the country.

Replication to the first plea in bar,—that after the marriage of the said Sarah with the said Julius, and more than seven years before the said Sarah committed any adultery with the said J. R. Hutton, &c., and more than seven years before the said Sarah was married to the said J. R. Hutton, the said Julius absented himself from the said Sarah for the space of ten years and upwards; and until the time of the marriage of the said Sarah with the said J. R. Hutton, and from thence continually until the

(a) See the avowry at length, ante, vol. ii. p. 10.

accruing due of the said arrears, and at the time of the said intermarriage of the said Sarah with the [255] said J. R. Hutton, the said Sarah had no knowledge of the said Julius being alive. To the second plea in bar the similitur was added.

Demurrer to the replication to the first plea in bar ; and joinder.

Upon the cause coming on for trial at the last spring assizes for the county of Denbigh, a verdict was entered for the plaintiff under a rule of court, and the cause, and all matters in relation to the annuity in question in the cause, were referred to a barrister ; the costs of the cause to abide the event and determination of the award, and the costs of the reference to be in the discretion of the arbitrator. On the case being heard before the arbitrator, the defendants, in support of the affirmative of the issue as to the discreetness of the conduct and behaviour of Sarah Wynne, offered in evidence a certificate bearing date the 9th of January 1822, and purporting to be signed by Colonel Wynne and another, the surviving trustees of the will of Robert Watkin Wynne. An objection was taken to this certificate, on the ground that Colonel Wynne himself might have been called. The arbitrator refused to receive it, and also rejected a subsequent certificate, likewise signed by Colonel Wynne, and dated the 6th of July 1838, which was tendered on the part of the plaintiff to shew that, at that time, Colonel Wynne, who had then become the only surviving trustee, disapproved of the conduct and behaviour of Sarah Wynne ; the arbitrator remarking that the defendants had failed to prove the issue. It appeared by a decree in equity, dated the 23d of December 1816, given in evidence by the defendants, that the will of Robert Watkin Wynne was thereby ordered to be established, and the trusts thereof directed to be carried into execution ; that by an order of the 5th of March 1826, the receiver appointed in the equity suit was ordered to pay to Sarah Wynne the sum of 196l. in satisfaction of the then arrears of the annuity to the 2d of March 1826 ; and that the [256] receiver was also directed out of the rents and profits of the devised estates, from time to time, to pay the annuity of 20l. to Sarah Wynne for her sole and separate use during her life, or until the further order of the court, by half yearly payments ; that in pursuance of that order the sum of 196l. was paid to Sarah Wynne, and that the growing payments of the annuity continued to be regularly paid by the receiver to Sarah Wynne, and into her own hands, from the 15th of March 1826 until the 2d of September 1836 ; that John Wynne, the tenant for life of the estates charged with the annuity, died on the 19th of December 1836, whereupon the plaintiff became, under and by virtue of the will of Robert Watkin Wynne, tenant for life of the estates ; and that ever since he so came into possession of the estates so charged, he had refused to pay the annuity to Sarah Wynne.

On the 14th of May last the arbitrator made his award in the following terms. "I do award and declare that the plaintiff had not at the time of the commencement of the said action any cause of action against the defendants in respect of the matters so to me referred as aforesaid ; and I do further award and direct that, instead of the verdict so found for the plaintiff, a verdict in the said action be entered for the defendants. And I do further award and direct that on the issue in law joined between the parties to the said action, judgment be entered for the defendants : and I do further award, order, and direct that the plaintiff forthwith shall and do pay unto the defendant Sarah, the wife of the defendant Julius Wynne, the sum of 50l., as and for the arrears due on and up to the 2d of March 1839 of the annuity or yearly rent-charge of 20l. mentioned in the avowry of the defendants in the said action, and also the further sum of 40l. being the arrears of the said annuity or yearly rent-charge of 20l. from the 2d of March 1839 unto the 2d of March now last past : and lastly I do [257] award, order, and direct, that each of the said parties shall and do bear and pay his and their own costs of this reference, and one moiety of the costs of this my award."

Channell Serjt. now moved on the part of the plaintiff to set aside the award. In the first place, the plaintiff was misled by the declaration of the arbitrator that the defendants had failed in establishing the issue which it lay upon them to prove. But for the arbitrator's remark, the plaintiff would have called evidence to shew that Colonel Wynne, the surviving trustee, had disapproved of the conduct and behaviour of the defendant, Sarah. [Erskine J. Is it sworn in your affidavits that the plaintiff would have called Colonel Wynne, if it had not been for the observation of the arbitrator?] It is not so stated in precise terms. [Maule J. The case seems to have been left very bare by both parties. It is not improbable that the arbitrator may have

been influenced by the presumption arising from the fact of the annuity being paid for so many years.]

A second objection is, that the arbitrator had no authority to direct payment of any arrears which accrued between the time of the distress and the order of reference on the 27th of March 1841. It is clear that by the order of court, all that was referred to the arbitrator was, the cause, and all matters in relation to the annuity in question in the cause, and that no authority was given to him over the annuity generally. [Tindal C. J. The part of the order to which you allude, is merely matter of description; the parties evidently meant to refer something more than the cause.]

Thirdly, the cause is left undetermined; for the arbitrator, instead of awarding payment of the arrears of the annuity to the two defendants, has directed them to be paid to the defendant, Sarah Wynne. The will of Robert Watkin Wynne does not give the annuity to her for her [258] sole and separate use. The claim for the return of the goods replevied is made by the two defendants, and, consequently, the plaintiff cannot with safety pay the 50l. to the wife. [Maule J. Although both the husband and wife are parties, the arbitrator has considered that the proper hand to receive the money is the wife's.]

TINDAL C. J. Suppose the case of a husband being abroad—would an award be bad which directed a payment to be made to his wife? We cannot but remember what passed upon a previous occasion (*ante*, vol. ii. p. 10). It is evident that the husband has been acting in collusion with the plaintiff, in order to deprive his wife of this annuity; for it was not until he received an indemnity that he would permit his name to be used in this suit. The award of the arbitrator, that the money should be paid to the wife, was in accordance with the arrangement then come to between the parties. No authority has been cited that an award is bad for directing the payment to be made to the wife, and I see, therefore, no ground for setting aside this award.

The rest of the court concurred.

Rule refused.

On the 3d of July 1841, judgment was signed for the 50l. and costs, and on the 7th the amount of the costs, 131l. was tendered to the attorneys of Sarah Wynne, and at the same time a receipt of Julius Wynne for 90l. was produced, acknowledging that the two sums of 50l. and 40l. mentioned in the award had been paid to him. The attorneys refused to receive the costs with-[259]—out the sums awarded, and at length levied the 50l. and costs under a *fi. fa.*

Sir T. Wilde Serjt., in Hilary term last, obtained a rule nisi for an attachment against the plaintiff for non-payment of the 40l. to Sarah Wynne, pursuant to the award.

Channell Serjt. now shewed cause upon affidavits, which stated that the 40l., together with the 50l., had been demanded by Julius Wynne, the husband, and had been paid to him by the plaintiff.

Although the plaintiff might have been discharged by payment to the wife, he is not liable to an attachment for having paid it to the husband. [Tindal C. J. If he had paid the wife pursuant to the award, how could he have damnified himself? The payment to the husband was clearly collusive. Cresswell J. All the parties entered into a rule of court; and, among others, the husband bound himself to abide the decision of the arbitrator. Can he get rid of the award? And, if not, how can the plaintiff?] All that the husband consented to, was, that the wife should try the question as to her right to the annuity, but not that she should receive it. [Cresswell J. That question was decided by the award.] The objection is open to the plaintiff in resisting the attachment, for it appears on the face of the award.

Sir T. Wilde Serjt., *contra*, was stopped by the court.

TINDAL C. J. The ground taken by the plaintiff is, that the husband permitted the wife to try her right to the annuity out of the funds of her friends, and yet, on the money being recovered, it is not to be paid to her. If the plaintiff has got himself into a difficulty, it is of his own creating. This is not a point of strict law, but is [260] rather an application to the equitable jurisdiction of the court. The question is, what was intended by the proceedings which have taken place. It was evidently meant that the wife should enjoy the fruits of the action; and the plaintiff must have known that such was the intention of the court. The plaintiff never would have paid this money

to the husband but from a determination to prefer him to the claims of his wife. The attachment must therefore go.

The rest of the court concurred.

Rule absolute.

MILLER v. THOMSON. May 8, 1842.

In an action on a promissory note, the defendant having pleaded fraud, the plaintiff brought up a witness to disprove the fraud, but the defendant failing to make out a *prima facie* case of fraud, the witness was not called: Held, that the plaintiff was entitled to the expenses of such witness.—No costs will be allowed upon a rule made absolute to review the master's taxation.

Sir Thomas Wilde, Serjt. had obtained a rule nisi for the master to review his taxation in this case. It was an action by the indorsee against the maker of a promissory note payable to the order of one Francis. The defendant pleaded (*inter alia*) that the note was obtained from him by the fraud of Francis and others; to which the plaintiff replied *de injuriâ*. Francis had been brought up by habeas corpus from Somersetshire, as a witness at the trial on the part of the plaintiff, for the purpose of disproving fraud; but he was not called, as the plaintiff made out a *prima facie* case on the bill, and obtained a verdict on the issue of fraud, the defendant not supporting his plea. The master had disallowed the expenses of Francis's attendance at the trial.

[261] Channell Serjt. shewed cause.

Sir T. Wilde Serjt. was heard in support of the rule.

TINDAL C. J. The object of bringing up the witness was, not to make out a *prima facie* case for the plaintiff, but to repel the case of fraud which might be set up by the defendant; but as no *prima facie* case of fraud was made out, it became unnecessary to call the witness. I think the plaintiff, therefore, ought to be allowed the expenses of the witness, and the rule must be made absolute; but, as the master is, as to these matters, in the place of a judge, there will be no costs.

Per curiam. Rule absolute without costs (*a*).

[262] NEEDHAM v. BRISTOWE. May 8, 1842.

"A. B. of the Fleet prison in the parish of St. B. in the city of L.," is a sufficient description of the plaintiff in the indorsement on a *capias* issued by him in person.

—A rule nisi to set aside a judge's order—for arresting the defendant, to set aside

(*a*) In a note to the report of this case upon the motion to enter a nonsuit, ante, vol. iii. 579 (*b*), it is said that it was formerly essential to the validity of a bill of exchange that it should be payable in a different place from that in which it is drawn. It may be added, that this is still the law in most, if not all, of the continental states.

Thus by the French Code de Commerce of 1807, Art. 110, "*La lettre de change est tirée d'un lieu sur un autre.*"

But what shall be a sufficient distance to constitute "*un autre lieu,*" is left to the discretion of the tribunals. Bravard, Manuel de Droit Commercial, No. 74.

The Spanish Commercial Code (*Código del Comercio*) of 1829, Art. 429, prohibits the drawing of bills of exchange payable in the place in which they are drawn (*en el mismo pueblo de su fecha*), and directs that such instruments shall be treated merely as promissory notes from the drawer to the payee, and that the acceptance shall operate only as an ordinary undertaking or suretyship (*afianzamiento ordinario*), to guarantee the solvency of the drawer.

The Dutch Commercial Code (*Wetboek van Koophandel*) of 1836.—Art. 210, &c. allows such instruments to be transferable by indorsement, not, however, as bills of exchange, but as assignments (*assignation*).

The Code de Commerce pour les Etats de S. M. le Roi de Sardaigne, promulgated on the 30th of December 1842, Art. 119, defines a bill of exchange in the same terms as the French Code. As is done here, it divides bills of exchange into two classes—those drawn from one place upon another within the kingdom, and those drawn from or upon foreign places.

the *capias* for irregularity, and to cancel the bail-bond,—may be made absolute, as to cancelling the bail-bond, under the 1 & 2 Vict. c. 110, s. 6, although no grounds be laid before the court for setting aside the order, and although there be no irregularity in the *capias*.—On a motion to set aside a judge's order, the affidavits on which such order was obtained should be before the court.—Semble, that the proper mode to bring the affidavits before the court, is to give notice to the judge's clerk that they are required. Per Coltman J.

Shee Serjt., on a former day in this term (18th of April), had obtained a rule nisi, why an order in this cause made by Lord Denman C. J. at chambers, dated the 15th of March, for holding the defendant to bail, should not be set aside; why the writ of *capias*, issued in pursuance of the same, should not be set aside for irregularity; and why the bail-bond should not be given up to be cancelled; and why the plaintiff should not pay the costs.

The learned serjeant stated, upon obtaining the rule, that the case had been at chambers before Wightman J., who had referred it to the court. The facts were as follows:—Bristowe, the defendant, was the sole trustee of the marriage-settlement of Needham, the plaintiff (his brother-in-law); and had advanced him the trust-money without security. In order to recover it, Bristowe, had brought an action against Needham, which action was tried before Lord Abinger C. B. at the sittings after last Hilary term, when Bristowe recovered a verdict for 22,350*l.* Bristowe being indebted to Needham in 750*l.* for money lent, proposed, at the trial, to deduct this sum from the amount recovered in the action; but Lord Abinger thought that the verdict ought to be taken for the whole amount, and that Bristowe might enter a remittitur for the 750*l.* Needham, how-[263]-ever, was taken in execution for the whole amount, and was committed to the Fleet prison. In November last Needham obtained a judge's order to hold Bristowe to bail for the 750*l.*, on the ground that he was about to leave England; which order was set aside at chambers on the 25th of November. In March last (after the trial of the action), Needham again obtained a judge's order to hold Bristowe to bail on the same ground; which order, on the 11th of March, was rescinded at chambers. On the 15th of March, Needham obtained a third order to hold Bristowe to bail as before. This was the one now sought to be set aside. Various letters were referred to, as having been before Wightman J. at chambers; and it was distinctly sworn that Bristowe had no intention of leaving England. In the indorsement on the *capias*, which was issued by Needham in person, Needham described himself as "of the Fleet prison in the parish of St. Bride in the city of London," which description was the irregularity complained of.

Bompas Serjt. and Channel Serjt. now shewed cause. There is no irregularity in the *capias*. It is necessary, in following the form of the indorsement given in the act (a), that the residence of the plaintiff should be stated, when the writ is issued by him in person, and that regulation has been complied with in this case; for, when a party is in prison, the prison is, to all intents and purposes, his residence. [Tindal C. J. The statement would certainly be sufficient in an affidavit (b); and I think it is so in this case.]

Then there is nothing further to argue, as no other [264] irregularity in the proceedings is complained of, and it is not necessary to go into the merits. [Cresswell J. Suppose nothing had been said about irregularity in the rule, it would have been competent, to the other party to set aside the order upon the merits. Will the fact of his having inserted the word "irregularity" prevent his doing so? Erskine J. Besides, the rule to set aside the order and cancel the bail-bond is not for irregularity.] There is still, however, a preliminary objection. The rule is drawn up—on reading the order and the affidavits upon which the rule nisi was obtained; but it is necessary that the court should also see the affidavits upon which that order was made, and these the defendant has not set out. In *Cooper v. Folkes* (ante, vol. i. 942), this court held, that on a motion to discharge a rule obtained for a *distringas* to compel an appearance, the

(a) 1 & 2 Vict. c. 110, Sched. When the writ is issued by the plaintiff in person, it is necessary to "mention the city, town, or parish, and also the name of the hamlet street, and number of the house of the plaintiff's residence, if any such there be."

(b) And see 6 & 7 Vict. c. 18, Sched. B. No. 3, 4, 6, 8, as to the notices and forms directed to be used with respect to lists of voters.

affidavits on which such rule was granted, must be brought before the court. [Tindal C. J. In that case were the affidavits in court?] That does not appear from the report; the rule had been drawn up, as in this case, upon reading the rule for the *distringas*, and the affidavits upon which the rule nisi to set it aside had been obtained; but the affidavits upon which the *distringas* was obtained must have been filed in the court. [Tindal C. J. It certainly does seem rather a strange thing to require a party to be at the expense of obtaining copies of the affidavits upon which a judge's order was obtained.] The affidavits in this case are at the judge's chambers, and the court has no means of ascertaining their contents. [Tindal C. J. (after referring to the master). They will be brought into court to-day. Cresswell J. There may be this distinction,—that if a party seeks to shew that a judge's order was improperly made, he must produce to the court the affidavits upon which it was obtained; but if he seeks to relieve himself from the effects of the order, he may admit that it [265] was properly made in the first instance. Tindal C. J. It may be, that the defendant seeks to set aside the order for something *ex post facto*. Shee Serjt. stated that he had mentioned the affidavits to the court at the time he obtained the rule, and believed he had handed in office-copies; but he understood it was not the practice, in the master's office, on drawing up a rule, to notice office-copies of affidavits. Tindal C. J. It could not be drawn up on reading the original affidavits, as they are not in the custody of the party who obtains the rule. But although the defendant in this case may not be in a condition to set aside the order, he may be entitled to insist on his discharge under the sixth section of the imprisonment for debt act (a). The proper form of the rule in that case would be, to call on the plaintiff to shew cause, why the defendant should not be discharged out of custody, or why the bail-bond should not be delivered up to be cancelled; but we can decide that now.] The present rule has three objects; first, to set aside the order; secondly, to set aside the *capias*; and, thirdly, to cancel the bail-bond. The court has decided that the second of these cannot be entertained, as the *capias* is not irregular; if they now decide that the order cannot be gone into, there will be no ground for cancelling the bail-bond. [Tindal C. J. The latter point is still open to argument, under the sixth section of the act referred to, without impeaching the order.] The only authority the court has, under that section, is to discharge the defendant out of custody; but there is no such application in this case. [Tindal C. J. [266] I think the present rule may be made absolute as to cancelling the bail-bond.]

Shee Serjt. applied for the costs.

TINDAL C. J. I think the defendant is not entitled to the costs, as he has asked for too much. He is seeking to set aside the judge's order; and he has not brought before the court the materials upon which that can be done.

COLTMAN J. It seems to me that the proper course in such a case would be, to give notice to the judge's clerk that the affidavits were required; and then he would send them into court.

Per Curiam (Shee Serjt. consenting). Rule absolute to deliver up the bail-bond to be cancelled; the costs to be costs in the cause.

JONES v. ELDRIDGE. May 9, 1842.

An affidavit to ground a motion to set aside a writ of summons commanding C. E. (whose real name is C. D. E.) to answer A. B., was held to be properly entitled, "*A. B. v. C. D. E., sued as C. E.*"

Bompas Serjt. had obtained a rule nisi to set aside the copy of the writ of summons in this case, and the service thereof, for irregularity, by reason of the omission of the

(a) 1 & 2 Vict. c. 110, s. 6, enacts, "That it shall be lawful for any person arrested upon any such writ of *capias*, to apply at any time after such arrest, to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to shew cause, why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule."

memorandum at the foot of the copy, as to the time during which the writ might be served.

Channell Serjt. now shewed cause, and took a preliminary objection that the affidavit upon which the rule was obtained was wrongly intitled. The writ was addressed to John Elridge; and the affidavit was headed *Jones v. John Adams Eldridge, sued as John Elridge*. He contended the affidavit should have followed the writ, [267] and relied upon *Borthwick v. Ravenscroft* (5 M. & W. 31, 7 Dowl. P. C. 393); where, in a motion to set aside a distringas, the affidavits intitled "*Borthwick v. Henry William Ravenscroft, sued as Henry Ravenscroft*," were held incorrect; as not being in conformity with the notice subscribed to the writ of distringas, which was intitled "*Between John Borthwick, Plaintiff, and Henry Ravenscroft, Defendant*." He also cited *Shrimpton v. Carter* (3 Dowl. P. C. 648); where, in an action by *Geo. Shrimpton v. Wm. Carter*, an affidavit intitled *Geo. Shrimpton v. Wm. Carter the Elder, sued as Wm. Carter*, was rejected as being improperly entitled.

Bompas Serjt., in support of the rule, contended, that since the new rules, a defendant must appear in his right name, as he cannot plead misnomer in abatement. He relied upon *Finch v. Cocker* (2 Dowl. P. C. 383, 2 C. & M. 412. S. C., not S. P. 2 C. M. & R. 196, 3 Dowl. P. C. 678); where, a rule having been obtained for setting aside a bail-bond, on the ground of a variance in stating the defendant's name as Cocker instead of Cocken. The affidavit on which the rule was obtained being entitled "*Finch v. Cocker*," it was insisted that it ought to have been intitled "*Finch v. Cocken, sued by the Name of Cocker*," and the affidavit was held to be improperly intitled.

TINDAL C. J. I do not think that this affidavit is improperly intitled. The heading amounts, in effect, to the defendant's saying, "the plaintiff has sued me, John Adams Eldridge, by the name of John Elridge." The decisions that have been cited are contradictory; but I cannot distinguish this case from *Finch v. Cocker*, which has been relied on by my brother Bompas. *Borthwick v. Ravenscroft* certainly decides the contrary. [268] In this conflict of authority the best way appears to be to decide in conformity with the case which is most consistent with good sense; and that case, I think, is *Finch v. Cocker*.

The other judges concurring, and Channell Serjt. not arguing the point as to irregularity—

Rule absolute (a).

[269] JOHN BARTLETT, THE ELDER, v. JOHN BARTLETT, THE YOUNGER.
SAME v. SYMONS. SAME v. LYNE. May 9, 1842.

The assignee of a replevin bond having brought actions severally against the principal and his two sureties, the court made a rule, that the proceedings in all the actions should be stayed upon payment of the rent due and costs; and that upon such payment not being made, the first action should be proceeded with, the defendants in the other two actions to be bound by the event of the first.

These were three actions upon one replevin-bond, brought by the assignee of the sheriff of Devon, against the principal, and each of the two sureties.

The distress was taken, and the replevin-bond executed, on the 18th of January

(a) In *Swift v. Wright*, 7 Dowl. P. C. 863, it is said that, the defendant was described in the writ of summons as "Charles Wright," but in the distringas as "Charles James Jonathan Wright, sued as Charles Wright;" and that the latter process was held to be irregular, as varying from the writ of summons.

The same case is reported (nom. *Swift v. Knight*), in 5 M. & W. 618, where it is said, that the defendant was described as "Charles Knight" in the distringas, and that he was described in the writ of summons and the plaintiff's affidavits, as "Charles James Jonathan Knight, sued as Charles Knight."

Upon inquiry at the rule office, it appears that, in the writ of summons, the plaintiff is described as "Charles Knight;" in the distringas as "Charles Jonathan Knight, sued as Charles Knight;" that the defendant's affidavits are intitled "Charles Jonathan Knight, sued as Charles Knight;" and that the plaintiff's affidavits are intitled "Charles James Jonathan Knight," that being the true name.

last. On the 25th a plaint was entered by Bartlett the younger, in the county court ; and on the 31st an appearance was entered for Bartlett, the elder, as of the preceding 25th. Another court was held on the 22d of February, but negotiations being pending between the parties, no step was then taken by Bartlett, the younger. On the part of Bartlett the elder, it was, however, insisted that there had been a default, and that the replevin-bond was forfeited ; and on the 7th of March he obtained an assignment thereof from the sheriff. The writs in the three actions thereon were issued on the 14th. On the 22d a declaration in the replevin suit was filed, and a rule to avow given.

There was a dispute between the parties as to the amount of rent in arrear, but Bartlett, the younger had tendered the sum which he alleged was actually due.

Appearances had been entered in the actions on the replevin-bond on the 30th of March.

A summons had been obtained before a judge at chambers to stay the proceedings in these actions without costs, or on payment of the costs in the first action only. This was heard before Maule J. when a preliminary objection was taken on behalf of the plaintiff in this [270] court, that the application was too late ; as it was to set aside the proceedings for irregularity, and therefore fell within the thirty-third rule of H. 2 W. 4 ; and that the defendants, by entering appearances, had waived the irregularity. His lordship expressed an opinion that the application was not in the nature of an application on the ground of irregularity, and therefore not within the rule ; but he decided he had no jurisdiction to entertain the question, except by consent, which was refused on behalf of the plaintiff.

Channell Serjt., on a former day in this term (April 30th), upon affidavits of the above facts, had obtained a rule nisi to stay all proceedings in the three actions, on payment of the costs in the first mentioned action only, or upon such other terms as the court should direct. He referred to *Key v. Hill* (2 B. & Ald. 598) ; 4 Ann. c. 16, s. 20 (c), R. G. H. 2 W. 4, r. 30 (d), and 11 G. 2, c. 19, s. 23 (e).

Bompas Serjt. now shewed cause.

[271] Channell Serjt. was heard in reply.

The court ultimately pronounced a rule, that all proceedings in the three actions should be stayed on payment of the rent and costs : otherwise, the rule to be discharged, and the plaintiff to proceed in one action, and the defendants in the other two actions to be bound by the event of that one (a).

COTTAM AND ANOTHER v. PARTRIDGE. May 7, 1842.

[S. C. 4 Scott, N. R. 819 ; 11 L. J. C. P. 161. Discussed, *Tatam v. Williams*, 1844, 3 Hare, 357 ; *Friend v. Young*, [1897] 2 Ch. 430.]

An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as

(c) By which it is enacted, that "if the said bail-bond or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after assignment made, may bring an action and suit thereupon in his own name ; and the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, upon the said bond or other security taken from such bail, as is agreeable to justice and reason ; and that such rule or rules of the said court shall have the nature and effect of a defeazance to such bail-bond or other security for bail."

(d) The effect of which is, that proceedings in several actions on the bail bond may be stayed upon payment of costs in one action, unless sufficient reason be shewn by the plaintiff why he should be allowed to proceed in more.

(e) By which it is enacted, that "if the bond so taken and assigned, be forfeited, the avowant, or person making cognizance, may bring an action and recover thereupon in his own name ; and the court where such action shall be brought may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason ; and such rule shall have the nature and effect of a defeazance to such bond."

(a) Upon application at the master's office it has been ascertained that the rule was never drawn up.

payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchandise between merchant and merchant" within the exception of the statute of limitations (21 J. 1, c. 16, s. 3).—Since Lord Tenterden's act (9 G. 4, c. 14, s. 1), the existence of items, within six years, in an open account, will not operate to take the previous portion of the account out of the statute of limitations.

Assumpsit for goods sold and delivered, and upon an account stated.

Pleas: first, except as to 3l. 8s., parcel, &c., non-assumpsit. Secondly, except as to the said sum of 3l. 8s., parcel, &c., the statute of limitations. Thirdly, except as to the said sum of 3l. 8s., parcel, &c., a set-off for goods sold and delivered, money lent, had and received, and due upon an account stated. Fourthly, payment into court of 3l. 8s., and no damages ultra.

The replication joined issue on the first plea.

To the second plea, so far as the same related to the sum of 3l. 9s. 3d., parcel of the moneys in the first count mentioned, and also so far as the said plea related to the last count, the plaintiffs replied that they ought not to be barred from having their aforesaid action thereof [272] against the defendant, because they said that the said cause of action in the said first count mentioned as to the said sum of 3l. 9s. 3d., and the said cause of action in the said last count mentioned, and each of them, did accrue to the plaintiffs within six years next before the commencement of the suit, modo et formâ; concluding to the country. Whereupon issue was joined.

And as to the said second plea, so far as the same related to the residue of the said causes of action in the declaration mentioned,—that the said residue of the said causes of action were and are, and relate to, certain accounts still open and unsettled, concerning the trade of merchandise between merchant and merchant, that is to say, between the plaintiffs and defendant, as merchants; and that the plaintiffs and the defendant were merchants during the time the said account and matters arose and were subsisting between them. Verification; and prayer of judgment, and of damages on occasion of the non-performance of the promises in the declaration mentioned, as to the said residue of the said causes of action.

As to the third plea, so far as the same related to the sum of 3l. 12s. 0½d., parcel of the moneys in the said third plea mentioned, and not excepted thereby,—that the plaintiffs were not nor are indebted to the defendant as in that plea alleged; concluding to the country. Whereupon issue was joined.

And, as to the said third plea, so far the same related to the residue of the matters of set-off in the said third plea mentioned, and not thereby excepted,—the statute of limitations.

And, as to the last plea, the plaintiffs took out of court the said sum of 3l. 8s., in full satisfaction and discharge, &c.

Rejoinder. As to the replication to the second plea, so far as the same related to the said residue of the causes of [273] action in the declaration mentioned, that the said residue of the said causes of action were not nor are, nor was nor is either or any of them, nor did they or any or either of them, relate to accounts still open and unsettled concerning the trade of merchandise between merchant and merchant, nor were the plaintiffs and defendant merchants, modo et formâ; concluding to the country. Whereupon issue was joined.

And, as to the replication to the third plea, so far as the same related to the said residue of the said causes of set-off in that plea mentioned, that the said residue of the said causes of set-off were and are, and related to, certain accounts still open and unsettled concerning the trade of merchandise between merchant and merchant, that is to say, between the plaintiffs and defendants as merchant, and that the plaintiffs and the defendant were merchants during the time that the said accounts and matters arose and were subsisting between them. Verification.

Surrejoinder. As to the rejoinder to the replication to the third plea, so far as the same related to the said residue of the said causes of set-off in that plea mentioned, that the said residue of the said causes of set-off, were not nor are, nor did they relate to, accounts still open and unsettled concerning the trade of merchandise between merchant and merchant, that is to say, between the plaintiffs and the defendant as merchants, modo et formâ; concluding to the country. Whereupon issue was joined.

The cause was originally tried before Tindal C. J. at the London sittings after

Trinity term 1839, when a verdict was taken for the plaintiffs, by consent, for 44l. 12s. 8d., subject to a special case. A fiat in bankruptcy being subsequently issued against the defendant, the plaintiffs declined to proceed with the argument of the [274] special case; whereupon the court, on the application of the defendant, granted a new trial (a).

The cause was consequently tried a second time before Erskine J. at the London sittings after last Michaelmas term.

The facts as they appeared at both trials were briefly as follows:—The plaintiffs were ironfounders, and wholesale dealers in agricultural implements, &c. The defendant, down to June 1834, carried on the business of a retail ironmonger. The action was brought to recover the balance of an account for goods sold by the plaintiffs to the defendant between June 1830 and June 1834. The value of the goods supplied to the defendant within six years before the commencement of the action was only 3l. 9s. 3d.; but the whole amount of what was due from him (after giving him credit for cash paid and goods sold) was 44l. 12s. 8d. It was proved by the clerk to the plaintiffs, that in May 1834 he called upon the defendant for a settlement of the plaintiffs' account, when the defendant stated, that if the plaintiffs gave him credit for the goods he had furnished to them, there would be but little between them. It was left by Erskine J. to the jury to say, whether the defendant had made any payment, or any delivery of goods to the plaintiffs by way of payment, within six years before the action was commenced; or whether there had been any agreement between the parties to set the items on one side of the account against those on the other.

The jury returned a verdict for the defendant; but leave was reserved to the plaintiffs to enter a verdict for them on the second issue for 3l. 9s. 3d.; and on the third issue for 41l. 3s. 5d.; making together the sum of 44l. 12s. 8d.

[275] G. Hayes in last Hilary term (January 11) obtained a rule nisi accordingly; and referred to *Catling v. Skoulding* (6 T. R. 189); and also to *Inglis v. Haigh* (8 M. & W. 769), which, he contended, was an authority that ought to be reconsidered.

W. H. Watson now shewed cause. Two questions arise in this case. First, whether the dealings between the parties are within the exception as to merchants' accounts in the third section of the statute of limitations (d); secondly, there being items of account between the parties within six years, whether those items take the whole account out of the operation of the statute, the account remaining open and unsettled.

First, even if these are to be considered as merchants' accounts, still the defendant would be entitled to arrest the judgment (*Inglis v. Haigh*, 8 M. & W. 769); as it has been decided that the exception in the statute of limitations as to merchants' accounts, applies only to actions of account, or possibly to actions in the case for not accounting (vide post, 278). But it is [276] submitted that the accounts between these parties are not merchants' accounts within the meaning of the statute. They are merely debts due from one party to another, amounting to nothing more than cross demands, which, before the statute 2 G. 2, c. 22, could not have been set off against each other. If accounts such as the present were to be considered as merchants' accounts, an action for goods sold and delivered would not lie; for the contract would be to account, and not to pay *de die in diem*. *Catling v. Skoulding* (6 T. R. 189) is, in fact, an authority precisely in point for the defendant. Cross sales of goods were there denied

(a) Ante, vol. ii. p. 843, 3 Scott, N. R. 174, 9 Dowl. P. C. 629.

(d) 21 Jac. 1, c. 16, s. 3, enacts "that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, &c., or any of them, which shall be sued or brought at any time after, &c., shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say), the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after," &c.

to be merchants' accounts within the exception in the statute. That case was put upon the ground that where there were mutual accounts between parties, the latter items would draw down the items which were beyond the six years; because credit having been given within that period, that fact was taken as evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. An action of account will not lie upon a mutual sale of goods from one tradesman to another. At common law the action of account only lay against a bailiff or receiver, or a guardian in socage; and the 4 Anne (b)¹ merely extends the right to bring that action to demands against the executors of an accountant, and to cases between joint-tenants and te-[277]-nants in common. But a mere cross demand never gave an action of account. *Inglis v. Haigh* (8 M. & W. 769), which was very elaborately argued, and the judgment in which was delivered after time taken to consider, has fully settled the point. The exception in the statute applies only to cases where a merchant has consigned goods, and where there is a consignee who would be bound to account. The words "their factors or servants" give the clue to the interpretation of the whole passage.

With respect to the second issue, which raises the question whether the statute of limitations applies to the sum of 3l. 9s. 3d. parcel of the sum mentioned in the first count—the defendant has paid 3l. 8s. into court; which will cover the 3l. 7s. 4d., the sum claimed by the plaintiffs in respect of the items accruing within the last six years of the account. The defendant says that the whole amount (except the 3l. 8s. paid into court), including the 3l. 9s. 3d., accrued before the six years. [Erskine J. The division of the sums in the pleadings appears to be quite arbitrary, and introduced merely for the purpose of letting in different answers.] It may be admitted that before the passing of Lord Tenterden's act (b)² it had been held, that if goods had been bought within six years, so as to form an item of a running account between the parties, that would have drawn down the other items of the account, and thereby taken [278] them out of the operation of the statute of limitations (vide supra, 276). But Lord Tenterden's act requires that every acknowledgment or promise of a debt shall be in writing to have that effect; and the introduction of the proviso, that the previous enactment shall not take away the effect of any payment, shews that, but for the express exception, the part payment of a debt would not have prevented the residue of such debt from being barred by the statute. This is the view taken of the 9 G. 4, c. 14, in *Williams v. Griffiths* (5 Tyrwh. 748, 2 C. M. & R. 45), and *Waugh v. Cope* (6 M. & W. 824). [Tindal C. J. It never was supposed that items on one side of an account only would draw down former items.]

If the court should finally be of opinion that the evidence is sufficient to enter a verdict for the plaintiffs, as prayed by the rule, then the defendant would crave leave to move in arrest of judgment. [Tindal C. J. Should he not have moved before?] Whilst the verdict for the defendant stood, he could not move in arrest of judgment.

G. Hayes in support of the rule. The exception contained in the third section of the statute of limitations is not confined to dealings between merchants and their factors; it extends to the cases of independent merchants dealing with one another.

(b)¹ 4 Anne, c. 16, s. 27, by which actions of account may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one joint tenant or tenant in common, and his executor or administrator, against the other, as bailiff, for receiving more than his share, and against his executor or administrator. The action of account was given to executors by stat. 13 Ed. 1, c. 23; to the executors of executors by 25 Ed. 3, s. 5, c. 5; and to administrators by 31 Ed. 3, c. 11. See the stat. of Marlbridge (52 H. 3, c. 23), and the stat. of Westminster 2 (13 Ed. 1, s. 1), c. 11.

(b)² 9 G. 4, c. 14, s. 1, enacts, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them (21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6; the Irish stat. of limitations), or to deprive any party of the benefit thereof, unless such acknowledgment or promise, shall be made or contained by or in some writing to be signed by the party chargeable thereby;" "provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever."

[Cresswell J. The act speaks of accounts "between merchant and merchant, their factors or servants ;" but it does not mention "their customers."] The effect of the construction contended for on the other side would be to deprive merchants of the benefit of the exception where they had dealings merely with each other. At common law the action of account lay in all cases of agency. In all the old authorities it is stated that it will lie against an agent, [279] bailiff or receiver. In Selwyn's *Nisi Prius* title, Account (pp. 1, 2, 7th ed.), it is said, "at the common law, account will lie against a bailiff, a receiver, and, in favour of trade and commerce, by one merchant against another ;" and the same doctrine is laid down in Buller's *Nisi Prius* (p. 127), and in Bacon's *Abridgement*, Accompt (A.) ; where the reason given is, that "between these there was such a privity, that the law presumed them conversant with each other's disbursements, receipts and acquittance." On the one hand, where there is agency, it is not necessary that the parties should be merchants ; so, on the other hand, where the parties are merchants, it is not necessary that there should be any agency. "Accounts between merchant and merchant" are clearly not confined to cases, where the one is the agent for the other, or to cases where parties are concerned in merchandize in the modern and limited sense of the word "merchant" ; but extend to all shopkeepers. In *Hamond v. Jethro* (2 Brownl. 99) it is said, "that it was agreed by all the justices, that by the law of merchants, if merchants join in trade, that, of the increase of that, if one die, the other shall not have the benefit of survivorship : and so of two joint shopkeepers ; for they are merchants." [Tindal C. J. There is no doubt of that. But it does not follow that accounts between two several shopkeepers without any other privity between them, are to be considered as "merchants' accounts" within the statute.] An account between two parties must be either stated or open. Here, it had not been stated, and, therefore, it clearly remained open. And where there is such an open, current, unsettled account between two parties, who are merchants in law, with the understanding between them that the items on the one side are to go against the items on the other, it surely must be considered as a mer-[280]-chants' account within the statute. [Erskine J. But it was not shewn at the trial that there was such an agreement.] It was undoubtedly treated at the trial as one current account between them. [Cresswell J. That might make a set-off unnecessary.] The application made by the plaintiffs' clerk to the defendant shews the light in which the account was considered by the parties. He applied for a settlement of the account, not for payment of the price of the goods ; it is therefore clear the plaintiffs only demanded the balance of an account. The case of *Inglis v. Haigh* (8 M. & W. 769) was decided after the present action had been tried. After that decision the plaintiffs in this case, if successful in this application, may not think it expedient to proceed to judgment. But this is not a motion in arrest of judgment : the question is, how the verdict is to be entered.

As to the second point, there are three ways by which claims, which would otherwise be barred by the statute of limitations, may be taken out of its operation. One is, by an acknowledgment of the debt ; which, before Lord Tenterden's act, might be verbal ; another is, by payment of money in part-payment of the whole debt ; which is an acknowledgment of a debt being due, not in words, but by an act done. The third method is, where there is a mutual account between parties, who have had dealings with each other within the six years, with reference to, and upon the faith of, such account being still unsettled between them. That was decided in *Callin v. Skoulding* (b) ; where the court were clearly of opinion that such a case was taken out of the operation of the statute. Where goods are supplied under such circumstances, although they do not technically amount to a part payment, yet they are equivalent to it ; and per-[281]-haps ought to operate more strongly than a payment, in shewing that the account is still unsettled and open. Lord Kenyon in that case uses the following language : "Here are mutual items of account ; and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained ; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily

(b) 6 T. R. 189. And see *Clarke v. Bradshaw*, 3 Esp. N. P. C. 155 ; *Webber v. Twill*, 2 Wms. Saund. 127, n. (6).

experience teaches us that if this rule be now overturned, it will lead to infinite injustice. In *Cotes v. Harris* (Bull. N. P. 149), all the items were on one side; and Denison J., who well knew what was the proper replication in such cases, and was well acquainted with the import of the statute of limitations, said, where all the items are on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing: but it was not doubted there, but that if there had been mutual demands the plaintiff might have recovered." The terms "acknowledgment or promise," in the 9 G. 4, c. 14, s. 1, do not apply to such transactions as took place between the parties in this case and in *Catling v. Skoulding*. Still less can a delivery of goods be construed to be an "acknowledgment or promise by words only." The court are now called upon entirely to disregard that expression. It is argued on the other side that the proviso shews that the effect of a part-payment would not have been preserved by the earlier portion of the section, and that it was necessary that it should be expressly saved by such proviso; but that is not a correct inference. The proviso may have been added *ex abundanti cautela*. [Coltman J. It seems more pro-[282]-bable that the case of a delivery of goods as an acknowledgment would have been expressly excepted, if it was so intended to be, than that of a part payment.] The present case is quite beside the original intention of the statute, which was to prevent loose evidence of verbal acknowledgments. In *Williams v. Griffiths* the facts were very different from those of the present case. One of the parties was tenant to the other, and was also his servant, and was to receive wages from him. There having been no payment on either side, the court held that this was not such an open account between them as would take the case out of the statute of limitations. That case is not inconsistent with *Catling v. Skoulding*; or if so, it was not so solemnly decided. There was, besides, no evidence in that case of any agreement to set one claim against the other; a circumstance on which Parke B. comments in giving judgment. In *Willis v. Newham* (3 Y. & J. 518) it was held that a verbal acknowledgment of a part payment was not sufficient to take the case out of the statute; and the same point was decided in *Bayley v. Ashton* (12 A. & E. 493, 4 P. & D. 204), and in *Maghee v. O'Neil* (7 M. & W. 531). [Cresswell J. That is a wholly different point.] In *Tippels v. Heane* (1 C. M. & R. 252, 4 Tyrwh. 772), Parke B. says, "the principle upon which a part payment takes a case out of the statute, is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." And his lordship expressed a similar opinion in giving the judgment of the court in *Waters v. Tompkins* (Tyrwh. & G. 137, 2 C. M. & R. 723, 725). The cases of *Hart v. Nash* (2 C. M. & R. 337, 5 Tyrwh. 955), and *Hooper v. Ste-[283]-phens* (4 A. & E. 71, 7 C. & P. 260. S. C. nom. *Cooper v. Stevens*, 5 N. & M. 635), establish that a delivery of goods may be equivalent to a part payment in money. Now, in the present case, it is clear, that the delivery of goods had been so treated by the parties; the defendant having been applied to for payment, not of the price of the whole of the goods, but only for the balance of the account. There is no sound and substantial difference between those cases and the present.

TINDAL C. J. To this action, which is for goods sold and delivered, the defendant, except as to 3l. 8s. paid into court, has pleaded the statute of limitations. The plaintiffs, in order to avoid the effect of the statute, have in their replication divided their demand into two, alleging, as to 3l. 9s. 6d., part thereof, that the causes of action did accrue within six years before the commencement of the suit; and as to the rest of their claim, "that the said residue of the said causes of action were and are and relate to accounts still open and unsettled concerning the trade of merchandize between merchant and merchant, that is to say, between the plaintiffs and defendant as merchants," &c. What the object of the plaintiffs could be, except indeed with a view to costs, in separating their demand, when the whole arose out of the same series of transactions, it is difficult to say. However, they have a right to our opinion upon the two questions thus raised. In *Inglis v. Haigh* (8 M. & W. 769. Supra, 277) the court of Exchequer seem to have decided that the exception in the statute of limitations, as to merchants' accounts, applies only to cases where an action of account, or an action on the case for not accounting, will lie, but not to an action of indebitatus assumpsit. Without going so far as that decision (though I do not mean to [284] impugn it), I think that the exception is not applicable where an action of account cannot be maintained; and I am of opinion, that, under the circumstances of the

present case, an action of account would not lie. [His lordship read the third section of the statute, 21 Jac. 1, c. 16 (ante, p. 275, n. (d)).] The exception, therefore, extends only to such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, and cannot apply except where an action of account, or an action on the case for not accounting, would lie. Is this a case in which an action of account could be maintained? It is laid down in Selwyn's *Nisi Prius*, p. 1, 8th ed., that, "by the common law, an action of account for the rents and profits, may be maintained by the heir after he has attained the age of fourteen years, against the guardian in socage; so at the common law, account will lie against a bailiff or receiver, and, in favour of trade and commerce, by one merchant against another." It has not been contended, that an action of account will lie in every case where there have been sales of goods between tradesmen, but only where there are mutual accounts, and an agreement has been come to, that the one shall be set off against the other, and the balance alone is claimed by the party in whose favour it is found; for, otherwise, the case could not be distinguished from the ordinary one of goods sold and delivered, with a claim of set-off of a similar description. The cases put in Selwyn shew that the action of account is founded upon some trust or privity between the parties; as, for instance, there is a confidence or trust between the heir and his guardian; between the owner of land and his bailiff or receiver; and between merchant and merchant. The exception in the statute extends, not only to accounts between merchant and merchant, but also to [285] accounts between merchants and "their factors or servants;" which latter words clearly import dealings creating a trust. Although account would lie where a merchant in this country consigns goods to a merchant or factor abroad, for sale on his account upon commission, it by no means follows that the action could be maintained in the simple case of mutual sales. The action of account is more like a bill in equity for enforcing the execution of a trust, than an ordinary action. The first judgment is, that the defendant do account, which is commonly called a judgment *quod computet*; whereupon, the defendant offering to account, the court assigns auditors to take and declare the account between the parties; and then the final judgment is, that the plaintiff do recover against the defendant so much as the latter is found to be in arrear. Neither in Selwyn nor in Buller is there a reference to any case where this action has been held to lie as between merchant and merchant. The only authority I have found is in Fitzherbert's *Natura Brevium*, 117 D., where it is said, "If two merchants occupy their goods and merchandises in common unto their common profit, one of them shall have an action of account against the other in the county, or in the Common Pleas;" and the form of writ is given, commanding "A., merchant, that justly, &c. he render to B., merchant, a reasonable account for the time in which he was the receiver of the money of him the said B., from whatever cause and contract coming to the common profit of them the said A. & B.; as by the law of merchants he may reasonably shew that he ought to render to him," &c.; shewing a privity between the two, and agreeing with the limited notion already expressed with regard to the action, rather than with a case of ordinary dealings between one tradesman and another. Is this a case of an account concerning the trade of merchandize between merchant and merchant? [286] Passing over the question whether ordinary tradesmen can be regarded as "merchants" (a) within the meaning of the statute—when this case is considered, it is nothing more than the ordinary one of two tradesmen selling goods to each other, without any agreement that the goods delivered by the one shall be considered as payment for those delivered by the other, or any understanding that the balance only shall be enforced on the one side or the other. There was nothing to prevent one party from suing the other for the whole of his account, and the other from bringing his cross action for his entire demand. It appears to me, therefore, that this is not an account concerning the trade of merchandise between merchant and merchant, and that the exception in the statute was not meant to apply to such a case.

With respect to the 3l. 9s. 3d., I cannot help thinking that it was separated from the general account in order that the plaintiffs, in the event of their failing upon one point, might have the chance of succeeding upon the other, and so get their costs. Upon this part of the case it has been contended, that, notwithstanding the 9 G. 4, c. 14, there has been such a course of dealing amounting to an acknowledgment

(a) Vide T. 4 H. 6, fo. 26, pl. 6.

between the parties as will take the case out of the statute. I do not deny that the present case would, previously to the 9 G. 4, c. 14, have fallen within the principle of *Calling v. Skoulding*, or that the decision there was not perfectly good law at the time it was given. But as I read that statute, *Calling v. Skoulding* is now no longer applicable. [His lordship here read the first section of the statute, 9 G. 4, c. 14.] The weight of the argument on the part of the plaintiffs rests upon the words "no acknowledgment or promise by words only [287] shall be deemed sufficient," &c. But in the enacting part which follows, the terms are, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." In effect, the first part of the clause merely adverts to the existing state of the law. The clause then goes on to except the case of a part payment: "Provided always, that nothing herein contained shall alter or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever;" leaving that particular case upon the footing on which it stood before. The ground on which part-payment was previously held to take the case out of the 21 Jac. 1, c. 16, was, that a payment of a part was an admission of the rest by inference, and that, from such payment, a jury might conclude that the rest was due. In *Calling v. Skoulding* it was held, that a jury might assume, from the existence of items in the account within six years, an acknowledgment within that period, of there being an open account between the parties, and a promise to pay the balance. When we find that the exception in the 9 G. 4, c. 14, is expressly confined to payment only, the inference is that every other kind of acknowledgment which is not in writing, was intended to be abrogated. *Expressio unius est exclusio alterius*. And this seems to be an answer to the second branch of the argument. I refrain from entering into the cases that have been cited for the purpose of shewing that a delivery of goods may be equivalent to payment. It is unnecessary to consider those cases, as there was no evidence that the defendant's goods were sent by way of payment,—the jury having negatived that fact. The object of the 9 G. 4, c. 14, which is a beneficial statute, is very clear; if we were to yield to the arguments that have been urged on the part of the plaintiffs, we should be opening a door to all the diffi- [288] culties which were created by the construction put upon the statute of the 21 Jac. 1.

COLTMAN J. I concur in what has fallen from my Lord Chief Justice. The clause of the statute of James on which the first point arises has not at all times received the attention that has recently been given to it. Looking at the language employed, I do not see much room for doubt. It has been sought, on the part of the defendant, to limit the exception to actions of account against factors or servants; but the writ that has been cited from Fitzherbert shews that it lies between merchant and merchant, although neither of them be a factor. The nature of the action of account was in some degree considered in the recent case of *Baxter v. Hozier* (5 New Cases, 288). It has been contended, on the part of the plaintiffs, that the exception in the statute as to merchants' accounts, applies to every case where two tradesmen furnish goods to one another. I do not, however, find that there is any authority for that position; and when *Baxter v. Hozier* was before the court, I looked into the books without finding much more than was laid down in Fitzherbert. The statements in Buller and Selwyn are true when understood with limitation. It appears to me that account would not lie between the parties to this action, and therefore that it is not a case of merchants' accounts within the meaning of the exception in the third section of the statute.

With respect to the second point, I think the cases which have been cited for the defendant are decisive, and that it would be frittering away the 9 G. 4, c. 14, if we were to hold that the delivery of goods had the effect of payment, and took the case out of the statute, as contended for on the part of the plaintiffs. Before [289] the statute, delivery of goods stood upon the same footing as payment would have done, each being evidence of an acknowledgment of the continuance of the debt. But now it is provided by that statute that no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the statute of limitations, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; with an exception, from the operation of this new enactment, of payment of any principal and interest. All other kinds of acknowledgment are therefore expressly abrogated. At the trial the plaintiffs failed in proving that

there had been any agreement that the goods delivered by the defendant should be taken by them in payment, or that the items on the one side of the account should be set off against those upon the other.

ERSKINE J. Two questions have in this case been raised before us upon the replication to the second plea,—the first being as to the sum of 41l. 3s. 7d., which the plaintiffs claim to be entitled to recover, on the ground that the accounts between themselves and the defendant were merchants' accounts, within the exception in the third section of the statute of limitations. The question is, what does the statute mean by "such accounts as concern the trade of merchandize between merchant and merchant?" Mr. Hayes has contended that all accounts between two merchants, if there be any arrangement between them that the accounts shall be cross demands, are within the exception; and that the statute is not confined to accounts between merchants properly so called, but applies equally to all tradesmen having mutual dealings with each other. Admitting that retail tradesmen may be merchants within the meaning of the statute, the question is, whether the accounts between these parties are merchants' accounts within the statute. I agree with my Lord Chief Justice and my brother Coltman in thinking, that the exception is confined to accounts in respect of which the one party may maintain against the other an action of account, or an action upon the case for not accounting. The exception seems to have been inserted in order to give merchants the same period of time for proceeding at law to compel their correspondents or agents to furnish accounts, as they would have had if they had proceeded to enforce an account in equity. The words of the exception are,—not "other than in an action of account," but—"other than actions for an account," and they seem to refer alone to actions strictly brought for an account. If this be the true interpretation, is this a case between merchant and merchant so as to bring it within the exception? Mr. Hayes thought it necessary to qualify the proposition for which he contended, by limiting it to cases where there has been an agreement between the parties that the goods delivered on the one side shall be set off against those delivered on the other, and the balance only shall constitute the debt between them. If that had been the case here, there might have been some foundation for the argument. Indeed it would not have been necessary to consider whether these accounts were within the exception in the third section of the statute of limitations; for the case would have fallen within the proviso in the first section of 9 G. 4, c. 14. There was, however, no evidence of any such agreement, but simply a statement by the defendant, when applied to for payment for the goods furnished to him by the plaintiffs, that if the accounts were balanced there would not be much owing. It appears to me, therefore, that if the exception in the statute only applies where there has been such an agreement, the evidence does not bring this case within it.

[291] As to the second branch of the replication, which relates to the sum of 3l. 9s. 3d., it is contended that the cause of action is shewn to have accrued within six years, inasmuch as there was an open account between the parties, and some of the items accrued within six years; and that this is sufficient to bring the case within the principle of the decision in *Catling v. Skoulding*. If this action had arisen before the passing of Lord Tenterden's act, *Catling v. Skoulding* would have been in point. At that time any promise would have been sufficient to take the case out of the statute of limitations; and where there was an account open on both sides, a promise to pay the balance might have been inferred. But now, the first section of 9 G. 4, c. 14, enacts that "in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments (a) or either of them, or to deprive any party of the benefit thereof." It is said that this section does not apply to the present case, the plaintiffs seeking to take it out of the operation of the statute of limitations, not by an acknowledgment or promise by words only, but by an act done,—an act which, in *Catling v. Skoulding*, was held to be equivalent to a promise to pay. If the clause had stopped there, it might have applied to this case; but it goes on to say, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." We must look at the whole of the clause taken together. The legislature may have supposed that by this language an acknowledgment by part-

(a) English act, 21 Jac. 1, c. 16; Irish act, 10 Car. 1, sess. 2, c. 6.

payment might be excluded. This [292] may have led to the introduction of the proviso, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." Upon what principle is payment considered as taking a case out of the operation of the statute of limitations, except as an admission of the existence of a debt? The creditor is allowed to shew that the payment was made on account of a larger sum remaining due; for there must be something to shew that the payment had reference to a larger debt. Words accompanying the act of payment would be necessarily admissible to shew the connection between the payment and such larger debt. Authorities have been referred to by Mr. Hayes, in which it was decided, that a statement made previously to the payment of money, might be given in evidence for the purpose of explaining the act of payment. He has also cited cases which shew that an agreement, that goods shall be received in part-payment, is sufficient to take the demand out of the statute. In the present case there was no evidence that the goods supplied by one party were sent in liquidation of the debt due by him to the other party; nor has it been shewn that there was any agreement between the parties, either before or after the goods were delivered, that they should be received as part-payment. It does not appear to me, therefore, that this case has been brought within the proviso in Lord Tenterden's act, relating to the effect of payment.

CRESSWELL J. The case has been so fully discussed that I shall add but a few observations to what has been said.

The first question relates to open accounts, or rather to mutual dealings; for which the case of *Callin v. Skoulding* is relied upon by the plaintiffs. In that case Lord Kenyon was of opinion, that the existence of an [293] open account was a fact from which a jury might infer a promise to pay. Subsequently to that time the courts departed still further from the letter of the statute of limitations. In *Hellings v. Shaw* (7 Taunt. 608, 1 B. Moore, 340) Gibbs C. J. appears to have endeavoured to arrange the cases in which the words of the statute have been departed from. These he reduces under three heads; of which the second and third shew how far the courts may go when they depart from the plain meaning of the language of a statute. Lord Tenterden's act was intended to get rid of acknowledgments by inference; and it contains no exception in favour of the sale or delivery of goods. No delivery of goods, therefore, is sufficient to take a case out of the statute, except under circumstances which render the delivery equivalent to payment.

With respect to the second point, it is difficult to say that, in one sense, these are not merchants' accounts; but, unless the language of the replication be understood in a sense which would make the replication bad, we must give to that language such a construction as will make it conformable to the statute; the exception in which, I think, refers only to such accounts as would support an action of account. Now, were the dealings of this case such as would enable the plaintiffs to maintain an action of account? Could they have called upon the defendant to render an account of goods sold to and by him? The only duty of the defendant was, to pay the price of the goods which he had bought from the plaintiffs. It is suggested that these dealings were to form one entire indivisible account. If that were so, two consequences would follow. The plaintiffs could only sue for the balance (b); and there could be no [294] set off, inasmuch as this would be a case, not of mutual debts (to which alone the statutes of 2 G. 2, c. 22, s. 13, and 8 G. 2, c. 24, apply), but of one account.

(b) By the French law of set-off (compensation) mutual debts extinguish one another pro tanto from the moment they coexist, absolutely, and pleno jure; Code Civil, Art. 1289; even where the existence of the cross demand is unknown; Art. 1290; and the balance only can be sued for; Ibid.

In England it not unfrequently happens, that a party who is indebted on the balance of accounts, refuses to come to any settlement; and when sued, being unable to get rid of the costs by pleading a set-off, he prefers bringing a cross action for the purpose of annoying his creditors, or of obtaining a sacrifice of part of his demand, or in the hope of effecting both these objects, more especially when the ill-feeling and dishonesty are fomented and encouraged by an unscrupulous adviser.

The evil might, perhaps, be remedied by adopting the French system of treating the balance only as the debt, (as, in effect, is done in cases of mutual credit in bankruptcy,) or by enabling plaintiffs to give notice of their readiness to allow a set-off,

I therefore entirely concur with the rest of the court in thinking that the plaintiffs have not established their claim, either in respect of the 41l. 3s. 7d. or in respect of the 3l. 9s. 3d., and that the rule obtained by the plaintiffs, to enter a verdict for those sums upon the second and third issues, must be discharged.

Rule discharged.

End of Easter Term.

[236] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE FIFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were, Tindal C. J., Erskine J., Maule J., Cresswell J.

ANTONIO BONZI AND LEWIS BONZI v. PATRICK MAXWELL STEWART.

May 24, 1842.

[S. C. 5 Scott, N. R. 1; 11 L. J. C. P. 228. See *Cole v. North-Western Bank*, 1875, L. R. 10 C. P. 370. For subsequent proceedings see 7 Man. & G. 746.]

Where a factor has raised money by a wrongful pledge of the goods of his principal, it is competent to the latter, in taking the account between himself and the factor, to abandon the goods and treat the money raised thereon as money had and received to his own use.—A., a factor, after depositing dock-warrants with the defendant as a security for an advance of money, withdrew them from the defendant's hands and substituted other dock-warrants for silk belonging to the plaintiffs, the defendant having no notice that A. was not the true owner. Held, that this transaction was not protected by the second section of the factors' act (6 G. 4, c. 94), there being no advance of money on the faith of such warrants; and that the plaintiff might recover the value of such silk in trover (see 5 & 6 Vict. c. 39, s. 2, p. 331, n.).—The defendant advanced money to A., upon a promise that he would deposit dock-warrants to the amount of the advance as a security. This advance took place on a Saturday, but the warrants were not deposited with the defendant till the Monday following, and were not, in fact, made out before that day. Semble, (if the question had been properly raised by the pleadings), that this transaction was not protected by the second section of the factors' act as against the plaintiffs, (the real owners of the property to which the warrants related), inasmuch as A. was not intrusted with, or in possession of, the warrants at the time of the advance (see 5 & 6 Vict. c. 39, ss. 1, 3, post, pp. 331, 332, n.).—A material allegation in a pleading, which is not traversed, is so far admitted, that it is not competent to the other party to disprove it.—Therefore where, in trover for bales of silk, the defendant pleaded that A. was factor of the plaintiffs, and as such factor was intrusted by the plaintiffs with, and was in possession of, dock-warrants relating to the said bales; that A., so being intrusted, &c., applied to the defendant for an advance of money upon the said bales as a security for repayment; that A., being so intrusted, &c., delivered the said dock-warrants and pledged the said bales with the defendant as a security for the said sum, which the defendant did then advance and lend on the faith of the said dock-warrants, and that the defendant had no notice that A. was not actual owner of the said bales; and the plaintiffs, in their replication, traversed the allegation that the defendant advanced and lent the money on the faith of the said dock-warrants modo et formâ. Held, that upon this record, the plaintiffs had admitted that A. was intrusted with, and in possession of, the dock-warrants, and that he pledged them with the defendant at the time of the advance; and therefore that it was not competent to the plaintiffs to give evidence that the

and to make such notice pleadable in bar of a cross action brought in respect of the matters embraced by such notice.

As to the old French law of Compensation, and the Roman law upon which it was founded, see Pothier, *Traité des Obligations*, No. 623, &c.; Dig. lib. 16, tit. 2, de Compensationibus.

dock-warrants were not deposited with the defendant, and were not in fact in esse at that time.

Trover, for sixteen bales of silk.

Pleas; first, not guilty. Secondly, that the plaintiffs were not possessed of the silk as of their own property. Upon both of which pleas issue was joined. Thirdly, as [296] to four bales of silk, parcel, &c., that at the several times hereinafter mentioned, certain persons using the firm, &c. of Douglas, Anderson and Co., were the factors and agents of the plaintiffs in the city of London, and that at the time of the delivery of the dock-warrants hereinafter mentioned, the said four bales of silk, parcel, &c., were deposited and warehoused in the warehouse of the St. Katharine's Dock Company, and the said D., A. and Co. were before, and at the time of, the pledge and delivery of the dock-warrants hereinafter next mentioned, as such factors and agents as aforesaid, intrusted by the plaintiffs with, and were then in possession of, divers, to wit, four dock-warrants for [297] the delivery of the said four bales of silk, parcel, &c., and in which said dock-warrants the said four bales of silk, parcel, &c., were described and mentioned; and the said D., A. and Co. being so intrusted with, and in possession of, the said dock-warrants, applied to the defendant for the loan and advance of a certain sum of money, to wit, the sum of 1900*l.* upon the pledge of the said four bales of silk, parcel, &c., as a security for the repayment of the said sum of money, and thereupon heretofore, to wit, on the 7th day of October A.D. 1836, it was agreed between the defendant and the said D., A. and Co., that they should pledge with the defendant the said four bales of silk, parcel, &c., as a security for the said sum of money to be advanced by the defendant, and which he then agreed to advance to the said D., A. and Co. upon the faith of the said dock-warrants; and that the said D., A. and Co. being so intrusted with, and in possession of, the said dock-warrants, in pursuance of the said agreement, heretofore, to wit, on, &c., did deliver to the defendant the said four dock-warrants, and did pledge with him the said four bales of silk, parcel, &c., as a security for the said sum of money, and which the defendant did then and there advance to the said D., A. and Co. upon the faith of the said four dock-warrants; and that the defendant had not notice before or at the time of the said pledge, or before or at the time of advancing and lending the said money, by the said dock-warrants, or either of them, or otherwise, that the said D., A. and Co. were not the actual and bonâ fide owners and proprietors of the said four bales of silk, parcel, &c., so pledged as aforesaid. And that the defendant at the same time, when, &c., detained, and still detains, the said four bales of silk, parcel, &c., under and by virtue of the said pledge as aforesaid, and for and on account of the said sum of money so advanced as aforesaid, which still remains unpaid; [298] which detention is the said conversion thereof in the declaration mentioned. Verification; and prayer of judgment, if the plaintiffs ought to maintain their action in respect of the four bales.

Fourthly, a similar plea as to ten bales, but omitting the statement that they were in the St. Katharine's dock warehouse.

Fifthly, a similar plea as the fourth, as to two bales.

Sixthly, as to four bales, that at the several times hereinafter mentioned, D., A. and Co. were the factors and agents of the plaintiffs, &c., and the plaintiffs before and at the time of the pledge hereinafter mentioned, were indebted to D., A. and Co. as such factors and agents as aforesaid, in a large sum of money, to wit, the sum of 8000*l.*, and which said sum of money still remains unpaid. And that at the time of the pledge hereinafter mentioned, D., A. and Co. as such factors and agents as aforesaid, had a lien upon the said four bales of silk, parcel, &c., and had a right to detain the same for the said sum of money so due to them as aforesaid, and a right to enforce such lien against the plaintiffs. And that the plaintiffs being possessed of the said four bales of silk, parcel, &c.; did, before committing the said supposed grievances, consign the said four bales of silk, parcel, &c., to D., A. and Co. as such factors and agents as aforesaid, and that the said D., A. and Co. were before, and at the time of the pledge hereinafter next mentioned, as such factors and agents as aforesaid, intrusted by the plaintiffs with, and were in possession of, divers, to wit, four dock-warrants for delivery of the said four bales of silk, parcel, &c., and in which said dock-warrants the said four bales of silk were described and mentioned, and D., A. and Co., being so intrusted with, and in possession of, the said dock-warrants, to wit, on the 7th day of October in the year aforesaid, under a certain agreement then made between D.,

A. [299] and Co. and the defendant, did pledge the said last-mentioned four bales of silk, parcel, &c. to the defendant, as security for the repayment of a large sum of money, to wit, the sum of 2567l. then due from D., A. and Co., to the defendant, and which said sum of money was, at the time of the said last-mentioned pledge, a debt due for money advanced by the defendant to D., A. and Co.; and a large part thereof, to wit, the sum of 2000l. still remains unpaid. And that D., A. and Co., being so intrusted with, and in possession of, the said dock-warrants upon such pledge last-mentioned, to wit, on, &c., did deliver to the defendant the said dock-warrants. And that the defendant had not notice before or at the time of the said last-mentioned pledge, by the said dock-warrants, or either of them, or otherwise, that the said D., A. and Co., were not the actual and bonâ fide owners and proprietors of the said last-mentioned four bales of silk, parcel, &c., so pledged as last aforesaid, and that the defendant at the said time when, &c., detained, and still detains, the said four bales of silk, under and by virtue of the last-mentioned pledge, on account of the said sum of money due from the said D., A. and Co. to the defendant, to the extent of the right of lien which the said D., A. and Co. had a right to enforce in respect of the four bales of silk, parcel, &c. as aforesaid; which is the conversion thereof in the declaration mentioned. Verification; and prayer of judgment.

Seventhly, that at the several times hereinafter mentioned the said D., A. and Co. were the factors and agents of the plaintiffs, &c., and the said D., A. and Co. were before and at the time of the pledge hereinafter mentioned as such factors and agents as aforesaid, intrusted with, and in possession of, divers, to wit, sixteen dock-warrants, for the delivery of the said goods and chattels in the declaration mentioned, in which last-mentioned dock-warrants the said goods and chattels [300] were mentioned and described; and D., A. and C. being so intrusted with, and in possession of, the said dock-warrants heretofore, to wit, on the 5th day of November 1836, did pledge the said goods and chattels to the defendant as a security for a large sum of money, to wit, 6000l., advanced and lent by the defendant to the said D., A. and Co., as then agreed upon between the defendant and the said D., A. and Co., on such pledge, upon the faith of the said dock-warrants; and that D., A. and Co. being intrusted with, and in possession of, the last-mentioned dock-warrants, did deliver to the defendant the last-mentioned dock-warrants, and the defendant did then and there advance and lend to the said D., A. and Co. the said sums of money upon the faith of the said dock-warrants. And that he had not notice before or at the time of the last-mentioned pledge, or at the time of the last-mentioned loan and advance, by the said dock-warrants, or either of them, or otherwise, that D., A. and Co. were not the actual and bonâ fide owners and proprietors of the goods and chattels in the declaration mentioned, and so pledged as aforesaid; and that the defendant detains the said goods and chattels under and by virtue of the said pledge, and for and on account of the said sum of money so advanced as aforesaid, which still remains wholly due and unpaid to the defendant; wherefore the defendant refused to deliver to the plaintiffs the said goods and chattels; which is the conversion thereof in the declaration mentioned. Verification.

Eighthly, that at the several times hereinafter mentioned D., A. and Co. were the factors and agents of the plaintiffs, &c.; and that before, and at the time of, the pledge hereinafter mentioned, the plaintiffs were indebted to D., A. and Co. as such factors and agents as aforesaid, in a large sum of money, to wit, 8000l., and which sum of money still remains due and unpaid. And [301] D., A. and Co., as such factors and agents as aforesaid, had a lien upon and a right to detain the said goods and chattels so in their possession as aforesaid, in respect of, and until payment by the plaintiffs of, the said sum of money so due by them to D., A. and Co. as last aforesaid; and the said D., A. and Co. being so in possession of such goods and chattels as such factors and agents as aforesaid, did heretofore, to wit, on the 2d day of October, and on divers days, &c., pledge with the defendant the said goods and chattels for divers sums of money, amounting, in the whole, to a large sum of money, to wit, &c., on those days and times lent and advanced by the defendant to D., A. and Co.; and which said sum of money remains unpaid to the defendant; and that the defendant, at the said time when, &c., detained, and still detains, the said goods and chattels under and by virtue of the said pledge as aforesaid, and on account of the said sum of money so lent and advanced by the defendant as aforesaid to the extent of the right of lien of D., A. and Co., to detain the said goods and chattels for a debt due from the plaintiffs to D., A.

and Co. as aforesaid; which is the conversion thereof in the said declaration mentioned. Verification.

Replication; to the third plea; that the defendant did not advance or lend to D., A. and Co. the said sum, &c., in that plea mentioned, or any part thereof, upon the said four dock-warrants, in that plea also mentioned in manner and form, &c. Issue thereon.

The like to the fourth and fifth pleas.

To the sixth plea; that at the time of the pledge of the four bales of silk in the said plea in that behalf mentioned, the plaintiffs were not indebted to the said D., A. and Co., as such factors and agents in that plea alleged, in the said sum of 8000*l.*, or any part thereof, in manner and form, &c. Issue thereon.

[302] To the seventh plea, a similar replication to that to the third plea, *mutatis mutandis*.

To the eighth plea, a similar replication to that to the sixth plea, *mutatis mutandis*.

At the trial before Tindal C. J., and a special jury at Guildhall, the sittings after Hilary term 1838, the following facts appeared.

The plaintiffs were silk merchants resident at Bergamo, in Italy. The defendant was a merchant in London. The action was brought to recover the value of sixteen bales of silk, which had been consigned by the plaintiffs, for the purpose of sale on commission, to the house of Douglas, Anderson and Co., merchants in London, who had for some time acted as factors for the plaintiffs and other parties.

Previously to the 7th of October 1836, D., A. and Co. had been in the habit of obtaining advances of money from the defendant, upon the security of goods, or bills of lading, &c., in their possession. On that day, being then indebted to the defendant in respect of such advances, they deposited with him five dock-warrants, four of which were for the like number of bales of silk belonging to the plaintiffs (which were then lying in St. Katharine's dock, consigned to D., A. and Co.), in exchange for twenty other dock-warrants relating to property of about the same value belonging to other parties, which D., A. and Co. were desirous of selling. No advance of money was made by the defendant at that time.

On the 15th of October following, being a Saturday, Mr. Anderson, of the firm of Douglas, Anderson and Co., applied to the defendant for a further advance of 3000*l.*, and stated at the time that he would give dock-warrants to the amount of such advance. The money was advanced accordingly; and on the Monday following (the 17th), ten dock-warrants, for as many bales of [303] silk, belonging to the plaintiffs, were deposited in respect of such advance. In point of fact, the dock-warrants were not in existence on the Saturday; and Mr. Anderson, when applied to for them in the afternoon of that day, after the money had been advanced, said that they had been busy, and had not had an opportunity of getting them.

On the following Saturday, (the 22d,) the defendant made a further advance to D., A. and Co. of 2000*l.*, on the security of other dock-warrants; and seventeen warrants, two being for silk belonging to the plaintiffs, were accordingly deposited with the defendant on the Monday following (the 24th). At the time that both the last-mentioned advances were made, the bales of silk, in respect of which the warrants were afterwards delivered, were in dock, consigned to D., A. and Co., who had in their possession the bills of lading for them. It was in respect of these three transactions that the present action was brought.

On the 5th of November, in a conversation between Mr. Anderson and the defendant, it was agreed that the previous deposits should be held as securities for a further advance of 1400*l.* then made; and the further sum of 500*l.* was subsequently advanced on the 10th of November, on the express understanding that the sixteen warrants were to be charged therewith.

In January 1837, D., A. and Co. stopped payment, having, at that time, in their possession various consignments of goods belonging to the plaintiffs, which were afterwards given up by the assignees under a fiat of bankruptcy against D., A. and Co.

A considerable body of evidence was gone into with regard to the state of accounts between the plaintiffs and D., A. and Co., for the purpose of ascertaining whether the plaintiffs were indebted to D., A. and Co. at the time the advances were made to them by the defendant, [304] so as to establish the lien set up in the fifth and eighth pleas. In these accounts the plaintiffs had taken credit for sums of money raised by Douglas,

Anderson and Co., upon previous pledges of silk belonging to the plaintiffs, the amount of which had never been brought forward in their favour.

Upon the issues raised by the replications to the third, fourth, fifth and seventh pleas (as to the validity of the deposits in question), it was contended, on the part of the plaintiffs, that none of the transactions were protected by the operation of the factors' act (a), [305] inasmuch as the transaction on the 7th of October was an exchange of securities; and as, on the 15th and 22d of October, when the money was advanced by the defendant, the dock-warrants were not in existence, there was in neither case a deposit or pledge, as a security for money or negotiable instruments, of any document which Douglas, Anderson and Co. were intrusted with, and in possession of, so as to fall within the second section of that act. For the defendant it was insisted, that the different advances had been made by him *bonâ fide*, upon the faith of the deposit of the dock-warrants, and in pursuance of the general understanding between the parties; and that they came within the spirit, if not the very letter, of the act.

Upon this point the Lord Chief Justice, adopting the view urged on behalf of the plaintiffs, expressed an opinion, that none of the transactions were protected by the factors' act. But his lordship ruled, that it was not open to the plaintiffs to raise the question upon the pleadings as they stood; and he therefore directed the jury to find a verdict (and the verdict was returned accordingly), for the defendant on the third, fourth, fifth and seventh issues—reserving leave to the plaintiffs to move to enter the verdict for them upon those issues,—and for the plaintiffs on the second issue. A verdict was also found for the plaintiffs on the first, sixth and eighth issues.

Wilde Serjt., in Easter term, 1838, obtained a rule nisi, according to the leave reserved, to enter the verdict for the plaintiffs upon the third, fourth, fifth and [306] seventh issues, or for a new trial, with liberty to the plaintiffs to amend their replication.

Sir J. Campbell, Attorney-General, for the defendant, in the same term, obtained a cross-rule for a new trial, upon the ground that the verdict as to the sixth and eighth issues was contrary to the weight of evidence.

(a) 6 G. 4, c. 94, s. 2, which enacts, "that any person or persons intrusted with, and in possession of, any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize, described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, &c., or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person, &c., upon the faith of such several documents, or either of them: Provided such person, &c. shall not have notice, by such documents, or either of them, or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors of such goods, &c. so sold or deposited or pledged as aforesaid."

Sect. 3 enacts, "that in case any person or persons, &c., shall, after the passing of this act, accept and take any such goods, &c., in deposit or pledge from any person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so interested and in possession as aforesaid, to such person, &c., before the time of such deposit or pledge, then and in that case such person, &c. so accepting or taking such goods, &c., in deposit or pledge, shall acquire no further or other right, title or interest in or upon or to the said goods, &c., or any such document as aforesaid, than was possessed, or could or might have been enforced, by the said person or persons so possessed and intrusted as aforesaid, at the time of such deposit, &c., as a security as last aforesaid; but such person, &c., so accepting, &c. such goods, &c. in deposit, &c., shall and may acquire, possess and enforce such right, &c., as was possessed and might have been enforced by such person, &c. so possessed and intrusted as aforesaid."

The rules were argued in Michaelmas term, 1838 (November 20. Before Tindal C. J., Vaughan, Bosanquet, and Coltman JJ.), and in Easter term, 1839 (April 25. Before Tindal C. J., Bosanquet, Coltman, and Erskine JJ.).

Sir J. Campbell, A.-G., Maule and R. V. Richards for the defendant. It cannot be disputed on the other side, that the defendant had *bonâ fide* advanced large sums of money to Messrs. Douglas and Co., the factors, or that the dock-warrants were deposited on the 15th and 22d of October, and for the sums so advanced. Neither can it be denied that, by the agreement between the factors and the defendant, whatever warrants had been previously deposited by the former in the hands of the latter for advances, should stand charged with any subsequent advances made by the defendant to the factors. On the other hand, it is admitted on the part of the defendant, that the dock-warrants deposited on the 7th October in exchange for other warrants, cannot be charged with the advances previously made in respect of the warrants then given up. But the point in dispute is, whether, because on the 15th and 22d of October, dock-warrants were not deposited with the defendant *uno flatu* with the advances of the money, but were delivered two days afterwards, such advances are not to be considered as made *bonâ fide* on the faith and security of those warrants. It is contended on the part of the defendant, that the advances in question were protected by the factors' act; [307] and, moreover, that the warrants deposited on the 7th of October, are charged with the subsequent advance made on the 15th; and that, in like manner, the warrants deposited on that day and on the 22d are charged with the advances respectively made on the 22d of October and the 5th and 10th of November.

Under the old law, a factor intrusted with goods or their symbols for the purpose of sale, could not lawfully pawn either; and if he did, the owner might recover them from the pawnee, although the latter might have had no notice that the factor was not the true owner. *Paterson v. Tash* (a). The second section of the factors' act, 6 G. 4, c. 94, was passed to remedy what was felt to be a great evil in the commercial world (b); its object being to enable parties safely to advance money on the security of warrants or other symbols of property, provided they had no notice that such warrants or other symbols were not the property of the persons pledging them. Formerly, a factor, though he was the apparent owner of goods, and at liberty to sell, could not pledge; and the intention of the act was to enable such apparent owner to pledge; so that if the real owner trusted his agent with the possession and apparent ownership of his property or its symbols, and the agent obtained money thereon, the party advancing the money might [308] have a lien, to the extent of the advance, against the real owner. A sale and a pledge, therefore, are, by that act, put upon the same footing. It is true, that, in order to give validity to the pledge, the factor must have the symbols of the property in his possession; but if he has, he is empowered to pledge the property as a security for the advance of money, and such a contract is equally valid as a sale by him would have been.

It is important to consider the state of the pleadings. The plaintiffs rely on the fact, that on the 15th and 22d of October, when the advances were made by the defendant, the dock-warrants were not actually in the possession of the factors; but the defendant contends, that it is conclusively admitted on the face of the record that they were then in their possession; that it was not competent to the plaintiffs to give evidence to the contrary; and that such evidence has no bearing on the case, and ought not to influence the court to interfere with the verdict. The third plea (which

(a) 2 Stra. 1178, 15 East, 44.

In 1816 Gibbs C. J. told Manning that this case was misreported; but that having been acted upon, it could not now be shaken.

And see *Daubigny v. Duval*, 5 T. R. 604; *De Bouchot v. Goldsmid*, 5 Ves. 211; *Martini v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, ib. 484; *Solly v. Rathbone*, 2 M. & S. 298; *Cockran v. Irlam*, ib. 301, n.; *Barton v. Williams*, 5 B. & A. 395, 3 Bingh. 139, 10 B. Moore, 506.

(b) The evil had been partially remedied by the 4 G. 4, c. 83, which enacted, s. 1, that persons in whose names goods were shipped, should be deemed the owners, so as to entitle consignees to a lien thereon in the absence of notice; and by sect. 2, any person might take goods or bills of lading in deposit from a consignee, but without acquiring any further right than was possessed by the consignee.

is pleaded as to four of the bales of silk, in respect of which the dock-warrants were deposited on the 7th October), contains eight distinct allegations, only one of which is traversed by the replication. The first allegation is, that Douglas, Anderson and Co. were the factors and agents of the plaintiffs; the second is, that the four bales of silk were warehoused in the St. Katharine's docks; the third—which is the material allegation now sought to be disputed—is that Douglas, Anderson and Co. were, before and at the time of the pledge and delivery of the dock-warrants, as such factors, intrusted by the plaintiffs with, and were then in possession of, four dock-warrants, for the delivery of four bales of silk, in which warrants the said four bales were described; the fourth is, that Douglas, Anderson and Co., being so intrusted and in possession of the warrants, applied to the defendant for a loan and advance of money, upon the pledge of the four bales as a security; the fifth, that it was agreed [309] between the defendant and Douglas, Anderson and Co., that they should pledge with the defendant the four bales as a security for the money to be advanced, and which the plaintiff agreed to advance on the faith of the said dock-warrants; the sixth, that Douglas, Anderson and Co. being so intrusted with, and in possession of, the dock-warrants, in pursuance of the agreement, did deliver to the defendant the dock-warrants, and did pledge with him the four bales of silk, as a security for the sum advanced. There is no traverse of any one of these allegations. The seventh allegation, which is traversed, is, that the defendant did then advance such sum to Douglas, Anderson and Co., on the faith of the said four dock-warrants. The eighth, which is not traversed, is, that the defendant had no notice before, or at the time of, the pledge, or the advance, or otherwise, that Douglas, Anderson and Co. were not the owners of the four bales. The fourth plea, as to fourteen bales, and the fifth, as to two bales, contain similar allegations, *mutatis mutandis*. The seventh plea, as to the whole sixteen bales, contains a pointed allegation, that at the time of the respective pledges, Douglas, Anderson and Co. were in possession of the dock-warrants. The replication is not *de injuriâ*: it takes issue on one allegation only. It is the same to the third, fourth, fifth and seventh pleas, namely, that the defendant did not advance or lend the sum of money in the plea mentioned on the faith of the dock-warrants, *modo et formâ*. It is not competent, therefore, to the plaintiffs to make it a part of their case, that Douglas, Anderson and Co. were not in possession of the dock-warrants at the time of the pledge and advance. They will contend, however, that the prior allegations in the pleas are mere matter of inducement; and, therefore, that the denial *modo et formâ* in the replication puts in issue the whole plea. But the rule is, that all substantive allegations in pleading, which [310] are not traversed, are admitted; even though denied by a *protestando*, they would not have been put in issue, but would have been admitted for the purposes of this cause. Lord Coke says, *protestation* is an exclusion of a conclusion, that a party to an action may by pleading incur (see Co. Litt. 124 b.). The doctrine established by *Harington v. Macmorris* (5 Taunt. 228, 1 Marsh. 33), and *Montgomery v. Richardson* (5 C. & P. 247), that one part of a record cannot be used as an admission on another part, is not disputed (*d*). But where a distinct and substantive pleading contains several allegations, and issue is tendered and taken as to one only, all the traversable allegations that are not traversed, must be taken as admitted; Com. Dig. Pleader, (G. 2). In *Cowlishaw v. Chealyn* (1 C. & J. 48. See 4 N. & M. 322, n. (a)), which was an action of trespass *quare clausum fregit*, the defendant pleaded that A. C. was seized in fee, and being so seized, granted a right of way by a lost deed. The plaintiff replied that A. C. did not grant, *modo et formâ*: and it was held, that on these pleadings, it was not competent for the plaintiff to give evidence to shew that A. C. was not seized in fee, for the purpose of rebutting the presumption of the grant. The allegation in the present case, of the possession of the dock-warrants by Douglas, Anderson and Co. is either material, or it is not; if not material, *cadit quæstio*; if it be material, it is not put in issue: it might have been traversed, and not having been so, it is admitted, and it is not therefore open to the plaintiffs to contradict the statement by evidence. [Coltman J. The pleas allege that the factors were in possession of the dock-warrants, not at the time of the advance of money to them, but "at the time of the pledge and delivery of the dock-warrants" by them. Wilde Serjt. [311] Therein lies the whole fallacy of the argument upon the other side.] The pleas

(*d*) See also *Knight v. M'Douall*, 12 A. & E. 438; *Gould v. Oliver*, ante, vol. ii. p. 208.

state that the factors were in possession of the dock-warrants at the time of the pledge and delivery thereof "as hereinafter stated;" and they go on to say, that being so in possession of the dock-warrants, they applied to the defendant for an advance upon the pledge of the bales; and that it was agreed, a sum should be advanced upon such security; and that the factors, being so in possession of the warrants in pursuance of such agreement, did deliver to the defendant the dock-warrants as a security for the sum which the defendant did then and there advance to them. It is impossible to read these pleas in any other way than as containing a statement that the factors were in possession of the warrants at the time of the advance of the money. It is contended that the allegation is mere matter of inducement; but that cannot be; for the main argument on the other side is, that the factors' act does not apply unless the warrants be in the possession of the factor at the time of the pledge. If, as argued upon the other side, the denial *modo et formâ* involves a denial of all the allegations, it would have the same effect as the replication *de injuriâ*, or even a larger effect, than that replication is allowed to have; for it would put in issue matter of title, which cannot be done by *de injuriâ*. Besides, the addition of *modo et formâ* to the denial is mere surplusage. *Nevil and Cook's case* (2 Leon. 5), Com. Dig. Pleader (G. 1). It is said that *de injuriâ* could not have been replied in this case. It is immaterial to the defendant's case whether it could or not; but probably it might have been replied, upon the authority of *Crogale's case* (8 Co. Rep. 66), *Selby v. Bardons* (3 B. & Ad. 2; affirmed, 3 Tyrwh. 431, 1 C. & M. 500), and *Solly v. Neish* (5 Tyrwh. 625, 2 C. M. & R. 355, 4 Dowl. P. C. 248). The case of *Parker [312] v. Riley* (3 M. & W. 230), may perhaps be relied upon by the other side upon this point; but that case has no application here, for it only decides, that when a plea to a declaration on a contract amounts to the general issue, the replication *de injuriâ* is bad. [Tindal C. J. There may be a doubt perhaps, whether that replication would be good in this case, where an interest is claimed.] The rule, it is submitted, only applies to real property. But supposing it to apply here, and that *de injuriâ* could not have been replied, that point has no bearing on the case. For *quâcunque viâ datâ*, whether *de injuriâ* could or could not have been replied, the allegation in question is not traversed. *Edmunds v. Groves* (2 M. & W. 642; 5 Dowl. P. C. 775) will also be relied upon. That was an action of assumpsit by the indorsee against the maker of a promissory note. The plea was, that the note was given for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration. The plaintiff replied, that the note was indorsed to the plaintiff without notice of the illegality, and for a good and sufficient consideration; on which issue was joined; and it was held, that, on these pleadings, the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration; but that, in order to compel him to do so, the defendants ought to have proved the illegality by evidence. The question therefore was, on whom the *onus probandi* lay. Lord Abinger C. B. said, "I think it was incumbent on the defendant, who set up as a defence this fact, that the note came into the hands of the plaintiff with notice of its original infirmity, to have produced some evidence to prove it: or, in other words, that the *onus probandi* was on him." And Alderson B. added, "An admission on the record is merely a waiver of requiring proof of [313] those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute: but if any inferences are to be drawn by the jury, they must have the facts, from which such inferences are to be drawn, proved like any other facts." These observations appear at first sight very strong in favour of the other side; but the question there was, which way the presumption lay; and the court decided for the plaintiff against the presumption of illegality. The defendant had offered no evidence of illegality, and therefore the court gave judgment for the plaintiff. The expressions of Alderson B. must be understood with reference to the subject-matter under consideration, and not as contravening an established rule in pleading. *Bennion v. Davison* (3 M. & W. 179), will also be cited on the other side; the marginal note of which is as follows:—"Declaration in assumpsit stated that the defendants were the owners of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board her a quantity of potatoes, to be safely carried by the defendants, as owners of the said vessel, to Liverpool; and in consideration thereof, and of certain freight, the defendants promised the plaintiff, to take proper care of, and safely carry, the said goods as aforesaid: with a breach, that, through the defendants' negligence, they were damaged. Plea, non assumpsit:—

Held, that the ownership of the defendants was not admitted by the plea. A plea denying a particular fact alleged in the declaration, does not admit other immaterial allegations in the declaration. Quære, whether it admits the other material allegations, so as they may be taken as facts to go to the jury? In that case Parke B. said, "It is not necessary to say more than this as to the effect of an admission on the record, that, at all events, the [314] taking issue on one fact averred in the declaration, is only an admission of the other material averments necessary to be proved. Taking it, that here there is an admission of the material allegations, there is no admission of the allegation of ownership, because that is perfectly immaterial" (a). That, therefore, was the case of an immaterial allegation, which could not have been traversed. But here, a plea denying the possession of the dock-warrants by Douglas, Anderson and Company as factors, would have been an answer to the action. The rule may be thus stated: if a material fact be alleged by way of inducement merely, it is not traversable; but if the denial of it would be an answer to the action, then, if it be not traversed, it must be taken as admitted.

With regard to the effect of the evidence, supposing it to be admissible, it is said that on the 7th of October when the four dock-warrants were deposited, no fresh advance of money was made, and that undoubtedly is so; the warrants were changed for others which were not the property of the plaintiffs, but had been previously deposited with the defendant as a security for advances made on the faith of such previous deposit. It is admitted that no lien arises under the factors' act in respect of that exchange. Then, on the 15th of October (the defendant at that time still holding the four warrants deposited on the 7th) an agreement was entered into between the defendant and Douglas and Co. for a new advance of 3000l. on warrants to be immediately handed over by the latter. The 3000l. was advanced on that day. Douglas and Co. had the bills of lading in their possession at the time; and the bales of silk were landed in [315] their name. The warrants, however, were not actually procured till the Monday following, but they were then handed over to the defendant. Can there be any doubt that this advance was made on the security of these dock-warrants? It is not necessary that in every case the factor must hand over the warrants at the actual time of the advance. It was not necessary that they should be in esse at the time. [Vaughan J. Suppose the warrants had been in existence at the time, but the factor had left them at home, and had brought them to the defendant on Monday.] Or suppose he had brought them on the same afternoon—or an hour after the advance—would it be contended, that would not have been sufficient? Or suppose the interval of a few minutes only. No one can do two things at the same moment. The whole must be looked at as one transaction in pursuance of the existing agreement. The advance and deposit must be considered as having taken place *semel et simul*. But it is said that the advance was made on the personal credit of Douglas and Co.; that however is not so. Credit was clearly given; but none in the proper and mercantile sense of the word. Credit was indeed given by the defendant to their statement that they would deposit the warrants—for no human affairs could be conducted without some confidence. The case then stands thus: the defendant had a lien for the advance made on the 17th of October in respect of the ten warrants that were then virtually deposited with him; and also in respect of the four warrants previously deposited on the 7th. The transaction on the 22nd is of the same character as that on the 17th, and the same observations apply—so that in effect the defendant had a lien in respect of all the sixteen warrants. It further appears, that on the 5th of November it was agreed, that any deposits then in the hands of the defendant, should be held as a security for [316] subsequent advances. The 1400l. advanced on that security was clearly advanced on the faith of the ten warrants; so with regard to the advance of 500l. upon the 10th of November. Will it be contended that, as the warrants were not on these occasions in the corporal possession of Douglas and Co., but of the defendant, the transactions were therefore not within the protection of the factors' act? The warrants were in the constructive possession of the factors; and consequently the fair construction of the act will protect these transactions. Again, on the latter occasion, the 10th of November, there was an express agreement that the ten warrants

(a) But Alderson B. added, "It is clear that this averment, being an immaterial one, was not admitted; but it is not to be taken for granted, that, if it had been material, there was an admission of it as a fact to go to the jury."

should be retained as a security for the 500l. then advanced; so that if all the former transactions were struck out, there would still be a lien for 500l., and therefore there was no tortious conversion by the defendant.

[The learned counsel then went into the question of the state of accounts between the plaintiffs and Messrs. Douglas, Anderson and Co.; but it does not appear to be necessary to report this part of the argument.]

As to the other branch of the rule with regard to a new trial, it would be useless to make it absolute unless a repleader were awarded. But this is not a case for the interference of the court. The pleadings are good and sufficient as they stand; and there is no pretence for awarding a repleader. The justice of the case is clearly with the defendant. Both parties are innocent, but one must suffer. And the plaintiffs having enabled their factors to appear as the owners of their property, have no right to make the defendant a loser by their act.

Wilde Serjt., Kelly and James for the plaintiffs. The object of the factors' act was, to prevent the possibility of fraud being committed by English on foreign [317] merchants, who intrusted the former with their property. It introduced guards and cautions which the courts of law will not break down. In this case the plaintiffs are foreign merchants; their factors, the English merchants, are bankrupt; it is a case in which the court will be disposed to render every legitimate assistance to the plaintiffs. It is said that the question is, whether the money was advanced by the defendant on the faith of the dock-warrants; and that the advances may have been made, though the warrants were not then in existence. The fallacy consists in the meaning attributed to the word "faith." The plaintiffs contend that it is used to signify a "deposit," or "pledge" (the words of the act). Therefore, where an advance is made on the faith of the symbols of property, it is indispensable that they should be in existence at the time, for if not in existence, there can be no deposit of them. The third, fourth, fifth and seventh pleas are substantially the same; and the question may therefore be disposed of with reference to the third plea. That plea contains much introductory matter—setting forth, *inter alia*, an agreement between the defendant and Douglas and Co., as to the pledge of the dock-warrants. There would have been no use in traversing that allegation, or any of the others which are mere matter of inducement. The important averment is, that "the said Douglas, Anderson and Co. being so intrusted with, and in possession of, the said dock-warrants," (that is, at the time of the delivery and pledge), "in pursuance of the said agreement, did deliver to the defendant the said four dock-warrants, and did pledge with him the said four bales of silk, as a security for the said sum of money, and which the defendant did then and there advance to the said Douglas, Anderson and Co., upon the faith of the said four dock-warrants." This allegation is traversed by the plaintiffs, *modo et formâ*. There [318] is no necessity to extend that traverse; but it clearly traverses the whole of that distinct allegation in the plea; and the existence of the dock-warrants at the time of the advance is therefore included. In *Coulshaw v. Cheslyn* the plea was, that A. C. did not make the grant as alleged in the declaration. Might not the defendant, under that issue, have shewn that A. C. was not, in fact, in existence at the time of the alleged grant? *De injuriâ* would not have been a good replication in this case, because the defendant claims an interest in the goods through the plaintiffs. No case has been cited in support of the position that that rule is limited to cases relating to real property. *Solly v. Neish* (5 Tyrwh. 625, 2 C. M. & R. 355, 4 Dowl. P. C. 248), *Selby v. Bardons* (3 B. & Ad. 2, 3 Tyrwh. 431, 1 C. & M. 500), *Bennion v. Davison* (3 M. & W. 179), *Noel v. Boyd* (Tyrwh. & Gr. 211, 4 Dowl. P. C. 415), and *Whittaker v. Mason* (3 N. C. 359, 2 Scott, 567), shew that the replication of *de injuriâ* would have been improper; and also that where one particular fact is reversed, all the other facts alleged are not to be taken as conclusively admitted.

The question therefore comes round to this—what is put in issue by the replication here? It is, in terms, whether the advance of money was made upon the faith of the dock-warrants. But how could an advance be made on the faith of documents that were not in *esse* at the time? The delivery of the warrants is clearly in issue, and their existence is unquestionably involved in that issue. In *Cross Keys Bridge Company v. Rawlings* (3 N. C. 71, 3 Scott, 400), the plaintiffs declared against the defendants for carelessly impinging with a ship against their bridge, and thereby doing damage. The defendants pleaded that the plaintiffs improperly narrowed the channel by an obstruction, without this, that the damage was occasioned by the care-

lessness of the defendants; and it was held that under [319] this plea, the defendants were entitled to give evidence in disproof of their carelessness, after they had failed to establish the obstruction imputed to the plaintiffs. That is an authority to shew that the introductory allegations in this case are matter of inducement; and may be disproved. [Tindal C. J. In that case there was a special traverse, and all that preceded it was necessarily matter of inducement, and could not have been traversed.] In *Ridley v. Tindall* (7 A. & E. 134) it was held that where the defendant in assumpsit pleads that he paid, and the plaintiff accepted, moneys in full satisfaction, a replication alleging that the plaintiff did not accept the moneys in full satisfaction, puts the payment as well as the acceptance in issue. That case was decided on the authority of *Webb v. Weatherby* (1 N. C. 502, 1 Scott, 477); where to a plea of payment of 3l. 8s. 2d. in satisfaction and discharge of the defendant's promise, the plaintiff replied, that the defendant did not pay it in satisfaction and discharge, nor did the plaintiff receive it in satisfaction and discharge; and, on demurrer, this replication was held to be good. *Mills v. Barber* (Tyrwh. & G. 835, 1 M. & W. 425, 5 Dowl. P. C. 77) is an authority to the same effect. The judgment of Alderson B. in *Edmunds v. Groves* (2 M. & W. 642, 5 Dowl. P. C. 775. Ante, 312, 313) is strongly in favour of the position contended for on the part of the plaintiffs. In *Firmin v. Crucifix* (5 C. & P. 98. And see ante, vol. ii. p. 220) it was ruled by Lord Lyndhurst C. B. at nisi prius, that the statements in a special plea, on which judgment had been given for the plaintiff on demurrer, could not be used, at the trial of the cause, as an admission on the record by the defendant; but that the cause must be tried on the general issue, without any reference to the special plea at all; and Lord Tenterden C. J. ruled in a similar [320] manner in *Montgomery v. Richardson* (5 C. & P. 247); and this ruling was afterwards upheld by the court. In *Grant v. Kearney* (12 Price, 773) it was held, that protestation of matter in a replication had not the effect of admitting it, so as to dispense with proof of it on the trial of the issue. These authorities establish that there is no admission in the pleadings in the present case to preclude the plaintiffs from shewing that, in fact, the warrants were not in existence at the time of the advances, or,—which amounts to the same thing,—that the moneys were not, in fact, advanced, upon the pledge of the warrants. [Tindal C. J. Suppose the warrants had been locked up in a drawer, the key of which had been mislaid, at the time of the advance.] Still some symbol might have been given to transfer the property. The fact that Douglas and Anderson were possessed of the warrants is clearly in issue; a fortiori, therefore the fact of their existence is in issue; for how could the factors be possessed of them, if they were not in esse? The advances were made on the credit of the factors, upon a promise of the deposit of some warrants, not upon the faith of an actual deposit. The defendant would have been as well satisfied if, on the Monday following, the factors had brought him any other warrants of the same value, as those belonging to the plaintiffs.

But then it is argued, that, even conceding that no lien was created at the time of the original delivery of the dock-warrants, still the defendant would have a lien in respect of the subsequent advances. But if the original delivery did not confer a lien, as not being a transaction protected by the statute, the subsequent dealings between the factors and the defendant would not validate such transaction; and if so, the refusal to deliver the warrants to the plaintiffs would amount to a conversion. In *McCombie* [321] *v. Davies* (6 East, 538. S. C. not S. P., 7 East, 5) it was held, that taking the property of another by assignment from one who had no authority to dispose of it, and refusing to deliver it to the principal after notice and demand of him, was a conversion. Then, with regard to the transaction of the 7th of October, that was clearly a case of exchange or transfer of warrants, and not a pledge or deposit, for money, of negotiable instruments (such warrants not being "negotiable instruments" within the meaning of the factors' act); and, consequently, the transaction was not protected by that act, and no lien was created in respect of it; *Taylor v. Kymer* (3 B. & Ad. 320). Then, it is argued that the actual possession of the warrants by the defendant, at the time the subsequent advances were made, may be considered as the constructive possession of the factors. But that is not so; the warrants would not have passed upon the bankruptcy of the factors to their assignees as being in their possession, order or disposition. Actual possession, or, at all events, the right to actual possession (which is inconsistent with a lien claimed by another party), must exist in such a case. *Greening v. Clark* (4 B. & C. 316, 6 D. & R. 375). [Bosanquet J.

Supposing there had been a valid deposit in the first instance under the factors' act, could not a further advance have been made in respect of such deposit without putting an end to the former transaction? It is submitted that it could not. But at any rate there was no valid deposit in this case.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This was an action of trover to recover the value of sixteen bales of silk. The defendant pleaded, first, not guilty; secondly, that the plaintiffs were not lawfully pos-[322]-sessed; thirdly, as to four of the bales of silk, that Douglas, Anderson and Co. were the factors and agents of the plaintiffs in the city of London, and at the time of the delivery of the dock-warrants after mentioned, the said four bales of silk were warehoused with the St. Katharine's Dock Company; and Douglas, Anderson and Co. were before, and at the time of, the pledge and delivery of the four dock-warrants, as such factors and agents, intrusted by the plaintiffs with, and were then in possession of, four dock-warrants in which the four bales of silk were described and mentioned, and that, "being so intrusted with and in possession" of the said dock-warrants, "they applied to the defendant for the loan and advance of 1900*l.* upon the said four bales of silk, as a security for the repayment of the said sum; and that it was thereupon, to wit, on the 7th of October 1836, agreed between the defendant and Douglas, Anderson and Co. that the said Douglas, Anderson and Co. should pledge with the defendant the said four bales of silk, parcel, &c., as a security for the said sum to be advanced by the defendant, and which sum the said defendant then agreed to advance to the said Douglas, Anderson and Co. upon the faith of the said dock-warrants. And the plea then proceeds to allege, that Douglas, Anderson and Co., being so intrusted with, and in possession of, the said dock-warrants, in pursuance of the said agreement, delivered to the defendant the said dock-warrants, and did pledge with the defendant the four bales of silk as a security for the said sum of money "which sum of money the said defendant did then and there advance and lend" to the said Douglas, Anderson and Co. on the "faith of the said dock-warrants;" and the defendant further states, in his plea, that he had no notice at the time of the pledge, or of the advancing or lending the money, by the said dock-warrants or otherwise, that Douglas, Anderson and Co. were not then actual and bonâ fide owners and proprietors of the said four bales [323] of silk, parcel, &c.; and justifies the detainer of the said silk under such pledge.

The plaintiffs, in their replication to this third plea, say, that the defendant did not advance or lend to the said Douglas, Anderson, and Co., the said sum of 1900*l.*, in that plea mentioned, or any part thereof, upon the faith of the said four dock-warrants in that plea mentioned, in manner and form, &c.; upon which issue is joined.

The fourth plea is pleaded in the same form—as to a pledge of ten bales of silk; the fifth—as to a pledge of two bales of silk; and seventh plea—as to a pledge of the sixteen dock-warrants; to each of which pleas, respectively, a similar replication is pleaded as to the third plea, and issue joined thereon. The sixth and eighth pleas justify the detaining of the silks, in those pleas respectively mentioned, upon a pledge by Douglas, Anderson and Co. to the defendant, under the provisions of the third section of the stat. 6 G. 4, c. 94; the pleas alleging that the plaintiffs, before and at the time of the pledge, were indebted to Douglas, Anderson, and Co., as their factors and agents, in a sum which is still unpaid, and for which they had a lien on the bales of silk; and that they pledged the same to the defendant as a security for a large sum, viz. &c., then due from Douglas, Anderson, and Co. to the defendant; and that the defendant detains the silks, under such pledge, on account of the money then due to him, to the extent of the right or lien which Douglas, Anderson, and Co. then had a right to enforce.

The replications to the sixth and eighth pleas respectively deny that the plaintiffs were indebted to Douglas, Anderson, and Co., as such factors and agents, in manner and form, &c.; upon which issue is joined.

At the trial of the cause before me at Guildhall, the jury found a verdict for the plaintiffs on the first and [324] second issues, upon which no question now arises; and a verdict was entered, by my direction, for the defendant upon the third, fourth, fifth and seventh issues, which, as stated above, justify on the ground of a pledge of the dock-warrants by the factors, under the provisions of the second section of the factors' act (6 G. 4, c. 94); and as to the sixth and eighth issues,—which justify on the ground of a pledge by the factors for a debt due to them from the plaintiffs

before the pledge, to the extent of the factors' lien—the jury found a verdict for the plaintiffs.

The case has come before us on cross motions; one, a motion on the part of the plaintiffs to enter the verdict for them on the issues raised on the third, fourth, fifth, and seventh pleas; or if that be not granted, then for a new trial, with leave, if necessary, to amend the replication as to those pleas; and another motion on the part of the defendant, to set aside the verdict as to the sixth and eighth issues, and for a new trial thereon.

As the only point raised upon the sixth and eighth issues involved an inquiry as to the real state of the accounts between the plaintiffs and their factors, before and at the time of the respective pledges,—upon which the evidence at the trial was far from satisfactory,—the case has stood over for a very considerable time, upon the understanding that the court should be furnished with a state of the accounts agreed upon by both parties; which would at once have put an end to all doubt in whose favour those issues ought to be entered. But as it appears no such agreement can be obtained, but each party has furnished his separate statement of the accounts, differing from each other, we can only determine this part of the question before us by the evidence given at the trial. Now it is clear that the affirmative of these two issues rests with the defendant. It is the defendant who asserts that, before and at the [325] time of the pledge, the plaintiffs (the principals) were indebted to their factors; and the burthen of such proof rests, therefore, upon him. And as the jury, —a jury of merchants,—have given their verdict against the defendant upon this precise point, we ought to be entirely convinced that such verdict is wrong before we can be called upon to set it aside. Indeed, in this case, the special jury at the trial, in the course of the summing up, on these pleas, stated that they had taken down the figures correctly, and that they found there was no debt.

It was objected, on the part of the defendant, that the jury were wrongly directed, at the trial, to give credit to the plaintiffs for the sums raised by the factors upon two former wrongful pledges of their silks, of which the amount had never been brought forward in favour of the plaintiffs. But we do not find that the jury was so directed, but that the whole case as to the debt due to the factors was summed up, and left to the consideration of the jury, as mercantile men, to draw their own conclusion whether there was a debt or not; and we can see no objection, in point of law, if the jury have given credit for those sums in the account between the factors and their principals; for we conceive, on the principle laid down in *Marsh v. Keating* (1 Mont. & Ayr. 592, in Dom. Proc. S. C. 1 N. C. 198, 1 Scott, 5), that Messrs. Bonzi were at liberty, at any time when they found that their factors had wrongfully raised money on their goods, in taking the account between themselves and their factors, to abandon the goods altogether, and to treat the money so wrongfully borrowed by them on the pledge of the goods, as money had and received to the use of themselves. On the other hand, the plaintiffs objected altogether to the principle on which the account was made up by the factors. But, without entering into a discus-[326]-sion on this point, we think this matter was a question peculiarly for the consideration of a jury of merchants; and we cannot see that they have come to a wrong conclusion with sufficient certainty to induce us to set the verdict aside. Perhaps, however, from the conclusion at which we have arrived upon the rule obtained by the plaintiffs, our determination as to the defendant's rule may not be considered of so much importance.

The plaintiffs' rule seeks to set aside the verdict which has been entered for the defendant upon the issues raised on the third and other pleas,—which are grounded on the second section of the factors' act,—and to enter such verdict for the plaintiffs; or that, at all events, there may be a new trial, with liberty to the plaintiffs to amend their replication. As to the third plea, which justifies the detaining of the four bales of silk, on the ground of the pledge made on the 7th of October, we think the rule for entering the verdict for the plaintiffs, so far as that plea is concerned, ought to be made absolute. For it is clear, upon the evidence in the cause, that no advance whatever or loan was made at the time of such pledge, on the faith of those four dock-warrants, but that they were tortiously delivered by the factors to the defendant, in exchange for other warrants of other persons then in his possession, and upon the security of which an advance had been previously made to the factors. Such a delivery of dock-warrants would, according to the case of *Taylor v. Kymer and Another*

(3 B. & Ad. 320), being a delivery in respect of an antecedent debt, give the defendant no greater right in respect of those warrants, than the factors themselves had, at the time of the deposit; and upon the finding of the jury on the sixth and eighth pleas, the factors appear to have had no lien at all. Such a delivery, therefore, is [327] neither within the letter nor the meaning of the second section of the factors' act; it is in effect a wrongful delivery, upon which no part of the advance mentioned in the third plea was made; and the verdict on the issue in that plea ought to be for the plaintiffs. But this observation goes only to the third plea, and the goods covered by it, and does not affect those included in the fourth and fifth pleas, which relate to the delivery of the dock-warrants on the 17th and 24th of October; nor does it affect the seventh plea, which is framed to cover the whole quantity of silks in the hands of the defendant, upon the ground of a subsequent advance upon the whole. As to the verdict on the fourth and fifth issues, the objection taken and argued before us on the part of the plaintiffs, is, not only that the factors were not in possession of the dock-warrants in the fourth and fifth pleas mentioned, at the time the advances were respectively made, on account of which advances they were afterwards delivered, but that the dock-warrants themselves were not even in existence until two days after the advances were made; and as to the issue on the seventh plea, the objection taken is, that the factors were not in the possession of the dock-warrants at the time the pledge mentioned in that plea took place. But we think that neither of these objections is open to the plaintiffs upon the present state of the record.

The real question between these parties,—the question which involves the whole right and justice of the case,—is undoubtedly this, (viz.) whether the factors, at the time of the original pledges of the dock-warrants stated in the respective pleas, were, not only in the possession of those dock-warrants, but intrusted with them by the true owners, within the meaning of the factors' act; a question, however, as we have already stated, which, as the pleadings stand at present, the plaintiffs are estopped from raising. That the act gives no authority to a factor [328] to pledge a dock-warrant belonging to his principal, for an advance of money to the factor, except in cases where the factor is not only possessed of the dock-warrant, but "intrusted therewith by the principal," is now so fully settled by the case of *Phillips v. Huth* (6 M. & W. 572), and the still later case, in the court of Exchequer Chamber, of *Hatfield and Another v. Phillips and Others* (9 M. & W. 647), that it is quite unnecessary to do more than refer to the judgments in those cases, and the reasons there given in their support; and, therefore, the right of the owners of these silks on the one part to recover them, and of the defendant on the other part, who has advanced money upon them to the factors, to retain them, ought to depend on the evidence which the defendant can produce that the factors were intrusted with the dock-warrants before and at the time of the respective pledgings; that is, either evidence of direct authority in the particular instance, or of a course of dealing between the owners and the factors on former occasions, such course of dealing being known and recognised by the owners, or of the course of trade generally observed between principal and factor with respect to this particular commodity. For the second section clearly enacts, that it is only such factor "who is" "intrusted with and in possession of any bill of lading, dock-warrant," &c. that shall be deemed and taken to be the true owner, so far as to give validity to any contract or agreement entered into by the person so intrusted and in possession for the sale, disposition, deposit or pledge of any goods, as a security for money advanced or given upon the faith of such several documents.

But, looking at the issue taken on each plea, we are of opinion, that, for the purpose of each separate plea, the plaintiffs must be taken to have admitted in each [329] plea that "before and at the time of the pledge mentioned in that plea the factors were intrusted by them with, and were then in possession of," the several dock-warrants upon which the respective advances are alleged to be made. In each plea there is a distinct separate allegation in the very terms above stated. It is a material allegation; and the subsequent allegation in the plea "that the defendant advanced and lent his money to the factors upon the faith of the said dock-warrants,"—upon which precise allegation alone the issue is taken by the plaintiff in his replication,—does not, in any manner, involve the former; which former allegation, not being denied, must, upon the general principles of pleading and the authorities, be considered to be admitted by these plaintiffs for all the purposes of the issue taken on each separate plea. See *Cowlishaw v. Cheslyn* (1 Crompt. & Jerv. 48) and *Bingham*

v. Stanley (1 Gale & Dav. 237, S. C. 2 Q. B. Rep. 117). The issue taken by the plaintiffs does indeed, in its natural sense and meaning, involve no more than the precise question, whether the advance was made on the faith of the dock-warrants; for whether the factors were intrusted with the dock-warrants or not at the time of the pledge, if the advance was not made on the faith of the dock-warrants but on some other warrant, the case is as completely out of the provisions of the second section of the factors' act as if the factors had not been intrusted with them by the true owner. And this consideration distinguishes the present case from that of *Ridley v. Tindall* (7 A. & E. 134), referred to on the part of the plaintiffs; for there, the denial in the replication that the money was accepted in satisfaction, was, necessarily, at the same time, a denial of the payment being in satisfaction—the payment in satisfaction and the acceptance [330] in satisfaction being one and the same act; for unless the money were accepted it could not be a payment, but a tender only: whereas, in the present case, the two propositions are not identical; the factors may have been in possession and may have delivered the warrants, but still the lender may not have advanced his money on the faith of such delivery. The cases of *Edmunds v. Groves* (2 M. & W. 642) and *Bennion v. Davison* (3 M. & W. 179) appear to be clearly distinguishable from the present.

We therefore think the plaintiffs are not entitled to have the verdict entered for them either on the fourth, fifth, or seventh issues, because, upon the evidence, the money was advanced by the defendant to the factors upon the occasion of each of these pledges, on the faith of the goods; which is all that is put in issue; nor could the plaintiffs be so entitled, on a new trial, although the factors were not proved to be intrusted with the dock-warrants, whilst the pleadings remain in their present state. But as the justice of the case manifestly requires that the plaintiffs should be at liberty to go to a new trial, and to put in issue the possession of the factors, and their being intrusted with the dock-warrants at the time of the respective pledges made, we think the plaintiffs should be allowed to amend their replication for this purpose; but that, in such case, they must pay the costs of the former trial.

The rule of the plaintiffs must therefore be disposed of, by making it absolute for entering the verdict in their favour on the issue raised on the third plea, or for a new trial altogether, with liberty to amend the replication; in which latter case it must be on payment of costs. And as to the rule obtained by the defendant, we think it must be discharged (c).

(c) By the 5 & 6 Vict. c. 39, s. 1, after reciting the 6 G. 4, c. 94, and that "whereas advances on the security of goods and merchandize have become an usual and ordinary [331] course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to bonâ fide advances upon goods and merchandize as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the security thereof; and whereas much litigation has arisen on the construction of the said recited act, and the same does not extend to protect exchanges of securities bonâ fide made, and so much uncertainty exists in respect thereof, that it is expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis," it is enacted, that "any agent who shall be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bonâ fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

By sect. 2 it is enacted, "that where any such contract or agreement for pledge, lien, or security shall be made in consideration of the delivery or transfer to such

[333] HODSON v. PATTERSON. May 24, 1842.

Where the defendant had obtained a rule for the costs of the day for not proceeding to trial, and the master, by his allocatur, indorsed on the rule, had ascertained the amount of such costs, the court thought it unnecessary to grant the defendant a rule for the payment of that amount, in order to entitle him to issue execution for it under the 1 & 2 Vict. c. 110, s. 18.

In this case the defendant had made a rule absolute for the costs of the day for not proceeding to trial. The master had taxed these costs at 80l. 1s. 6d., and had indorsed his allocatur on the rule to that effect.

Bompas Serjt. now applied for a rule, calling upon the plaintiff to shew cause

agent of any other goods or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance, within the true intent and meaning of this act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money: provided always, that the lien acquired under such last-mentioned contract or agreement, upon the goods or documents deposited in exchange, shall not exceed the value, at the time, of the goods and merchandize which, or the documents of title to which, or the negotiable security which shall be delivered up and exchanged."

[332] Sect. 3 provides that the statute is to be construed to protect only *bonâ fide* transactions, without notice that the agent pledging is acting without authority, or *malâ fide* against the owner.

And by sect. 4 it is enacted, that "any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid; and all contracts pledging or giving a lien upon such document of title as aforesaid, shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relate; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him, or on his behalf; and where any loan or advance shall be *bonâ fide* made to any agent intrusted with, and in possession of, any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing, to consign, deposit, transfer or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title, within the meaning of this act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money, or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this act; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence."

why he should not pay to the defendant or his attorney the sum so allowed by the master.

The learned serjeant suggested that the rule for the costs of the day might not be sufficient for the defendant to issue execution (under the 1 & 2 Vict. c. 110, s. 18 (a)¹) for the sum allowed, inasmuch as such rule did not mention any specific sum. [Tindal C. J. When the costs are allowed by the master, is it not the same as if they were mentioned in the rule?] In *Jones v. Williams* (11 A. & E. 175. S. C. in Exch. 8 M. & W. 349), where, under an agreement of reference, a sum was awarded to be paid by the plaintiff to the defendant, and afterwards the agreement was made a rule of court; it was held that the plaintiff could not, by virtue of the rule of court, issue execution for the sum under the statute, because the eighteenth section was applicable [334] for such purpose only where the money payable by the rule was expressed in the rule itself. [Maule J. In such a case the rule would merely be to obey the award. Tindal C. J. The statute speaks of rules "whereby any sum of money shall be payable." Was not the rule for the costs of the day such a rule, though the exact sum was to be ascertained by the officer of the court?] If the rule now applied for is necessary, and is made absolute with costs, the difficulty may certainly arise, that the defendant may have to apply for a separate rule for these costs, and so on ad infinitum. [Cresswell J. referred to *Neale v. Postlewaite* (1 Q. B. Rep. 243), where, by a rule of court, the costs of an attorney against his client were referred to taxation by the master, on the usual undertaking to pay what should be found due. The master having made his allocatur, and the money not having been paid, the court made an order that the client should pay the money, but that the attorney should abandon his right to move for an attachment; the purpose of applying for such order being, that the attorney might become a judgment creditor under the statute.] So in *Doe v. Amey* (8 M. & W. 565), it was held that the court had authority, under the statute, to order a party by rule, to pay a specific sum of money awarded by an arbitrator to be paid by him; and that, on such rule being made absolute, execution might issue against the party for the amount so specified in the rule. [Tindal C. J. You cannot take the rule to the officer to register, under the nineteenth section of the act, until you have the allocatur; but the moment you have the allocatur, it seems to me, it becomes a rule of court to pay the sum allowed.] It is clear the defendant might proceed now by attachment; and the object of the act seems to have been to give the remedy against [335] the property instead of proceeding against the person of a party (a)².

TINDAL C. J. I think that, at all events, the court is not called upon in this case to grant what would be a novel rule. There is no precedent for such a proceeding, and no case similar to the present. The decisions which have taken place on awards stand upon a different footing. In those cases it was not a necessary consequence of the submission to arbitration that any money would become payable. The parties therefore were obliged to go to the court to obtain a rule for payment of the money awarded. As at present advised, I cannot help thinking, that when the condition was complied with by the master in making his allocatur for a certain sum, the rule became a rule of court for the payment of that particular sum. I do not wish, however, to be understood as giving a regular decision on that point (b). But I do not think it necessary to grant a rule in this case.

(a)¹ Which enacts "that all rules of courts of common law, &c., whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, &c., charges, or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act, &c.; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, &c., charges, or expenses, are by such orders or rules, &c. respectively directed to be paid."

(a)² The statute enacts, that rules, &c. for the payment of money, shall have the effect of judgment. The statute, therefore, not only subjects the property of the party to execution, but gives a more direct remedy against the person (by ca. sa.) than could formerly have been had by attachment.

(b) See *Jones v. Williams*, 8 M. & W. 349.

C. P. XII.—5*

COLTMAN, MAULE and CRESSWELL JJ. concurred.
Rule refused.

[336] SCOTT AND ANOTHER v CHAPPELOW. May 25, 1842.

Where, in assumpsit, the plea admitted the contract in fact, but sought to avoid it on the ground of illegality, it was held that such plea set up matter of excuse, and that *de injuriâ* was a proper replication.—To an action by the drawers against the acceptor of two bills, the defendant pleaded that an illegal company had been formed, that they had accepted bills in furtherance of the purposes of the company, that the plaintiffs had become the indorsees and holders of two of such bills, and that it was agreed between the plaintiffs (having notice) and the company that the bills should be renewed; that, in pursuance of such agreement, the company accepted the bills in suit (the defendant then being a member), and upon no other consideration: Held, that the replication *de injuriâ* was good.—Held also, that the marginal note in the demurrer-book, of the points to be argued, is for the information of the court, and not for that of the parties; and that a party whose pleadings are specially demurred to may attack the pleadings of the other side, although he has not set down the points upon which he intends to object.

Assumpsit. The first count of the declaration stated that the plaintiffs, by the name of "Claude Scott and Co.," heretofore, to wit, &c., made their bill of exchange in writing, and directed the same to the defendant, under the name, &c. of "The Talacre Coal and Iron Company," and thereby required the defendant to pay to the plaintiffs 126l. 12s. 2d., with interest thereon, &c.; and the defendant, to wit, by one W. W., his agent in that behalf, then accepted the said bill, and promised the plaintiffs to pay, &c.

Second count, upon a similar bill between the same parties, for the same sum, at six months.

Third count, upon an account stated.

Fourth plea: That before the making of the bills of exchange hereinafter in this plea mentioned, or any of them, and before the making of the bills of exchange in the said first and second counts mentioned, or either of them, to wit, on, &c., it was agreed between Lewis Levason, George Frederick Baker, and divers other persons, in manner following; that is to say, that the said L. L., G. F. B., and the said other persons, should form a public joint-stock company, under pretext of carrying [337] on by means of such company the trade and business of mining, and that the said company should consist of a great number of members, to wit, of 5000 persons; and that the said company should become possessed of, and interested in, divers lands, tenements, hereditaments and personal estate; and the profits, from time to time arising from the trade and business which the said company might carry on, should be divided into a great number of shares, to wit, 23,600 shares; and that the interest in such shares should be vested in the said members of the said company in various proportions; and that the interest in the said lands, &c., should be vested in the said members of the said company in proportion to the numbers of the said shares in which they were respectively interested as aforesaid; and that the said company should act as a corporate body; and that the same shares should be transferable without any restriction, notwithstanding that the said company had not obtained, and notwithstanding that the said company might not obtain, before or during the time of their so acting as such corporate body, or before or during the time while the said shares should be so transferable without restriction, any act of parliament, or charter of incorporation, or any grant by letters patent or otherwise, enabling the said company so to act as a corporate body, or legalising the transfer of the said shares without restriction as aforesaid. And further, that after the making of the said agreement, and before the drawing of the bills of exchange hereinafter in this plea mentioned, or any of them, and before the drawing of the bills in the said first and second counts mentioned, or either of them, to wit, on the day and year last aforesaid, the said L. L., G. F. B., and the said other persons did succeed in forming the said company, and that the same was then formed by, and then consisted of, the said persons, who so agreed to form the [338] same, being a great number of persons, to wit, 2000 persons, who then became and were the members of the said company; and that the said

company did then, in pursuance of the said agreement, purchase for the purposes of the said company, and did then become and be, and thence continually up to and at the several times of the drawing of the several bills of exchange hereinafter mentioned, and at the time of the making of the said bills of exchange in the said first and second counts mentioned, were, for the purposes of the said company, possessed of and interested in divers lands, &c., and did during and at the several times last aforesaid, carry on divers trades and businesses; and that the said lands, &c., whereof and wherein respectively the said company were so possessed and interested respectively, and the profits from time to time arising from the trade and business which they so carried on as aforesaid, were, during and at the several times last aforesaid, divided into a great number of shares, to wit, 23,600 shares; and that the interest in the said shares, during and at the several times last aforesaid, was vested in the members of the said company, for the time being, in various proportions; and that the interest in the said lands, &c., at the said several times last aforesaid, was vested in the members of the said company, for the time being, in proportion to the number of such shares in which such members, for the time being, respectively were interested as aforesaid; and that the said members of the said company were subject to the liabilities of the said company, as between themselves, in like proportion; and further, that during and at the several times last aforesaid the said company did presume to act, and did act, as a corporate body, and did profess that the shares aforesaid were transferable without any restriction, and did pretend to transfer the said shares; and that during and at the said several times last aforesaid, the [339] said shares were transferable without any restriction; and that, at the said several times of the making of the said agreement, and of the formation of the said company, and during and at the said several times last aforesaid, the said undertaking and project of the said company was an attempt tending to the common grievance, prejudice and inconvenience of great numbers of the subjects of Her Majesty, the then and now Queen, in their trade and other lawful pursuits; and further, that no act of parliament was ever passed, and that no charter of incorporation or letters patent ever was or were made or granted, whereby the said company was authorised to act as a corporate body, or whereby the transfer of the said shares or the existence of the said company was rendered legal; of all which premises the said L. L. and G. F. B. always had notice and knowledge. And whereas at the said time when it was so agreed to form the said company, the said L. L. and G. F. B. were interested in divers of the lands and tenements and hereditaments afterwards purchased by the said company in the manner hereinafter mentioned, and had expended divers sums of money in mining operations therein, and were also possessed of divers machinery and effects then being thereupon; and it was then agreed between the said L. L. and G. F. B., and the other members of the said company, that the said company should purchase the interest of the said L. L. and G. F. B. in the said lands, &c. (including the value of the said mining operations), and the said machinery and effects, from the said L. L. and G. F. B., for the purposes of the said company; and the said company then did accordingly, for the purposes of the said company, purchase from the said L. L. and G. F. B., and then became and were possessed of and interested in, for the purposes of the said company, the interest of the said L. L. and G. F. B. in the said lands, &c. [340] (including the value of the said mining operations therein), and the said machinery, &c., which said lands, &c., machinery, &c., then became and were parcel of the lands, tenements, hereditaments and personal estate whereof and wherein the said company is hereinbefore alleged to have become possessed and interested as aforesaid. And further, that at the said time of the said agreement between the said company and the said L. L. and G. F. B., it was agreed that as an equivalent for, and in exchange and payment for, the said interest of the said L. L. and G. F. B. in the said lands, &c. (including the value of the said operations), and the said machinery, &c., the said L. L. and G. F. B. should be paid by the said company divers sums of money, amounting to the sum, to wit, of 20,000L, and that the said L. L. and G. F. B. should receive from the said company, and become and be the owners of divers, to wit, 1100 of the said shares. And further, that after the making of the said last-mentioned agreement, to wit, on the day and year last aforesaid, the said company accepted divers negotiable bills of exchange, drawn by the said L. L. and G. F. B. jointly, and by the said L. L. and G. F. B. severally, upon the said company, for divers sums of money, amounting, to wit, to the sum of 20,000L, and then delivered the said bills to the said L. L. and G. F. B. on

account of the said sum so agreed to be paid to them as aforesaid; and the said L. L. and G. F. B. then accepted the said bills from the said company, on account of the said sum so agreed to be paid to them as aforesaid. And further, that afterwards, to wit, on, &c., the plaintiffs became and were the indorsees and holders of two of the said bills so accepted by the said company and delivered to the said L. L. and G. F. B. on the account aforesaid. And further, that afterwards, to wit, on the day and year last aforesaid, it was agreed between the said company and the plaintiffs, [341] that the said bills, whereof the plaintiffs were the indorsees and holders as aforesaid, and which were then due and payable, should be renewed in manner hereinafter mentioned; and thereupon afterwards, to wit, on the day and year last aforesaid, the said company (the defendant then being a member thereof and shareholder therein) accepted the bills of exchange in the said first and second counts of the declaration mentioned, and then delivered the same to the plaintiffs in lieu of, and in satisfaction for, the said bills of exchange, whereof the plaintiffs were the holders and indorsees as aforesaid, and upon no other account and for no other consideration whatever: and further, that the plaintiffs always, before, and at, the said several times of their becoming indorsees and holders of the said bills hereinbefore in that behalf mentioned, and of the making of the agreement with them in that behalf hereinbefore mentioned, and of the said accepting of the said bills in the said first and second counts of the declaration mentioned, and before the plaintiffs ever gave any value or consideration for the said bills whereof they were the holders and indorsees as aforesaid, or either of them, to wit, on the day and year last aforesaid, had notice and knowledge of the premises and matters in this plea mentioned, and every of them. Verification.

Replication; *de injuriâ*.

Special demurrer, assigning for causes, that the matter pleaded in the said last plea, so far as it relates to the first count of the declaration, is not matter of excuse, or any such matter as can be replied to, in the manner in which it is replied to, in the said replication, so far as it relates as last aforesaid; and that the matters alleged in the said last plea ought to have been traversed directly, and in the negative of the terms therein used or otherwise, and not by the general replication *de injuriâ*, as they are traversed by the said replication; and that the [342] said last plea so far as it relates to the said first count, contains matter, which is either matter of denial of the defendant having been ever liable to perform the promise in the first count alleged, or else is matter which discharges him from the performance of the said promise; and that the said last plea, so far as it relates to the said first count, shews that the said promise in the said first count mentioned, was illegal and void in its inception, &c. Joinder.

The plaintiffs, in their marginal note, stated that, besides contending for the propriety of the replication, they meant to insist that the plea afforded no answer to the action, and that it was bad in substance.

Gaselee Serjt. for the defendant, first objected that it was not competent to the plaintiff to attack the plea upon this marginal note. From *Parker v. Riley* (3 M. & W. 230) it appears that where there is a demurrer to a pleading, and the party joining in demurrer does not state in the margin of his demurrer-book any objection to a former pleading, he is not entitled to object to its sufficiency on the argument; especially where it is only cause of special demurrer. [Maule J. The only effect of this objection would be, to put off the argument for the present (b). If the plea is bad in substance, it must be set aside either here, or in error. The marginal note in the demurrer-book is meant for the information of the court, and not for that of the other party. The origin of the rule clearly shews that the marginal note was for the use of the court.] The new rule, Reg. Gen. H. T. 4 W. 4, r. 2 (*vide infra*, 344, n.), [343] must have been intended for the benefit of the parties. The defendant here is in this situation, that he cannot tell what point he has to argue.

TINDAL C. J. The court do not complain of the difficulty. The marginal note is for their advantage, not for that of the parties. The plaintiffs say the plea is bad

(b) In a case cited as *Coleby v. Graves*, by Knowles, amicus curiæ, in *Parker v. Riley*, 3 M. & W. 235, where no notice had been given by the party who joined in demurrer of the objections which he intended to raise, the court of Queen's Bench is said to have postponed the case, in order that the points might be stated in the margin of the demurrer-books.

in substance ; by which they must mean that the whole is worth nothing. It does not seem to me that there is any thing in the objection (a).

(a) In the court of King's Bench a rule of M. 17 Car. 1 (A.D. 1641), required the delivery of the paper books to the judges. (Rules and Orders in K. B. and C. P. 1739.) In the same court a rule was made, E. 2 Jac. 2 (A.D. 1686), further regulating the delivery of the paper-books to the judges, and adding, "that the exceptions, which shall be insisted on, upon the argument, shall be marked in the margin of those books." (Ib.) Formerly these marginal notes do not appear to have been communicated to the adverse party. From a passage in Bohun's *Institutio Legalis* (3d edit. 1724), it appears to have been not unusual for a party to demur specially, and then catch his opponent by bringing on something else that was naught in substance. The above rule was revived by R. H. 38 G. 3 (A.D. 1798) ; but in *Appleton v. Binks* (A.D. 1804), 1 J. P. Smith Rep. 361 (S. C. not S. P. 5 East, 148), where there was a general demurrer, the court complained that in that case, as in some others, the points to be argued were omitted to be stated in some of the papers. In the demurrer-books, made up by the defendant, they were stated ; and Lawrence J. observed that, the party who objects to the pleadings and makes the points should leave a copy of them with the two other judges to whom he does not deliver paper-books.

In Hilary term, 48 G. 3 (1808), the following rule was promulgated in this court : "It is ordered, that from henceforth, in all special arguments in this court, the exceptions which are intended to be insisted upon, shall be marked in the margin of the books to be delivered to the respective judges ;" (1 Taunt. 203) being to the same effect as the rules in K. B.

In *Clarke v. Davies*, 7 Taunt. 72, 2 Marsh. 386 (1816), upon a general demurrer to a plea in bar in replevin, it appeared that the defendant had delivered paper-books, in the margin of which were stated two points, which the defendant meant to make on the argument, to invalidate the plea ; and the plaintiff had delivered paper-books, in the margin of which was stated a point which the plaintiff meant to make on the argument, as shewing that the defendant's cognizance was bad ; the court were at first inclined to consider that the effect of the practice established in this respect, was, that the plaintiff, by delivering paper-books which contained that point only, confined himself to that point, and abandoned the defence of the points, made by the defendant, as untenable, and could not be permitted to argue them ; but Vaughan Serjt. for the plaintiff, stating that the parties had supposed it sufficient, if each called the attention of the court to those points which himself intended to make, and that it was for the opposite party to supply the points which he intended to make, the court permitted the plaintiff to speak to all the points.

In Trin. T. 11 G. 4 (1830) this court made the following rule :—"It is ordered, that from henceforth, in all special arguments in this court, notice in writing of all the points which are intended to be insisted upon by each of the parties, be delivered to the judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the judges, or on separate paper ; and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application." (6 Bingh. 802.)

In *Grottick v. Phillips* (9 Bingh. 721, 723 (1833) when the case was called on for argument, it appearing that the party demurring had omitted to state in the margin of the paper-books the points to be discussed, the court were about to give judgment for the plaintiff, but upon the application of Coleridge Serjt., allowed the matter to stand over—intimating at the same time, that in future the penalty of immediate judgment would always be attached to the omission by the party demurring to state the points of his argument.

The other courts, without adopting so strict a course, appear to have limited the parties upon the argument to the points stated in the margin. See *Darling v. Gurney*, 2 Dowl. P. C. 101, 104 (1833). S. C. not S. P. 2 C. & M. 226.

By the new rules Reg. Gen. H. T. 4 W. 4 (1834), r. 2, it is required that "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated ; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea. Provided

[344] Gaselee Serjt. Secondly, the replication is bad ; for it puts in issue matter of record. The plea states that the company had no charter ; which is matter for the [345] court. [Tindal C. J. That objection is not pointed out by the defendant as a cause of demurrer.]

Then the plea is not matter of excuse ; it is pleaded either in denial or in discharge of the contract alleged in the declaration, and to such a plea the replication *de injuriâ* is insufficient ; *Whittaker v. Mason* (2 New Cases, 359). The plea discloses a contract which was illegal in its inception, and states that the plaintiff knew of the illegality ; this therefore is clearly not the admission of a contract, the non-performance of which the defendant seeks to excuse. In *Parker v. Riley* (3 M. & W. 230) it was held, that when a plea to a declaration on a contract amounts to the general issue, the replication *de injuriâ* is bad ; and it was intimated as the opinion of the court, that it is also bad where the plea is in avoidance of the contract itself. In *Humphreys v. O'Connell* (7 M. & W. 370), indeed, to an action by an indorsee against the acceptor of a bill of exchange, where the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff, before the indorsement to him, had notice thereof, the replication *de injuriâ* was held good ; but that was upon the ground that the plea did not seek to avoid the contract, but [346] only contained matter of excuse. [Tindal C. J. That case may be supported upon the supposition that the plea was considered bad.] The case was decided upon the authority of *Isaac v. Farrar* (Tyrwh. & Gra. 281, 1 M. & W. 65) ; where, in assumpsit by the indorsee against the maker of a promissory note, the defendant pleaded special circumstances, which, he alleged, amounted to a gross fraud and imposition upon him ; and that the note had been indorsed without consideration to the plaintiff, and with notice. The replication *de injuriâ* was held sufficient there, upon the same ground, namely, that the plea amounted only to matter of excuse for the non-performance of the promise, and to one ground of defence only. In the judgment of the court, as delivered by Lord Abinger C. B., it is said : "The plea confesses that the defendant made the note in question, and indorsed it to Richardson, who indorsed it to the plaintiff, which constitutes a *primâ facie* case of liability, and an implied promise to pay the amount to the plaintiff ; and it avoids the effect of that admission, by shewing that the note was made and indorsed without value *bonâ fide* paid, whereby the defendant was excused from performing that promise." In that case there was no illegality in the contract ; for there is nothing illegal in accepting a bill without consideration ; but here, there is illegality alleged which vitiates the whole contract. [Cresswell J. The want of consideration in that case did not arise after the contract.] In this case the defendant alleges, in effect, that there was no contract at all, inasmuch as that declared on was illegal. In *Solly v. Neish* (2 C. M. & R. 355, 5 Tyrwh. 625), in assumpsit for money had and received, the plea was that the money so received by the defendant, was the amount of the proceeds of the sale of goods consigned to him by P. and C. as their own goods, with the plaintiffs' knowledge and assent (but which, in fact, were the goods of P. and C. and the plaintiffs jointly), as a security for any money the defendant might advance to P. and C. ; with power of sale to reimburse himself for such advances ; that the defendant not knowing that the plaintiffs had any interest in the goods, made advances to P. and C. to the amount of 6000l. on the security of the goods which he afterwards sold, concluding with a set-off. It was held that this plea was—not matter of excuse, but—in denial of the promise, and that, therefore, the replication was bad (a). [Maule J.

that the party demurring may at the time of the argument insist upon any further matters of law, of which notice shall have been given to the court in the usual way."

This rule has not been considered by this court as altering the former practice with respect to the marking of the points for argument, although the penalty denounced in *Grottick v. Phillips* does not seem to have been enforced ; *Brogden v. Marriott*, 2 New Ca. 473, 479 (1836).

But see *Lacey v. Umbers*, 3 Dowl. P. C. 732 (1835), in the Exchequer (in which court there does not appear to have been any rule corresponding with that in this court of T. T. 11 G. 4). *Verbeke v. Pearce*, 1 Arnold, C. P. 244 (1838).

In *Ross v. Robeson*, 3 Dowl. P. C. 779, a defective marginal note was permitted to be amended by the court of Exchequer.

(a) It was held bad also on the ground that the plea claimed an interest in the money, and derived an authority from the plaintiff.

It was competent to the defendant in that case to deny the promise, being an action for money had and received, to which non-assumpsit would have been, under the circumstances, the proper answer. But in an action on a bill of exchange, like the present, the defendant cannot traverse the promise (*b*)¹. It would be strange if it were considered demurrable not to deny the promise, when the rule says it shall not be done.] The contract here is denied in the legal way. [Maule J. If so, may not such denial be traversed in the simplest way—by *de injuriâ*?] Not unless the plea offer matter of excuse. In *Jones v. Senior* (4 M. & W. 123), to a declaration on bills of exchange drawn by M. and accepted by the defendant, and indorsed by M. to the plaintiff, the defendant pleaded, that before the accepting of the bills, he was indebted to M. in a larger amount, and that they were accepted on account of part of the debt; that after the acceptance, and before the bills became due, &c., the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable [348] to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7s. in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of the suit, M. paid to the plaintiffs, and they received from him divers sums of money, amounting to a sum sufficient to satisfy all consideration whatever for, or in respect of, the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs, in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them, or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills without consideration, and in fraud of the defendant and his creditors. To this plea, amounting to matter of discharge, and not of excuse, the replication *de injuriâ* was held bad. [Maule J. In *Humphreys v. O'Connell* the replication was held good. How is that case distinguishable from the present? Here, there is a new contract with the plaintiff by means of another bill; in that case there was a new contract by the indorsement.] The new bills in this case are tainted by the illegality of the original contract. As in *Chapman v. Black* (2 B. & Ald. 588), where a bill of exchange, affected with usury, being in the hands of an innocent holder, he, on being informed of the [349] usury, took a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by the party who had accepted the former bill; and it was held that the holder could not maintain an action against the acceptor on this substituted bill; upon the principle, as stated by Lord Tenterden C. J. in giving the judgment of the court, "that a substituted security generally stands in the same situation as the original." In *Humphreys v. O'Connell*, Parke B. intimates that his opinion might have been different if the question had arisen between the original parties, as it does here. [Coltman J. Is there any case where it has been expressly decided, that where the contract is good *primâ facie*, but the defendant, by his plea, seeks to avoid it on the ground of illegality, the replication *de injuriâ* is not sufficient?] There is no case expressly in point, but such appears to have been the leaning of the courts.

Channell Serjt., *contra*. The replication *de injuriâ* is properly pleaded in this case. It is not denied that to admit of such a replication, a plea must offer matter in excuse; but, it is submitted, that such is the effect of this plea. It admits the existence of the contract in fact, and sets up an excuse for the non-performance of it. The cases cited on the other side are all distinguishable. *Parker v. Riley* (3 M. & W. 230) is not an express decision on the point; it is only intimated by the court that if the plea was in avoidance of the contract, the replication *de injuriâ* might be bad (*b*)². In *Solly v. Neish* (2 C. M. & R. 355, 5 Tyrwh. 625) the plea amounted to a denial of the facts from which the legal result would follow, that the money was had and

(b)¹ See Pleading Rules, H. 4 W. 4, Assumpsit 2, 10 Bingh. 470, 3 N. & M. 8.

(b)² "It either amounts to the general issue, or is an avoidance of the contract itself; on the first supposition, it is clear the replication is bad; on the other, we are strongly inclined to think it so." Per Cur. 3 M. & W. 237.

received [350] to the use of the plaintiff; and the court said that the plea itself would have been held bad on special demurrer. [Maule J. The ground of the decision that the replication was bad in that case, was, that it came within the exception in *Crogate's case* (8 Co. Rep. 66 b.), as setting up an authority under the plaintiff (b). In *Jones v. Senior* (4 M. & W. 123) the plea shewed a discharge, as the facts stated amounted to a constructive payment in point of law. *Chapman v. Black* (2 B. & Ald. 588) was decided under the old rules, and has no application to the present case. *Humphreys v. O'Connell* (7 M. & W. 370) was decided on the same ground as *Isaac v. Farrar* (1 M. & W. 65), which was similar to *Noel v. Rich* (5 Tyrwh. 632, 2 C. M. & R. 360). That was an action by the indorsee against the drawer of a bill of exchange; the defendant pleaded that his indorsement was in blank; that the defendant delivered the bill to A. (not a party to the bill), only to get it discounted for him; that A. fraudulently, and in violation of that special purpose, delivered it to B. to secure a debt due from A. to B.; of all which the plaintiff had notice; the plaintiff replied, not exactly *de injuriâ*, but what was similar in effect; "that the defendant broke his promise, without the cause alleged by him in his plea; the court held the plea was bad; but intimated a strong opinion that to such a plea, if good, the replication would have been proper. This case, of course, is not cited for the point decided, but for an illustration of the principle on which the plaintiff here relies. Lord Abinger C. B., in giving judgment, said, "Now, if a man puts his name to a bill of exchange, that is, *primâ facie*, a promise, as it is a transferable security, to pay the holder; a promise resulting, as matter of law, from the nature of the instrument. All the cases, therefore, [351]—except where the promise is denied by denying the handwriting, are properly matter of excuse for the non-performance of the promise." Therefore it may be considered that in an action on a bill of exchange, if the handwriting be not denied, the promise is admitted, and every other defence to the action must be by way of excuse, unless indeed where it is positive matter of discharge. The plea in this case clearly amounts to matter of excuse; it states, in effect, that the first set of bills were tainted with illegality—that they were mere waste paper; and that as to the second set, there was no consideration for them; so that the plea amounts to a statement that there was no consideration; and to such a plea that the replication *de injuriâ* is clearly proper. (He was then stopped by the court.)

Gaselee Serjt., in reply. *Noel v. Rich* is one of the earliest cases on the subject, and, as applicable to the present case, contains only dicta thrown out by the court. The plea in *Jones v. Senior* amounted, in fact, to a plea of accord and satisfaction. In *Solly v. Neish* the decision rested on two grounds, one of which is in favour of the present defendant. All the cases shew that where the illegality of a contract is set up between the original parties, it is not matter of excuse for its non-performance; for, illegality in the inception of a contract, in the same manner as fraud, renders it void *ab initio*.

TINDAL C. J. I think, under the circumstances stated in this plea, that *de injuriâ* is a good replication. The plea, as it appears to me, amounts to no more, in substance, than an excuse for the non-payment of the bills by the defendant, by reason of there having been no consideration for his acceptance of them; and to such a plea, *de injuriâ* is a proper replication. What in this [352] case is the substance of the defence? It is that certain persons had entered into a speculation to form a company, which, it is alleged, was against public policy under the statute of George I. (6 G. 1, c. 18, ss. 18, 19, the bubble act); and that certain bills of exchange, accepted by the company, came into the hands of the plaintiffs as indorsees. But that does not make them parties to the original bills, or to the original illegal transaction. Then, in a subsequent averment, it is stated that the plaintiffs took these bills with notice of their illegality, without affirming or denying whether the plaintiffs had the right to put the bills in suit. The plea then states an agreement that the original bills should be renewed, and that, in furtherance of this agreement, the bills in the declaration mentioned were accepted by the company (the defendant being a member thereof), and delivered to the plaintiffs in lieu of, and in satisfaction for, the former bills, "and upon no other account and for no other consideration whatsoever." This, then, being in effect an excuse set up for the nonperformance of the contract—the making of which is not denied—on the ground of want of consideration for the acceptance of the bills, the replication *de*

injuriâ is proper to put that excuse in issue. I am of opinion, therefore, that there must be judgment for the plaintiffs.

COLTMAN J. No case has been cited to establish that where a plea shews that the contract declared upon is void by law, de injuriâ is an improper replication. Now this plea clearly goes in avoidance of the contract. There are some dicta, indeed, which appear to raise a doubt whether that replication is proper in such a case; but there does not appear to be any decision on the subject. The case of *Humphreys v. O'Connell* (7 M. & W. 370) seems [353] to be in point; and I think that this case falls within the rule in *Crogate's case* (8 Co. Rep. 66 b.); and that, the plea containing merely matter of excuse, and no denial of the cause of action, the replication is good.

MAULE J. I also think, both on the authorities and on principle, that the replication in this case is good. In most of the cases cited this form of replication has been held sufficient; certainly none of them shew that such a replication, under circumstances like the present, would be bad. But upon principle also I think the replication is sufficient. The rule in *Crogate's case*, which is founded on good sense, is this: If the cause of action be admitted, but an excuse is set up, by which the defendant does not claim any interest in the matter of dispute or rely upon any authority derived from the plaintiff or given by law, then, the general replication de injuriâ is sufficient. And the reason seems to be, that it would be hard to put the plaintiff to traverse one fact only, when the defendant's excuse consists of several. Now, the substance of this declaration is, that the defendant accepted two bills of exchange, which were drawn upon him by the plaintiffs. This is admitted by the plea; and therefore a *prima facie* cause of action is admitted by the defendant; but he says that he is excused from paying the bills by reason of the special matter which he states. If any portion of this excuse had arisen from an authority derived from the plaintiffs not to pay,—as if the defendant had set up accord and satisfaction,—I think the case would have fallen within the exception in *Crogate's case*; but the plea states no such authority. For these reasons, therefore, I am of opinion that the replication is sufficient.

[354] The case of *Humphreys v. O'Connell* seems to me to be in point. There, the plaintiff was the indorsee and holder of a bill under circumstances similar to those in the present case. It has been pointed out as a distinction between that case and the present, that here the plaintiffs are the drawers, and therefore original parties to the transaction, which, it is alleged, is void by illegality. Now I agree that the new bills mentioned in the plea in this case stand upon the same footing as the former, and that the plaintiffs must be considered as if suing upon the old bills; but that will bring the case directly within the principle of *Humphreys v. O'Connell*.

CRESSWELL J. I am also of opinion that in none of the causes of demurrer set forth is there any thing to shew that the present replication is bad.

The plea admits the acceptance of the bills by the defendant, and the promise to pay resulting therefrom; that which follows is matter of excuse for non-payment according to the promise; the case therefore falls directly within the principle of *Inac v. Farrar* (1 M. & W. 65, Tyrwh. & Gra. 281) and *Humphreys v. O'Connell*. Some dicta in the latter case have been relied upon, as shewing that there the decision might have been different, if the question had arisen between the original parties to the bill. But if we are to consider this as an original transaction between the parties in this case, we must lay out of our consideration all that took place between those who were in fact the original parties; and then the plea will amount to one of no consideration, and will clearly fall within the cases just mentioned.

Judgment for the plaintiffs (b).

[355] HEWITT v. PRICE. May 30, 1842.

Railway shares were considered by the court as not being joint-stock within the 7 G. 2, c. 8. (the stock-jobbing act); and it was intimated that if a rule nisi for leave to add a plea raising a defence under that statute were granted, such rule would probably be discharged with costs.

Bompas Serjt. applied for leave to add a plea in this case for the purpose of raising a defence to the action under the stock-jobbing act (7 G. 2, c. 8).

(b) Vide *Gibbons v. Mottram*, post, M. T. 1843.

The declaration was in assumpsit upon a contract by which the plaintiff agreed to sell, and the defendant to purchase certain shares in a railway company. The defendant had already pleaded, that the plaintiff was not possessed of the shares; that he was not the registered owner; and that he was not ready to transfer them to the defendant. The case had been at chambers before Erskine J., who refused the application on the ground that the act did not apply to contracts for the sale of railway shares.

In *The London Grand Junction Railway Company v. Freeman* (ante, vol. ii. p. 606, 2 Scott, N. R. 705) the provisions of the bubble act (6 G. 1, c. 18, s. 18, repealed by 6 G. 4, c. 91) were referred to; but the stock-jobbing act does not appear to have been mentioned; and it is submitted that such contracts as the present fall within the fifth and sixth sections of that act. By the former clause no money is to be paid or received for compounding differences for not delivering any public or joint-stock, or other public securities, or for not performing any contract in that respect; and by the sixth section no person who shall sell such stock, which is not paid for according to agreement, shall be obliged to transfer the same; but such stock may be sold to other parties, and the vendor may recover the damage from the first vendee. [Cresswell J. It is difficult to see how that statute can apply to shares in a railway company. They are [356] not public stock or public annuities.] The statute speaks of "joint-stock" as well as of "public stock" and "public securities;" and it is submitted that joint-stock in a railway, in respect of which the shareholders contract no liability in their individual character, comes within the enactment. South Sea stock is within the act. [Tindal C. J. That stock was funded.] Omnium has also been held to be within the act. [Cresswell J. For the reason given by Lord Ellenborough C. J. in *Olvierson v. Coles* (1 Stark. N. P. C. 496. See *Brown v. Turner*, 2 Esp. N. P. C. 631, 7 T. R. 630), that "a person who has omnium is potentially in possession of stock." Maule J. In *Wells v. Porter* (b) it was held that foreign stock is not within the provision of the statute; and, as was there said by Bosanquet J. "when we find the expression public stocks, we must intend the public stocks of this country." Tindal C. J. That case appears to be decisive. If, however, the defendant wishes to have the question more formally determined, he may take a rule nisi; but it will probably be discharged with costs. This is a very penal act. Maule J. It may be a question whether a defendant should be allowed to set up this defence with any other.]

Bompas Serjt. declined taking a rule (c).

[357] WILLIAM CRAWSHAY v. WILLIAM THOMPSON AND OTHERS.

May 24, 26, 1842.

[S. C. 5 Scott, N. R. 562; 11 L. J. C. P. 301. Discussed *Singer Manufacturing Company v. Loog*, 1882, 8 App. Cas. 31; *Derry v. Peek*, 1889, 14 App. Cas. 366. Referred to, *Mansell v. Valley Printing Company*, [1908] 2 Ch. 447.]

Case, for "wrongfully knowingly and fraudulently" stamping bars of iron made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew, and intended, to be in imitation of the plaintiff's, and which was used by the defendants in order to denote that their iron was made by the plaintiff; and for knowingly, &c. selling the iron so marked as and for the plaintiff's iron.—A correspondence between the parties was given in evidence, in which the plaintiff

(b) 2 N. C. 722. That was an action by the broker for commission, &c. The defence was, not that it was joint-stock, but that it was public stock.

To an argument that the language of the enactment shewed that such gambling contracts were illegal at common law, it was answered by the court, "that, at the most, such a contract would be only void; and the work of the agent who effected it could scarcely be called illegal." After the decision of the demurrer the action was compromised.

In a case between the immediate parties to the gambling contract, it would evidently be a sufficient defence that the contract was void.

(c) And see *Henderson v. Bise*, 3 Stark. N. P. C. 158; *Rossum v. Taylor*, Chitt. Stat. 1022, n.; *Mortimer v. M'Callan*, 6 M. & W. 58, 7 M. & W. 20, 9 M. & W. 636; *Wilkinson's Law of Public Funds*, ch. ix.

charged the defendants with using the mark in question, as being a fraud upon him ; the defendants, in answer, asserted that they had used the mark for many years continuously. This was not so, in fact ; but it was shewn that the mark had been adopted by them in the execution of orders received from foreign correspondents. Held, that it was properly left to the jury to say ; first, whether the defendants' mark bore such a close resemblance to the plaintiff's as was calculated to deceive the unwary, and to injure the sale of the plaintiff's goods ; and, secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders.—Held, also, that the notice of the resemblance of the mark given by the plaintiff to the defendants, did not, in the absence of proof of any intention to imitate it on the part of the defendants, give the plaintiff any cause of action.—The correspondence was commented upon by the counsel for the plaintiff in his reply, but not by the judge in summing up. Held, that it was not necessary that it should have been commented upon by the judge.

Case. The declaration stated that the plaintiff, for divers years before and at the time of the committing of the grievances hereinafter next mentioned, was an iron manufacturer and exporter of iron, and exercised and carried on, and still did exercise and carry on the business of an iron manufacturer and exporter of iron ; and the plaintiff, in the way of his said business, did prepare, manufacture, make and sell, and still did prepare, &c., amongst other goods, divers large quantities of bars of iron, of a superior quality and description, which bars of iron the plaintiff during and at the time aforesaid was and still was accustomed to mark with a certain stamp or mark, stamped or impressed on the said bars of iron respectively, of a peculiar form, shape and appearance, consisting of, [358] to wit, two Roman capital letters, that it to say, the letters W. C.(a), disposed and placed and enclosed within a certain oval figure or bracket in manner and form following, that is to say, W C ; in order to denote that the said bars of iron so respectively marked as aforesaid were, and each of them was, prepared, manufactured, and made by the plaintiff, and to distinguish them from all bars of iron prepared, &c. by other persons. And the plaintiff, during and at the time aforesaid had sold, and still did sell, divers large quantities of such bars of iron so by him made and marked as aforesaid. And whereas the plaintiff, before and at the time of the committing of the grievances thereafter next mentioned, had gained, acquired, and enjoyed great fame and reputation with public, and also with divers foreign merchants in places beyond the seas, to wit, at Constantinople and Smyrna in Turkey, on account of the excellent quality of the said bars of iron so by him prepared, &c., and marked, and sold as aforesaid ; whereby the demand for the said bars of iron of the plaintiff so distinguished and marked as aforesaid was very great. And the plaintiff, by means of the premises before and until, &c. had acquired and was acquiring divers great gains and profits by the sale of his said bars of iron so made and marked by him as aforesaid. Yet the defendants, well knowing the several premises, but wrongfully intending to injure the plaintiff in his sale of the said bars of iron, and to deprive him of the great gains and profits which the plaintiff might, and otherwise would, have acquired by preparing, manufacturing, marking, and selling such [359] bars of iron so by him made and marked as aforesaid, to wit, on, &c., and on divers other days, &c., did wrongfully, knowingly and fraudulently, and against the will and without the consent or licence of the plaintiff, prepare, manufacture and make, and cause to be prepared, &c., divers, to wit, 200,000 bars of iron, of similar form to those of the plaintiff, and did wrongfully, knowingly and fraudulently, and without the consent or license of the plaintiff, stamp or mark, and caused to be stamped or marked, the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of iron respectively in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape, and appearance of the plaintiff's said stamp or mark, to wit, consisting of two Roman capital letters ; that is to say, the letters W. O., disposed, and placed, and enclosed

(a) Both letters are of the Roman character, though W., as remarked by the Lord Chief Justice on the motion for the new trial, is not, properly speaking, a Roman letter. So the Germans call all letters in our ordinary type Latin letters, as distinguished from German, i.e. black-letter.

within a certain oval figure or bracket, in manner and form following; that is to say, **(W O)**; and which last-mentioned mark the defendants then well knew and intended to be in imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid; and was [sic] by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the plaintiff, and were respectively bars of iron prepared, manufactured and made by the plaintiff; and the defendants did knowingly, wrongfully, and fraudulently, and against the will of the plaintiff, and without his licence or consent, sell for their own lucre and gain the said bars of iron so by them prepared, manufactured, made and marked as aforesaid, as and for and under the false colour and pretence that the same were respectively bars of iron **[360]** of the genuine manufacture of the plaintiff, and so respectively prepared, manufactured and made by him as aforesaid; whereas, in truth and in fact, the plaintiff had never prepared, manufactured or made the said bars of iron, or any of them, or any part thereof. By means of which said several premises, the plaintiff had been and was wrongfully and unjustly hindered and prevented by the defendants from selling and disposing of divers large quantities, to wit, 200,000 of his said bars of iron, so by him prepared, manufactured and made as aforesaid, of great value, to wit, &c., which the Plaintiff would otherwise have disposed of, and had been and was deprived of divers great gains and profits, which would otherwise have accrued to him from the sale thereof. And also by means of the premises, divers persons in parts beyond the seas, to wit, in Turkey aforesaid, had been induced to buy, and had bought, divers large quantities of the said bars of iron so made, marked and sold by the defendants as aforesaid, as and for bars of iron respectively of the genuine manufacture of the plaintiff, and also had been and were induced to believe, and did suppose, that the said bars of iron so made, marked and sold by the defendants as aforesaid, were respectively bars of iron made and marked, and sold, by the plaintiff as aforesaid. And because the said bars of iron so made, marked and sold, by the defendants as aforesaid, were respectively of inferior quality to those so made, &c., by the plaintiff as aforesaid, the said fame, credit and reputation, with the public, of the said plaintiff, had been and was greatly prejudiced and deteriorated; and also, by means of the premises, the plaintiff had been and was greatly injured and damaged in his said business, and otherwise; to the damage of the plaintiff of 30,000*l.*, &c.

Plea: not guilty.

At the trial before Tindal C. J., at the sittings **[361]** for London after last Michaelmas term, the following facts were proved in evidence. The plaintiff was an iron manufacturer and the proprietor of extensive iron works near Merthyr Tydfil in South Wales. The defendants were also iron manufacturers and proprietors of iron works in the said neighbourhood: one of which was called "The Tredegar"—another, "The Aberdare"—and a third, "The Penydarran Iron Works." They also carried on the business of iron merchants. It is the custom in the iron trade for the different iron masters to mark the iron made by them with a peculiar mark of their own; (generally a letter or letters, having some reference to the names of the maker, or of the place where the iron is made). The plaintiff, and his father before him, had been for some years past in the habit of marking their bars of iron with their initial letters, placed in an oval thus—**(W C)**. The marks usually adopted by the defendants were the words "Aberdare" and "Penydarran" upon the iron made at these places; and the letters c. T. o. upon that made at Tredegar. Since the peace in 1815, a large trade for iron had grown up between this country and Turkey and Greece (which had previously been supplied by Russia), and the plaintiff's iron, marked **(W C)**, was in great estimation in the Turkish market, where the mark in question was generally known as "the comb mark." It appeared to be the custom for several merchants to order iron from different English manufacturers, stamped with particular marks, differing from their own private marks. In the year 1837, the defendants received from a Mr. Kerr, a Turkish merchant in London, an order for a quantity of iron to be shipped by a certain vessel, and such iron was directed to be stamped W with a little o in an oval **(W o)**. This order was executed at the Aberdare works; but the stamp was made W with a dot in an oval **(W ·)**. The plaintiff happening to be there at **[362]** the time, saw some of the iron so marked,

and remonstrated with the defendant's manager on the alleged similarity of the mark to his own. No further notice was taken at that time; and the defendants, in execution of other orders, continued to supply iron stamped with the foregoing letters, which were afterwards varied, according to orders, to W with a large O, in an oval, thus; **W O**. This latter mark was not used till 1838.

In March 1839, the plaintiff addressed a letter to the defendant Thompson, in which he complained of the continued use of the stamp, which he designated as "a palpable fraud" upon him. The defendant Thompson, in his answer (dated April in the same year), said, "I most readily admit that my house has for many years continuously made iron for the Turkish market, stamped **W ?** and **? W** (and also other marks), and I conceive they are perfectly justified in so doing:" and, he added, "I believe the whole of the iron now made, or nearly so, for the Turkish market, is stamp in that form at whatever works it may be manufactured." Further correspondence took place between the parties; and in one of his letters, the defendant Thompson, referring to the mark in question, said: "In fact, it is a foreign mark (Russian), in corroboration of which you can find original and unequivocal testimony, if you make inquiry in the proper quarter." The use of the stamp was not discontinued by the defendants, but they used it only in the execution of foreign orders. Other manufacturers had used somewhat similar marks, having been ordered to do so for the Turkish market. The earliest instance proved, was in the year 1834, when Messrs. Bailey, an English firm, were ordered by a house in Constantinople to manufacture some iron, and stamp it **O A** (which, when inverted, would have the appearance of **W O**). This, the writer said, was the mark of a particular iron [363] much in request, and which he stated to be the original mark of the Constantinos. The Constantinos were a Turkish firm, who were supplied by the plaintiff with iron marked **W C**. There was no evidence to shew that any person had been actually deceived by the mark used by the defendants; but one witness stated that, possibly, in Asia Minor, it might be taken for the plaintiff's mark.

The Lord Chief Justice left it to the jury to say; first, whether they were satisfied that the defendants' mark bore such a close resemblance to the plaintiff's as, in its own nature, was calculated to deceive the unwary, or persons who were moderately skilled in the article, and to injure the sale of the plaintiff's goods; and, secondly, what was the intention of the defendants in using the mark complained of—whether it was for the purpose of supplanting the plaintiff, or done in the usual course of trade, and in execution of foreign orders sent to their house;—because, his lordship said, it seemed to him, that, unless there were such a fraudulent intention existing (at least before notice), and it were proved to the satisfaction of the jury, the defendants would not be liable. His lordship did not advert to the defendant Thompson's statement in his letter of April 1839, that his house had been "for many years continuously" in the habit of using the mark in question; but it had been fully commented upon by the counsel for the plaintiff as a mis-statement in point of fact. The effect of the notice contained in the plaintiff's letters, of the resemblance of the marks, with reference to the defendants' continuing to use them after such notice,—supposing the previous use to be found by the jury to have been innocent,—was reserved by his lordship, as a point of law, for the consideration of the court.

The jury returned a verdict for the defendants.

[364] Shee Serjt., in last Hilary term (January 13th. Before Tindal C. J., Colman, Erskine, and Maule JJ.), obtained a rule nisi for a new trial on the ground of misdirection, and of the omission of the Lord Chief Justice to comment upon the misstatement in defendant Thompson's letter, as to the continuous use of the mark in question (b). He cited *Blofield v. Payne* (4 B. & Ad. 410, 1 Nev. & Mann. 353), *Polhill v. Walter* (3 B. & Ad. 114), *Foster v. Charles* (6 Bingh. 396, 7 Bingh. 105, 4 Moo. & P. 61, 741), *Sykes v. Sykes* (3 B. & C. 541, 5 D. & R. 292), *Millington v. Fox* (3 Myl. & Cr. 338), *Smith v. Pelah* (2 Stra. 1263), Com. Dig. Action on the case for negligence, (A. 5).

Sir T. Wilde, Bompas and Channell Serjts., now shewed cause. First, as to the misdirection. If there was no semblance between the plaintiff's and the defendants'

(b) The case was also moved on the ground that the verdict was against evidence, but on shewing cause, the Lord Chief Justice said, he thought the question was so entirely for the jury, that the court ought to be relieved from the consideration of that point.

mark, calculated to deceive any one, there is no pretence for the action. The notice of the alleged resemblance can have no effect in this point of view; for, if in fact, the marks used by the defendants had no tendency to injure the plaintiff, any notice by the latter cannot give the marks that character. The jury have found a general verdict, and may therefore have negatived the fact of resemblance. But assuming that a resemblance did exist, then the second question was properly left by the Lord Chief Justice, whether the marks were used by the defendants for the purpose of supplanting the plaintiff; or whether they were used *bonâ fide*, in the usual course of trade, pursuant to orders received from correspondents. The other side must argue, that it is [365] not necessary that the defendants should have known that the marks were calculated to deceive others, if, in fact, they were so calculated; but there is no authority for such a proposition. The intention of the party is an essential ingredient of the right of action. The cases cited when the present rule was obtained, fully support the summing up of the Lord Chief Justice. In *Sykes v. Sykes* (3 B. & C. 541, 5 D. & R. 292), which was an action for fraudulently imitating the plaintiff's mark, and selling certain articles so marked, as and for articles of the manufacture of the plaintiff, it appeared that the plaintiff's father had formerly obtained a patent for the manufacture of shot-belts, &c.; which patent had been held invalid by reason of a defect in the specification; but the father, and the plaintiff after him, had continued to mark their articles "Sykes' Patent," in order to distinguish them as their manufacture. The defendants subsequently commenced the manufacture of articles of the same sort, but of an inferior description, and sold them at a reduced price to the retail dealers. They marked them with a stamp closely resembling the plaintiff's, in order that the retail dealers might, as in fact they did, sell them again as and for goods manufactured by the plaintiff. It was contended for the defendants, that, as one of them was named Sykes, he had a right to mark his goods with that name, and had also as much right as the plaintiff to add the word "patent," there being, in fact, no patent to protect the plaintiff's goods. But Bayley J. at the trial overruled the objection, on the ground that the defendant had no right to mark his goods as and for goods manufactured by the plaintiff; and the court afterwards upheld his ruling. There, it expressly appeared that the goods were marked with the particular stamp, in order that they might be sold [366] as the plaintiff's. There was another point in that case upon which the other side might rely. It was proved that the retail dealers, who purchased of the defendants, knew by whom they were manufactured, and they sold them as the manufacture of the plaintiff; and it was urged that the evidence did not support the allegation in the declaration, that the defendants sold the goods as and for goods made by the plaintiff, but that they sold them to third persons, in order that they might sell them as and for goods made by the plaintiff. The declaration however was held to be substantially proved. There the intention of the defendants that the goods so marked by them should be sold, either by themselves or others, as the plaintiff's manufacture, was clearly established. In *Blofield v. Payne* (4 B. & Ad. 410, 1 Nev. & Mann. 353), the declaration stated that the plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his; and that the defendants wrongfully made other hones, and wrapped them in envelopes resembling the plaintiff's, and sold them as and for the plaintiff's; whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendants being inferior; and it was held that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that the hones were inferior, or that he had sustained any specific damage. But in that case it was proved that the defendants had obtained some of the plaintiff's own wrappers, and had wrapped their hones in them; so that a fraudulent intention was also established in that case beyond all question. In *Millington v. Fox* (3 Myl. & Cr. 338) the court of Chancery, it is true, granted a perpetual injunction against the use [367] by one tradesman of the trade marks of another, although such marks had been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms; but the main question in that case ultimately turned upon the costs, which were refused to the plaintiffs; and there the marks used by the defendants were identically the same with those used by the plaintiffs, and not, as is alleged in the present case, a mere resemblance. The Lord Chancellor, in giving judgment in that case, observed, "The sole object I had in looking into the

pleadings in this cause was, to satisfy myself as to what ought to be done with respect to the question of costs; having previously come to the conclusion that there was sufficient in the case to shew that the plaintiffs had a title to the marks in question; and they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time, the case is very different from the cases of this kind that usually occur, where there has been a fraudulent use by one trader of the trade marks or names used by another. I see no reason to believe that there has in this case been a fraudulent use of the plaintiffs' marks. It is positively denied by the evidence; and there is no evidence to shew that the defendants were even aware of the existence of the plaintiffs, as a company manufacturing steel; for although there is no evidence to shew that the terms 'Crowley' and 'Crowley Millington' were merely technical terms, yet there is sufficient to shew that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and therefore I stated, that the [368] case is so made out as to entitle the plaintiffs to have the injunction made perpetual." The result therefore of that case is, that the Lord Chancellor decided that the plaintiffs were entitled to the sole use of particular marks, which indeed was not contested on the part of the defendants; but his lordship refused the costs, on the ground that the litigation was unnecessary, as the plaintiffs had abandoned their claim to an account.

Blanchard v. Hill (2 Atk. 484) is in favour of the defendants. In that case Lord Hardwicke refused an injunction to restrain the defendant from using the Mogul stamp on his cards, although the plaintiff had suggested the sole right to be in him, by having appropriated the stamp to himself, conformably to the charter granted to the Card-makers' Company by King Charles I. His lordship said, "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." His lordship then referred to a case cited in *Southern v. How* (Poph. 144), (which had been mentioned in the argument), where an action was brought by a cloth-worker against another of the same trade, for using the same mark, and judgment was given that the action would lie; "but," his lordship added, "it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier." In *Scott v. Morgan* (2 Keen, 212), an injunction was granted to restrain the defendant from running an omnibus having upon it such names, words and devices as to form a colourable imitation of the names, words and devices on the om-[369]-nibuses of the plaintiffs; but the decision rested also on the ground of the imitation having been practised by the plaintiff, with the intention to deceive the public, and to injure the plaintiff. *Foster v. Charles* (6 Bingh. 396, 7 Bingh. 105, 4 Moo. & B. 61, 741) was an action for giving a false character; and *Corbett v. Brown* (8 Bingh. 33, 1 Moo. & Sc. 85, 1 Moo. & Rob. 108, 5 C. & P. 363) was a similar action; but they are not material to the present case. In *Polhill v. Walter* (3 B. & Ad. 114) a bill of exchange was presented for acceptance at the office of the drawee, when he was absent. The defendant who lived in the same house with the drawee, being informed by one of the payees, that the bill was perfecting regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the indorsee brought an action against the drawee, and, on proof of the above facts was nonsuited. The indorsee then sued the defendant for falsely, fraudulently and deceitfully representing that he was authorised to accept by procuration. On the trial the jury negatived all fraud in fact; but it was held, notwithstanding, that the defendant was liable; because the making of a representation which a party knows to be untrue, and which is intended, or is calculated from the mode in which it is made, to induce another to act on the faith of it, so that he may incur damage, is a fraud in law; and that the defendant must be considered as having intended to make such representation to all who received the bill in the course of its circulation. The acceptance by procuration amounted to a statement by the defendant that he had authority to accept, a statement which was false in fact. [370] [Cresswell J. It was false also to his own knowledge.] It was the same as forging a bill with the intention

of paying it; but that case has no analogy to the present. There is no false representation in this case—unless the defendants used the mark in question with the intention that their iron should be taken for the plaintiff's. That might have amounted to a false representation; but that question was left by the Lord Chief Justice, and was negatived by the verdict.

The declaration in this case, in fact, precludes any question on the subject. The plaintiff is bound to prove not all that he states, but so much only as is sufficient to give him a cause of action. The declaration contains three distinct allegations; two of which must at least be proved, if not all three. Omitting the intention of the defendant to injure the plaintiff, no cause of action is disclosed by the declaration. The declaration states, that the defendants did wrongfully, knowingly and fraudulently, and against the will, &c. of the plaintiff, prepare, manufacture and make certain bars of iron, and did wrongfully, knowingly and fraudulently stamp and mark the same with a certain stamp or mark, in imitation of the plaintiff's said stamp or mark. That allegation imputes intention; it does not mean that the defendants' mark was an accidental resemblance of the plaintiff's, but that it was intentionally a copy. The declaration, after describing the mark so used by the defendants, proceeds thus—"which last-mentioned mark the defendants then well knew, and intended, to be in imitation of, and similar in appearance to, the mark used by the plaintiff, and was by the defendants so used, in order to denote that such bars of iron by them prepared, &c., were of the genuine manufacture of the plaintiff, and prepared, &c. by him." So far there is no statement of any injury; but the declaration proceeds to allege, that "the defendants did knowingly and fraudulently, [371] and against the will of the plaintiff, and without his licence, &c., sell, for their own lucre and gain, the bars of iron so by them prepared and marked, as and for, and under the false colour and pretence that the same were, respectively bars of iron of the genuine manufacture of the plaintiffs." No cause of action is shewn before this. It is impossible to separate the intention of the defendants from the fact of their selling their iron, as and for the plaintiff's iron. This is the only injury to the plaintiff. The action is brought to recover compensation for this specific injury, viz., the sale of their goods, as and for the plaintiff's goods: all the rest is merely introductory. An allegation that the defendants had sold their goods, as and for the plaintiff's, to his damage, might perhaps have disclosed a sufficient cause of action; but a mere allegation of a sale of goods resembling the plaintiff's, would not have sufficed. The questions therefore that were left by the Lord Chief Justice were precisely those which were pointed out by the plaintiff on the record. The mere interference by the defendants with the plaintiff's mark would clearly give no right of action, unless such mark were used by him in the nature of an advertisement to the public that the goods were of his manufacture. There is no case in which an action has been held to be maintainable, for using the mark of another tradesman, unless it has been shewn that it was so used for the purpose of deceit. The declaration in this case is not proved by shewing that the letters W O might possibly in Asia Minor be mistaken for W C; no witness having proved that there was any such mistake in point of fact.

With respect to the notice, the plaintiff says in effect in his letter, "you have copied my mark;" and this is denied by the defendant Thompson in his answer. Such [372] a notice clearly cannot affect the defendants with any liability which had not previously attached to them.

Shée Serjt. in support of the rule. First, as to the misdirection. The defence set up was, that the defendant did not use the mark in question, with the view of imitating the plaintiff's mark, but in pursuance of orders received from abroad; and it was as to the sufficiency or insufficiency of this defence that the jury needed the direction of the judge. No objection is taken as to the first point that was left, namely, whether the defendants' mark bore so much resemblance to the plaintiff's as to deceive the unwary, or persons of ordinary skill. The direction, however, should have stopped there, and the second point left for the consideration of the jury ought to have been omitted. This point was, as to the intention of the defendants in using the mark,—whether it was adopted for the purpose of supplanting the plaintiff, or in the usual course of trade and in the execution of orders. But it is submitted, that the motive or intention of the defendants in using the mark was immaterial, if the resemblance in fact existed, and the defendants were aware of it. If the defendants had received orders in express terms to mark their iron similarly to the plaintiffs, or

in such a way as was calculated to make their iron pass for the plaintiff's, and if they had executed such orders, they would have been liable to this action, no matter from what motive they might have acted. The declaration charges that the defendants sold "for their own lucre and gain the said bars of iron so by them prepared, &c., and marked as aforesaid, as and for and under the false colour or pretence that the same were respectively bars of iron of the genuine manufacture of the plaintiff." If they manufactured them to please their correspondents, still it was "for their own lucre [373] and gain;" and *Sykes v. Sykes* (3 B. & C. 541, 5 D. & R. 292) is an authority that, if these correspondents sold the iron as the plaintiff's, the allegation in the declaration, that it was sold by the defendants, is supported. It was not necessary to shew that the defendants had been actuated by any dishonest or immoral intention; it was sufficient to maintain the action, if they knew that the mark they were using would deceive others, or was calculated so to do. In the allegation "which last-mentioned mark the said defendants then well knew, and intended, to be in imitation of, and similar in appearance to, the said mark so used by the plaintiffs," the words "and intended," might be omitted. So also might the words "in order to denote" in the following passage, which might be read thus: "and was by the said defendants so used, &c., denoting that such bars of iron so by them prepared, &c., were of the genuine manufacture of the plaintiff." The material allegation is, that the defendants knowingly sold the iron, as and for the plaintiff's. [Maule J. If that be left in, how can it be said that the direction was wrong? How could the defendants knowingly sell their iron, as the plaintiff's iron, without an intention to deceive the purchaser?] The defendants, possibly, may have originally used the stamp, not with the intention of deceiving any one, but only to gratify their correspondents; but still if they knew that their act would deceive customers, the plaintiff would have a right of action against them. It is contended on the other side, that the allegation, that the defendants' mark was used "in imitation" of the plaintiff's mark, includes an imputation of intention to deceive. But it does not do so more than the allegation in *Polhill v. Walter* (3 B. & Ad. 114), that the defendant "did falsely, fraudulently and deceitfully represent and [374] pretend that he was duly authorised" to accept the bill. Here, the defendants have knowingly done that which will deceive the plaintiff's customers; and the same erroneous impression is produced by their acts, as was created in *Polhill v. Walter*, by the defendant accepting the bill as by procuration, when he had no authority to do so. The two cases are parallel, supposing that here the defendants put a mark upon their iron so like the plaintiff's, that they knew it would deceive others: for that would shew that they intended to pass off their iron as his. [Coltman J. It might be evidence that they did so, but it would be no more.] Fraud in law would be sufficient. [Maule J. Would that be so, without an actual intention to deceive on their part?] The law will infer intention from the acts of a party. In *Foster v. Charles* (6 Bingh. 396. 4 Moo. & P. 61), Tindal C. J. said, "It has been urged that it is not sufficient to shew that a representation, on which a plaintiff has acted, was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also shew the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." And when the case came before the court, after a second trial (7 Bingh. 105. 4 Moo. & P. 741), his lordship said "The question, therefore, is, whether if a party make representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood? It would be most dangerous to hold that he is not. The confusion seems to have arisen from not distinguishing between what is [375] fraud in law, and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences." To apply that doctrine to the present case—the defendants have relied upon the honesty of their motives in using this mark; and that was left to the jury as a substantive defence; whereas it was really immaterial. [Cresswell J. In *Foster v. Charles* the defendant had made a false statement, knowing it to be false; and that could hardly be said to be done by him in the ordinary course of business.] In considering the two points left

to the jury in connection with the verdict, the plaintiff may assume that the resemblance proved was considered by them as calculated to deceive, and that the verdict was given upon that ground; and if so, what difference would there be between using the mark in question on the iron and putting W. C. on it or stamping upon it—"This is Crawshay's iron?" [Maule J. Supposing the defendants had done so, would it not have been necessary to shew they had intended to sell it as the plaintiff's iron?] That, it is submitted, would not have been requisite, provided they did in fact sell their iron so stamped, knowing it would deceive others. There was an injury here to the plaintiff's right; and that, as was observed by Littledale J. in *Blofield v. Payne* (a), is sufficient to enable him to maintain the action. [Coltman J. You appear to admit that there must not only be a probability that deception would be practised, but that there must also be a probability that parties would be deceived; but was not that a question for the jury?] It was not properly left to them. The complaint on the part of the plaintiff is, [376] that, in the way the case was left to the jury, they must have considered that the motive with which the defendant acted was material; but *Corbett v. Brown* (8 Bingh. 33, 1 Moo. & Sc. 85, 1 Moo. & Rob. 108, 5 C. & P. 363) shews that is not so.

But whether the intention were material or not, it was important that the jury should have been directed to consider the effect of the notice given by the plaintiff, that the mark used by the defendants was calculated to deceive others. In cases for uttering base coin, the animus, with which the act is done, is most important. So, if a party charged with receiving stolen goods give a false account of the manner in which he became possessed of them, it is an important fact for the consideration of the jury. Here, the defendant Thompson has given a false account of the origin of the use of his mark. It is not easy to say, upon the facts left to the jury, what they have really found. [Cresswell J. Their attention was drawn to two questions. Suppose the twelve could not agree as to both questions, but six were agreed as to one, and six as to the other—having been told that the decision of either question, according to the view which six of them in fact took of it, would authorise a verdict for the defendants—would not that support a general verdict?] That may be doubtful. There is no valid distinction between the use of two identical marks, and of two that are so like, that they may, by casual observers, be mistaken for each other. In *Sykes v. Sykes* the parties bore the same name, and the marks used by the defendant were not identical with those used by the plaintiff. So, in *Blofield v. Payne*. [Tindal C. J. There the defendant had taken the plaintiff's own wrappers to inclose his hones in.] *Millington v. Fox* (3 Myl. & Cr. 338) shews that an act not unlawful in [377] itself may become so by a notice that it is injurious to another. In Com. Dig. tit. Action upon the case for negligence (A. 5), it is said, "if a dog has once bit a man, and the owner, having notice, keeps him and lets him go about or lie at his door, action lies against him by a person bit, though it happened by his treading on the dog's toes;" and, again, "if a dog chases sheep, &c. without setting on, or notice before, to the master, an action does not lie." These authorities shew that if a party be affected with knowledge of the injurious tendency of certain acts, he is liable for their consequences. [Tindal C. J. That is so in a large class of cases as to nuisances.]

Assuming, then, that a resemblance has been found to exist between the defendants' mark and the plaintiff's, after notice of the resemblance, and of the injurious effects to the plaintiff by the defendants' using the mark, it was a wrong to the plaintiff that the defendants continued to use it.

COLTMAN J. I am of opinion that there has been no misdirection in this case. The declaration alleges in substance that the defendants made certain bars of iron bearing a mark in imitation of that, used by the plaintiff, and that they sold those bars, with the intention that they should pass in the market as bearing the plaintiff's mark. That allegation gives rise to the questions left by my lord to the jury. First, whether there was such a resemblance of the plaintiff's mark as was calculated to impose on any ordinary person; and secondly, if there was, whether the mark was used by the defendants with the intention to deceive. It appears to me that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party, that the iron

(a) 4 B. & Adol. 410, 411, 1 Nev. & M. 353. Sed vide, *Williams v. Mostyn*, 4 M. & W. 145.

should pass as the iron of the plaintiff. If [378] there was such a similarity as might impose on ordinary persons, and it was shewn that the defendants were aware of the resemblance, and that it was calculated to mislead, the plaintiff would have been entitled to the verdict, for the intention to deceive would have been manifest. Evidence was offered to the jury in support of the allegation which the plaintiff had to make out; but it appears to me that there was nothing in that evidence to shew the jury that the defendants had such a knowledge as alleged, or that the mark used by the defendants was so calculated to deceive as stated by the plaintiff.

There was a good deal of evidence to shew that persons might possibly be imposed upon by the mark used by the defendants; but there was none to shew that the defendants really believed that such would be the consequence of their using the mark in question. The plaintiff, indeed, told the defendants that such was the effect of their using the mark; but it does not appear that the defendants gave credence to the plaintiff's statements upon this point. On the contrary, the defendant Thompson represented—and we have no reason—contrary to the finding of the jury—for saying it was not so,—that the mark they used would pass for a Russian mark in the Turkish market. I think, therefore, that the two points were properly left to the jury by the Lord Chief Justice.

The next question is, was there any thing withdrawn from the consideration of the jury!—or, in other words, was there any miscarriage as to the manner in which the effect of the letters between the parties was left to the jury? It does not appear to me that it can be said, they were in any manner withdrawn from the jury. They were received in evidence, and fully commented upon by the plaintiff's counsel. The Lord Chief Justice reserved the question as to the effect of the notice contained in one of the letters for the con-[379]-sideration of the court; and it does not appear that he was asked by counsel to comment upon the letters to the jury. And it appears to me, that, as far as those letters had any bearing upon the case, they were fully in evidence, and that their general effect was left for the consideration of the jury. I do not think, therefore, that there is any fault to be found with my lord's direction.

With regard to the point of law that was reserved for the consideration of the court, as to the effect of the notice from the plaintiff to the defendants, I agree that my brother Shee, in this view of the case, was warranted in assuming that the jury found there was a resemblance between the mark used by the plaintiff and that adopted by the defendants; and that such resemblance was calculated to mislead ordinary persons—or, in other words, that the jury had found in the affirmative of the first question left to them by the Lord Chief Justice. Now, it is to be observed that this notice is somewhat equivocal in its terms. If it mean that the defendants must have known, that injury would necessarily result to the plaintiff from the continued use of the mark in question, that would give some colour to the argument which has been urged on the part of the plaintiff; but I think that is not so. A charge is made on the one side, which is not assented to on the other. And it amounts, therefore, to no more than a circumstance in the case upon which it was properly within the province of the jury to determine.

Upon the whole, I think the rule for a new trial should be discharged.

MAULE J. I also think this rule should be discharged. The first question is, whether there has been any misdirection. Now, I agree with what has been said at the bar, that, in order to see whether or [380] not there has been a misdirection, we must look at the pleadings and to the course of the evidence at the trial. The declaration alleges that the defendants fraudulently sold certain bars of iron “as and for, and under the false colour and pretence that the same were, respectively, bars of iron of the genuine manufacture of the plaintiff.” I rather think that the gist of the action is the selling iron of the defendants' manufacture as and for iron of the plaintiff's manufacture; and that this allegation would have been sustained if it had been shewn that the defendants had sold their iron to their correspondents for the purpose of being retailed, as of the plaintiff's manufacture. But there is a preceding allegation in the declaration, that the plaintiff having used a certain mark in the manufacture of his iron, the defendants knowingly manufactured their iron with a mark, in imitation of that used by the plaintiff, in order to denote that such iron was manufactured by the plaintiff. Now, I think the declaration might have been good without that allegation; and if that be so, then the question arises, whether, that allegation having been inserted in the declaration, it would be necessary to prove it; and I think such

proof would be necessary ; for it is an allegation of a particular mode of effecting the wrong complained of, and ought therefore to be proved as alleged. In an action on the case for diverting a watercourse, the plaintiff may declare generally ; but if he state a particular mode of diversion, he is not at liberty to prove any other.

The first question that was left by my Lord Chief Justice was, in effect, whether the iron made by the defendants was made so as to imitate the iron of the plaintiff's ; and I think that this was a material question, for the reasons just stated ; and that, from the course of the evidence, that question would have been properly raised, even if the allegation as to the particular mode of [381] imitation had not been contained in the declaration. The plaintiff's case is, that the defendants made iron and marked it in such a manner, that it might be taken as the plaintiff's iron, and in that way represented it as the manufacture of the plaintiff ; and this is, in effect, the same as an allegation that particular words had been used to convey such representation. The question whether the defendants sold their iron as the plaintiff's, depends upon whether the mark itself represented that the iron was manufactured by the plaintiff. The question for the jury was, whether such a representation was in fact made. It was left to them to say, whether the mark was used by the defendants with an intention to deceive. And that was a proper question to leave to them ; for if the mark was not so used, there was no such representation on the part of the defendants as is alleged in the declaration, and consequently the declaration was not proved.

The next question submitted to the jury was, whether the defendants had sent the iron to Turkey for the purpose of supplanting the plaintiff in that market, or whether it was done in the ordinary course of business, and merely in the execution of foreign orders sent to their house ; and his lordship added that, unless such a fraudulent intention existed, the defendants would not be liable, at least not before notice was given. Now, looking at the course of the evidence, that was equivalent to putting the question whether the defendants had sold their iron as and for the plaintiff's ; because, if they had done so, it would have had a natural tendency to supplant the plaintiff in the market ; and then the intention to defraud would follow as a matter of law, as well as of common sense. It is difficult to conceive what other object the defendants could have had in selling their iron as and for the plaintiff's, than that of supplanting the plaintiff.

[382] Several cases were cited for the purpose of shewing that it was not necessary to prove that the defendants intended to pass off their iron as the plaintiff's ; but that, whatever may have been their motive in so doing, if they executed the orders of correspondents, knowing that by so executing them, their goods would be calculated to pass as the plaintiff's, the substantial part of the declaration was proved, and the defendants would be liable. The argument in effect amounts to this,—if the defendants sold their iron as and for the plaintiff's, they are liable, whatever may have been their motive for so doing. And I agree that this may be so. But I think that the Lord Chief Justice did, in effect and substance, so direct the jury ; for he told them to find for the plaintiff, if they considered that the defendants had sold their iron, as and for the plaintiff's. If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure ; that is the effect of *Polhill v. Walter* (3 B. & Ad. 114). The matter complained of in that case was, that the defendant had knowingly made a false representation as to his authority to accept a bill of exchange for another party ; and that fact having been proved, and it also having been proved that the plaintiff had sustained an injury by reason of such false representation, the action was held to lie. So, in this case, if it had been proved that the defendants had, by any means, falsely and knowingly represented their iron as of the plaintiff's manufacture, the plaintiff would have been entitled to the verdict ; but that, in effect, was the question that was left to the jury. So, in *Foster v. Charles* (6 Bingh. 396, 7 Id. 105, 4 Moo. & P. 61, 741), the wrong complained of was, that a false representation had been know-[383]-ingly made by the defendant as to the circumstances of a third party, whereby the plaintiff was induced to employ such party, and that an injury had resulted to the plaintiff therefrom ; and these facts being proved, it was held that the action was maintainable without reference to the defendant's motives in making the statement. So here, the complaint is, that a false representation has been made by the defendants, whereby the plaintiff has suffered an injury ; and the action will lie if that representation was made knowingly by the defendants ; and that was the question left by my lord to the jury.

But another point is insisted upon, namely, that after the letters had been given in evidence, shewing a notice to the defendants that they were using a mark on their iron resembling the plaintiff's, the Lord Chief Justice was wrong in leaving the second question to the jury. It is argued that, supposing the defendants marked their iron in a way calculated to deceive other parties, although they had no intention of doing so, yet if they were told that such was the effect of using the mark, and they still continued to do so, they are liable to an action. But I cannot quite accede to that position. If a party is merely told that by continuing to do a certain thing he may deceive others, and he continues to do the thing without any intention to produce that effect, I do not think that an action will lie against him—at any rate, certainly not in this form of declaration. The effect of the decision in *Millington v. Fox* (3 Myl. & Cr. 338), is, that the Lord Chancellor thought the defendants would have been in the wrong if they had continued to use the plaintiff's marks after they had received notice from the plaintiffs. But why was this? because it was clearly [384] shewn, and was indeed admitted by the defendants, that the use of this mark would have been an injury to the plaintiffs; and therefore, if, after the notice, they had continued to use the mark, they must have known of the injury they were doing to the plaintiffs. But here the question is, whether the notice to the defendants was improperly excluded from the consideration of the jury; and it is contended that the first question left by my lord should have been the only one submitted to the jury. But it appears to me that the second question was properly left both upon the letters and upon the rest of the evidence. Nothing was withdrawn from the jury. If his lordship had been desired to read the letters to the jury, he would probably have done so; though I do not think he would have been bound to do so, provided they were not withdrawn from the jury.

CRESSWELL J. I quite concur in the opinion that this rule should be discharged. As to the question with regard to misdirection, it appears that two questions were left by my lord to the jury. The first was, whether there was such a close resemblance in the mark used by the defendants to that of the plaintiff as to be calculated to impose on the unwary, and injure the plaintiff's sale. Now it may be said that this perhaps was not a necessary ingredient in the proof to be given by the plaintiff. But it is to be observed, however, that there is a distinct allegation in the declaration, that the defendants "did wrongfully, knowingly and fraudulently stamp or mark the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of iron respectively, in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape and appearance of the plaintiff's said stamp or mark, and which mark the defendants then well knew and intended to be in [335] imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid, and was by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the said plaintiff, and were respectively bars of iron prepared, manufactured and made by the said plaintiff." Now, admitting that it was not necessary to prove the first allegation, still I think the direction to the jury was perfectly right; for there was nothing to support the declaration, and establish any representation by the defendants as to the iron being of the plaintiff's manufacture, but the evidence as to the similarity of the mark.

The other question left was, whether there had been any fraudulent intention on the part of the defendants to deceive customers by using this mark, or whether it was used innocently by the defendants in the course of the execution of orders without any intention to deceive; and I think it clear that the latter expression must have been understood as meaning without any fraudulent intention on the part of the defendants. This is in the nature of an action for deceit; and it is laid down in Com. Dig. tit. Action upon the case for a deceit (F. 3), that "the declaration regularly ought to charge that the defendant was sciens of the matter by which he deceived; and that he did it falso et fraudulenter." There is an early case in illustration of this principle, cited by Doderidge J. in *Southern v. How* (Poph. 143) to this effect, as stated in Popham (page 144): "An action upon the case was brought in the Common Pleas by a clothier,—that, whereas he had gained great reputation for his making of his cloth, by [336] reason whereof he had great utterance, to his great benefit and profit; and that he used to set his mark to his cloth, whereby it should be known to be his

cloth : and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him ; and it was resolved that the action did well lie." The same case is cited also in *Cro. Jac.* (page 471) ; but it is there said that the action was brought by him who bought the cloth ; whereas in *Popham*, the action is said to have been brought by the manufacturer, and the gist of the action appears to have been the use of his mark "on purpose to deceive" (b).

In *Polhill v. Walter* (3 B. & Ad. 114), and that class of cases no intention to deceive was proved ; but there we find falsehood in fact, with knowledge on the part of the defendant. Now what falsehood in fact is there in this case ? Did the defendants falsely represent their iron [387] to be of the plaintiff's manufacture ? That is the very question in the cause ; and that was left to the jury. Lord Tenterden, in giving the judgment of the court in *Polhill v. Walter*, observed, "If the defendant had had good reason to believe his representation to be true,—as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery,—he would have incurred no liability, for he would have made no statement which he knew to be false : a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive." The cases may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact, to the injury of another (a).

Can it be contended that the mere use of a similar mark will give a right of action ? I do not know that a man can have an abstract right to use any particular mark ; but long user in a trade of a mark may produce a general impression that goods bearing such mark are of a particular manufacture. The notice here,—although it was argued that it ought to have determined the case in favour of the plaintiff,—cannot alter the legal rights of the parties. *Millington v. Fox*, which was relied upon, does not establish that doctrine. What is the notice here ? It is to the effect that the defendants were using a mark similar to that used by the plaintiff. But such a notice is not equivalent to knowledge ; as the defendants might dispute the resemblance ; or they might [388] admit the resemblance, and yet insist that they had no intention of passing off their goods as the plaintiff's.

As to the withdrawal of the letters from the jury, I do not think there is any reason for disturbing the verdict upon that ground. If they were commented upon by the counsel for the plaintiff as being evidence of facts, the Lord Chief Justice certainly did not tell the jury that they were not such evidence ; if they were used to establish a proposition of law, their effect was reserved for the consideration of the court.

TINDAL C. J. concurred.

Rule discharged.

(b) The statement in *Cro. Jac.* is as follows :—"A clothier of Gloucestershire sold very good cloth ; so that, in London, if they saw any cloth of his mark, they would buy it without searching thereof ; and another, who made ill cloth, put his mark upon it without his privity ; and an action upon the case was brought by him who bought the cloth for this deceit, and adjudged maintainable." In *Popham* this decision is said to have taken place in 22 Eliz., and in *Cro. Jac.* in 33 Eliz. ; but it is clearly the same case. In *Com. Dig.*, Action on the case for deceit (A 9), the case is thus referred to :—"So, (i.e. an action will lie) if a clothier sell bad cloths, upon which he put the mark of another, who made good cloths." Comyns does not say by whom the action may be maintained ; but as he cites from *Cro. Jac.* only, it may be inferred that he considered the case as establishing the right of action in the purchaser, which it certainly would, supposing that report to be accurate. The report in *Popham* would appear more likely to be a true version of Doderidge's statement ; since the case, as represented by Croke, would not have been very apposite to that of *Southern v. How*, in which it was cited by the learned judge. Lord Rolle, however, expressly states, that Doderidge did not say whether the former action was brought by the clothier or by the vendee, but adds—"Semble que gist pur le vendee." 2 Roll. Rep. 28.

(a) Vide *Pasley v. Freeman*, 3 T. R. 51 ; *Eyre v. Dunsford*, 1 East, 318 ; *Haycraft v. Creasy*, 2 East, 92 ; *Tapp v. Lee*, 3 B. & P. 367 ; *Ames v. Millward*, 2 B. Moore, 713 ; *Adamson v. Jarvis*, 4 Bingh. 66 ; *Lyde v. Barnard*, Tyrwh. & G. 250, 1 M. & W. 101 ; *Freeman v. Baker*, 5 B. & Ad. 797, 2 Nev. & M. 446 ; *Haslock v. Ferguson*, 7 A. & E. 86, 2 N. & P. 269 ; *Swann v. Phillippis*, 8 A. & E. 457, 3 N. & P. 447. And see ante, vol. ii. 475, n., vol. iii. 82, n.

TAYLOR v. LORD STUART DE ROTHESAY. May 27, 1842.

Where a *distringas* to proceed to outlawry could not be had by reason of the defendant being a peer, the court granted it to compel an appearance, although the defendant was abroad.

Gaselee Serjt. applied for a *distringas* to proceed to outlawry against the defendant, a peer of the realm, upon affidavits stating that he was abroad. [Tindal C. J. referred to *Cassidy v. Stuart* (ante, vol. ii. p. 437). Maule J. The *distringas* may be taken to enter an appearance. At least I have made orders to that effect at chambers, under similar circumstances.]

Per curiam. Rule accordingly (b).

[389] TUGMAN v. HOPKINS THE YOUNGER. May 28, 1842.

[S. C. 5 Scott, N. R. 464; 11 L. J. C. P. 309. Applied, *O'Dwyer v. Geare*, 1859, 1 Sw. & Tr. 466; In the *Goods of Hughes*, 1860, 4 Sw. & Tr. 210. Distinguished, *Lane v. Grylls*, 1862, 6 L. T. 535; *Brownrigg v. Pike*, 1882, 7 P. D. 64.]

Certain stock in the long annuities was, by a marriage settlement, vested in trustees for the separate use of the wife, for life, and after her death they were to pay over the principal sum, together with the interest and dividends then due and growing thereon, to such person as she might by will appoint. By her will (reciting the settlement) she appointed executors, and directed them to sell the principal stock. "The proceeds thereof" she bequeathed to different parties. At her death (for some time previously to which she had lived apart from her husband), a sum of money was found at her lodgings, which was taken possession of by the defendant, the son of one of the executors, at the request of his father, to whom he immediately paid it over.—Held, that (assuming the money in question to consist of the accumulations of the wife's dividends), the will did not dispose of it.—Quære whether, under the terms of the settlement, she had power to dispose of it.—Held also, that, as the executors did not take *jure representationis*, they were not entitled to the money.—Held also, that the money vested in the husband at her death, without his taking out administration.—Held also, that, as the defendant was a wrong-doer in taking the money, he was liable in an action for money had and received at the suit of the husband.

Debt, for money had and received to the use of the plaintiff. Plea: never indebted.

At the trial, before Tindal C. J., at the sittings for London after last Michaelmas term, the following facts appeared in evidence. In April 1829 the plaintiff married a widow named Mary Ann Truscoat, who was possessed of a sum of 81l. per annum, long annuities. By an antenuptial deed of settlement (dated the 11th of that month), the above sum of 81l. long annuities was vested in the trustees of the settlement, upon trust to pay the dividends, interest and income of the same to her for life, and to and for her sole and separate use and benefit, independent of her husband. A power was given to the trustees, during her life, at her request, to sell, assign and transfer any part of the same, not exceeding in value the sum of 300l., and to apply the money arising from such sale or transfer to her sole use and benefit, or to that of any other person whom she [390] might, by deed or will, appoint; and, after her decease, to pay, assign and transfer the said principal sum of 81l. long annuities, or so much thereof as might remain undisposed of at the time of her death, together with the interest and dividends then due and growing thereon, to and for the use of such person as she might, by deed or will, appoint.

In the latter end of the same year, the trustees of the settlement, at the request

(b) Vide the uniformity of process act, 2 & 3 W. 4, c. 39, s. 3, which, in cases where the defendant cannot be served with a writ of summons, authorises the awarding of a writ of *distringas* "directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer."

of Mrs. Tugman, and under the power above mentioned, sold out 16l. part of the 81l. long annuities, and paid over the proceeds, amounting to 300l., to her; but what became of this money did not appear. In 1831 the plaintiff and his wife separated, and they continued to live apart till the time of her death, which occurred on the 17th of December 1840. Her will, dated the 29th of October 1829, after reciting the deed of settlement, proceeded thus:—"Now, in execution of the said power so given to me by such indenture, or by any other power or authority enabling me in that behalf, I do hereby direct my executors hereinafter named to sell or dispose of, or otherwise call in, the said sum of 81l. long annuities, or so much thereof as shall remain undisposed of at the time of my decease; and as to the proceeds thereof, I do hereby give and bequeath the same in manner and form following: that is to say, first, I give and bequeath unto my executors, Robert Scantlebury and Thomas Hopkins hereinafter named, the sum of 50l. each; and as to all the rest, residue and remainder of the proceeds of the said 81l. long annuities, I hereby give and bequeath the same and every part thereof unto my two nieces Emma F. and Eliza F., to be equally divided among them." The testatrix then appointed the said R. Scantlebury and T. Hopkins (the father of the defendant) her executors. Soon after the death of Mrs. Tugman, the defendant, by the direction of his father, who was in an infirm state of [391] health, went to her lodgings, and took from a bureau the sum of 84l. 3s. 6d. in bank notes, gold and silver, which he claimed to belong to his father, as executor, and which he paid over to him the same day. This money had been laid out by the executors in the payment of the funeral and testamentary expenses, and a portion of the debts of Mrs. Tugman. There was no evidence that she had any other source of income than the stock in the long annuities. The executors had taken out probate of the will "limited so far only as concerns all the right, title and interest of her, the said deceased, in and to the said sum of 65l. long annuities, and the dividends and interest now due and to grow due thereon; and the furniture and effects purchased by the said Mary Ann Tugman, with the dividends and interest of the said 65l. per annum, long annuities, and all savings and accumulations arising therefrom, which she, the said deceased, by virtue of the said indenture of settlement, had a right to dispose of, and hath by her said will disposed of, accordingly, but no further or otherwise," &c.

It was objected at the trial, on behalf of the defendant, that Mrs. Tugman's will was a valid appointment, under the settlement, of the 84l. 3s. 6d., which must be considered as the accumulations of her dividends; but that, even if it did not pass to the executors, the plaintiff could only be entitled to it upon taking out administration; that the fund was, at any rate, answerable to the funeral and testamentary expenses of the deceased; and, lastly, that the defendant was not liable, as he acted merely as agent for his father, one of the executors, to whom he had paid over the money, and against whom only, if at all, the action could be maintained.

These objections were overruled by the Lord Chief Justice, and the plaintiff obtained a verdict for the sum [392] in question; leave being reserved to move to enter a verdict for the defendant.

Channell Serjt., in last Easter term, having obtained a rule nisi accordingly,

Talfourd Serjt. (with whom was Montague Chambers) now shewed cause. The first question is, whether the money found in the lodgings of Mrs. Tugman after her death, belonged to her husband, the plaintiff; the second is, whether, supposing it did belong to him, the defendant is liable in this form of action.

The first question depends on the terms of the marriage settlement and of Mrs. Tugman's will. Even assuming that the sum of money under consideration consisted of accumulations derived from the dividends payable to the deceased under the marriage settlement, still her will did not profess to dispose of that money, neither had she any power of disposition over it by the settlement. All that the trustees were empowered by the settlement to do, was, to pay the dividends to her during her life, and after her death to pay the principal sum, "together with the interest and dividends then due and growing thereon" to any person to whom she might appoint it, by will. This power is confined, in terms, to the stock itself, and to such dividends as might be due or growing due at the time of her death; it does not apply to dividends previously due, which had been paid over to her. The will follows the power contained in the settlement, and contains no residuary clause. The testatrix desires her executor to sell the long annuities; and "as to the proceeds thereof" she makes certain bequests; but that can only mean the proceeds of the sale of the stock,

not the dividends previously received by her. She had no power to pass any property to her executors except the [393] particular stock comprised in the marriage settlement. As soon as the trustees paid over the dividends to her, the money became absolutely the property of her husband. If a burglary had been committed in Mrs. Tugman's house, and property belonging to her had been stolen from it, the house and property must have been described in the indictment as those of her husband; *R. v. French* (a)¹. By the twenty-fifth section of the statute of frauds (29 Car. 2, c. 3), explaining the statute of distributions (22 & 23 Car. 2, c. 10), the rights of the husband over the estate of the wife are expressly reserved. [Maule J. But the husband must take out administration.] He undoubtedly must do so where he wants to recover a chose in action belonging to his wife; otherwise he cannot sue for it; but this was a chose in possession. If the wife had purchased even wearing apparel for herself out of this money, it would have vested by law in the plaintiff, so as to have been liable to be taken in execution for his debts; *Carme v. Brice* (7 M. & W. 183). The cases of *Jarman v. Woolloton* (3 T. R. 618), and *Haselinton v. Gill* (ib. 620, n.; S. C. more fully, 3 Dougl. 415), will be relied on by the other side; but they are clearly distinguishable from this case. In *Jarman v. Woolloton* it was decided that if a woman, before marriage, with the consent of her intended husband, conveys all her stock in trade and furniture to trustees to enable her to carry on her business separately, and the husband does not intermeddle with them, and there is no fraud, the furniture and the stock (although fluctuating) are not liable to his debts. In that case the property never belonged to the husband; and the wife was considered to have been in possession of it, as agent for the trustees. *Haselinton v. Gill* [394] is to the same effect. These cases form, in fact, no exception to the general rule.—that all personal chattels of the wife, not in possession at the time of the marriage, if they are reduced into possession during the coverture, are vested in the husband. Com. Dig. Baron and Feme (E. 3.) There are undoubtedly cases in the ecclesiastical courts to shew that the wife may dispose of the accretions of her separate property; but by the canon law husband and wife are, for some purposes, considered separate persons. The rule of law is clear, that the right to take out administration belongs to the husband, exclusively of all other persons; and the ordinary has no power or election to grant it to any other; 1 Wms. Executors, 242, 243 (1st edition; 3d edition, 315, &c.); but although entitled, he is not bound, to take out administration. In the present case he is under no liability to make any distribution, or to render any account. *Malony v. Kennedy* (10 Sim. 254) is precisely in point, and shews that the plaintiff was entitled, in his marital right, to the money in question. [Maule J. Suppose there had been a debt on bond due to Mrs. Tugman before her marriage, and remaining due at the time of her death, the defendant must go the length of contending that the executors could recover the money due on the bond.] That they clearly could not do; nor indeed could the husband until he had taken out administration, as the bond would be a chose in action.

As to the second point—if this money was the property of the plaintiff, the defendant, who was a wrongdoer in taking it, cannot discharge himself from responsibility by saying that in so doing he acted as agent for his father. This case is distinguishable from *Stephens v. Badcock* (3 B. & Ad. 354); where an attorney who was accustomed to receive certain dues for the plaintiff, his client, went [395] from home leaving his clerk at the office. The clerk, in the absence of his master, received money on account of those dues for the plaintiff (which he was authorised to do), and gave a receipt in his own name for his master. The attorney was in bad circumstances when he left home, and he never returned; but it did not appear that his intention not to do so, was known to the clerk at the time of the payment. The clerk afterwards refused to pay over the money to the plaintiff; and on assumpsit being brought against him for money had and received, it was held that the action did not lie; for the clerk had received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being accountable to the client for the sum received by his clerk (a)²; and there was no privity of contract between the plaintiff and defendant. In the present case the plaintiff waives the tort and considers the

(a)¹ Russell & Ryan, C. C. 491. See also *Farre's case*, Kel. 43; *Rex v. Smith*, 5 C. & P. 201.

(a)² See *Bamford v. Shuttleworth*, 11 A. & E. 926.

money as received by the defendant to his the plaintiff's use. Even if the defendant were the agent of his father, he could not justify the commission of the wrongful act, on the ground that he had paid over the money to his principal (b). [Maule J. Supposing that such payment would have discharged the defendant, he ought to have pleaded it.]

Channell Serjt., in support of the rule. It may be admitted that it would be necessary to plead the payment over if it was set up by way of answer to the action. But the fact is used for the purpose of shewing that if the defendant received the money as agent for his father, it was not received to the use of the plaintiff.

The first question in this case is, as to the right of Mrs. Tugman to dispose of this money by her will. [396] The case of *Molony v. Kennedy* (10 Sim. 254) does not shew that a wife has not the power of disposing of the accretions of her property, where she has power to dispose of the property itself. On the contrary, the Vice-Chancellor in giving judgment said, "Mrs. Molony's annuity of 800l. and every thing that arose from it, was exempt from the control of her husband during her life (b); and as the cash and bank-notes which were found in her possession at her death, arose from that annuity, they were part of her separate property, and she might have disposed of them either by deed or by her will." But not having disposed of them by will, it was considered in that case that the husband was entitled to them in his marital right. In *Gore v. Knight* (2 Vern. 535) it was held, that where a woman, on marriage, had reserved a power to dispose of her personal estate, all that she died possessed of was to be taken to be her separate estate, or the produce of it, unless the contrary could be made appear; and as she had power over the principal, she might dispose of the interest. The principle of the rule is stated in Williams on Executors (vol. i. p. 43, 1st ed.; p. 47, 2d ed.; p. 48, 3d ed.), where,—after referring to the case of *Fettiplace v. Gorges* (1 Ves. jun. 46, 3 Bro. C. C. 8), in which it was held that where personal property is actually given or settled, or is agreed to be given or settled, to the separate use of the wife, she may dispose of it as a feme sole, to the full extent of her interest, although no particular form to do so is prescribed in the instrument by which the settlement or agreement was made,—the author proceeds; "the principle upon which that decision was founded is this: that when once the wife is permitted to take personal property to her separate use as a feme sole, she must take it with all its privileges and incidents, one of [397] which is the *jus disponendi*" (a). [Tindal C. J. Suppose the wife had laid out the accumulations of her dividends in the purchase of furniture, would not that have belonged to her husband at her death. I am speaking of the strict legal interest of the parties; it might be different in equity.] Assuming that the wife had the power to dispose of her separate property and its accretions, it is submitted that it would not belong to the husband. In such a case the wife would be treated, as in equity, as a feme sole; and the property held answerable for her debts.

Assuming that she had the right to dispose of the money, the next question is, whether Mrs. Tugman did dispose of it, by her will; and it is submitted that the term "proceeds" in the will may certainly be understood to mean the proceeds of the dividends previously received.

This being an action for money had and received, which is of an equitable nature, the court will look at all the circumstances of the case; and if it appear that in equity the wife's executors would be liable to pay her funeral expenses out of her property, they would be entitled to the money in question; at any rate till the husband takes out administration. [Coltman J. If the husband is liable for the funeral expenses, would he not be so whether he had taken out administration or not?] Perhaps he might; but in this case, the executors, persons appointed by the testatrix, have paid all the testamentary expenses. In *Molony v. Kemble* the vice-chancellor deducted the funeral expenses from the sum to which the husband was declared to be entitled. In this case therefore the plaintiff cannot be entitled to the whole of the money, which being the accretion of the wife's separate property goes to the executors in the first instance—for the purpose of [398] meeting the debts and testamentary expenses of

(b)¹ See *Calland v. Loyd*, 6 M. & W. 26.

(b)² But see *Carne v. Brice*, ubi supra.

(a) See the cases referred to, loc. cit.

the deceased; and after they have been paid, the executors may be trustees of the residue for the husband.

If, on the other hand, the disposition exercised by the wife in her will extended to the stock only, then she died intestate as to the accumulations, and the husband was bound to take out administration *cæterorum*, as would have been done in *Ledgard v. Garland* (1 Curtis, 286), if there had not been a question upon the construction of the will, which was left for the decision of the court of equity. The cases bearing on this point are collected in Williams on Executors (vol. i. pp. 321-327, 1st ed.; p. 280, 2d & 3d ed.). [Tindal C. J. A *cæterorum* grant would probably relate to choses in action only.] In *Salmon v. Hays* (4 Hagg. Eccl. Rep. 382, 386), a feme covert having made a will of her separate property, but having appointed no executor, the court refused to grant a limited administration with the paper annexed, to the legatees therein named; but according to the course of office, granted a general administration, cum testamento annexo, to the husband; and Sir John Nicholl in his judgment gives this reason for so doing; "What would be the effect of the court rejecting him (the husband)? It might lead to two distinct grants—the one limited to the two daughters (the legatees), the other, to the husband; because, if the wife has left any other property than that over which she had, and has exercised, a disposing power, the husband will be clearly entitled to have a *cæterorum* grant." [Tindal C. J. Sir John Nicholl merely says, that the husband might have such a grant, not that it was absolutely necessary. Maule J. Suppose the defendant had taken the money in the lifetime of the wife, in whose name must an action have been brought to recover it?] The wife would probably have been joined with the husband for conformity. [Maule J. Could not the husband have sued alone?] *Carne v. Brice* (7 M. & W. 183) is certainly in favour of that proposition; but equity would probably decide differently. [Maule J. But we must decide according to law. Equity would look to all the circumstances of the case; such as whether the husband had supported the wife, whether they had lived together, and so forth. We have no means of instituting such an inquiry.]

The last question is, whether this action will lie against this defendant. The executor is clearly entitled to some of the property of the deceased. He is prevented from going himself to her house, and he sends his son, who takes the money, and hands it over to his father. How can he, receiving this money as agent for his father, be said to have received it to the use of the plaintiff? It is not denied, that if a servant does a wrongful act by order of his master, either the master or the servant may be liable in trespass; but this is an action upon an implied contract. Suppose the father had brought an action for money had and received against the defendant to recover the money, could the latter have set up the right of a third party as a defence? [Maule J. Perhaps not. But a person may, by his own conduct, render himself liable to two parties. As if he receives a chattel from A., and agrees to return it to him, he will be liable to him, if he does not return it; and he may be liable also to the true owner.] But in such a case the double liability would not arise from one and the same act; neither would the party be responsible in the same form of action. He would be liable, on his contract, to A., and would be liable, in trespass or trover, to the true owner. The taking of the money by the defendant is only one act, and he cannot be liable in respect thereof to two different parties.

[400] TINDAL C. J. I think this rule must be discharged.

The first question is,—who had the right to the money, in respect of which the action is brought, at the time of the death of the plaintiff's wife? It appeared that she had been living apart from her husband, having an interest in some funded property, which was secured to her separate use, and which she had the power of disposing of by her will. She had made a will and appointed the father of the defendant one of her executors. After her death, the sum of money in question was found locked up in a drawer in her lodgings; and the defendant went to the house and obtained possession of it for his father, who was one of her executors. Of what did this money consist?—of accumulations of the dividends of her separate estate, or of savings derived from other sources? If of the latter, no further question could arise, as the plaintiff would clearly be entitled to recover. But admitting that the money was the produce of the dividends, the question is, whose property it was at the time of the wife's death.

Without entering into the question, whether or not the wife had the power of

disposing by will of the accumulations of these dividends, it is enough to say that no such disposition appears to have been made in this case; as the will is limited to the proceeds of the long annuities when sold, and leaves the prior accumulations untouched. But then it is said, that although these accumulations were not disposed of by the wife, yet, executors having been appointed, the law vested the money in them. But the authority of these executors is only co-extensive with the power given by the will; for the executors here do not take jure representationis, but under the power which the wife was authorised to exercise by making a will as to this particular property. They are therefore not entitled to this money.

The next question is as to the right of the husband [401] to the money. In Com. Dig. tit. Baron and Feme (E. 3), it is laid down that "all chattels personal which the wife has in possession in her own right, are vested in her husband by the marriage, though he do not survive. So, chattels personal, not in possession at the time of the marriage, if they are reduced into possession during the coverture" (citing Co. Litt. 351 b.). It has been admitted, in the course of the argument, that if this money had been taken away during the lifetime of the wife, the action must have been brought by the husband alone. Perhaps in such case he would have been considered in equity as a trustee for the wife; but, at law, the action must have been brought by him. The case of *Carne v. Brice* is a strong authority in favour of the husband's right to the money; and *Molony v. Kennedy* shews that he was entitled to the possession of it without taking out administration to his wife. These authorities, therefore, dispose of the first part of the case, and establish that the husband was, at law, entitled to the money sought to be recovered in this action.

Another point which has been insisted upon is, that this money was received by the defendant to the use, not of the plaintiff, but of the defendant's father, as executor; and that the money having been paid over to the father, the action ought to have been brought against him as the principal. The answer to this is, that the defendant was a wrong-doer in taking the money, and would have been liable to the plaintiff in trespass. The plaintiff however waives the tort, and sues the defendant for money had and received; and the defendant cannot relieve himself from liability, by paying over the money to another party, as he might have done if the original taking had been lawful (b). This circumstance distinguishes the pre-[402]-sent case from *Stephens v. Badcock* (3 B. & Adol. 354); for there the defendant received the money as agent for a party who was entitled to receive it; whereas here the receipt was altogether wrongful, and it must be taken with all its consequences. I am of opinion, therefore, this rule must be discharged.

COLTMAN J. I am of the same opinion. The case of *Carne v. Brice* appears to me to go the whole length of the present, and to establish that, although the wife may be entitled to separate property, the dividends arising therefrom, when received, vest in the husband. That is the principle of this case. The rule of law is, that in order to protect property from the husband, it must remain in the hands of the wife's trustees. Courts of equity seem to think that if the wife dispose of the property by will, it is still affected with the trust. Here, however, the property in question was not disposed of; and the case of *Molony v. Kennedy* shews that the property passes to the husband without administration; and I think that even if it had been disposed of, the rule, at law, would still have been the same.

It is said that this is an equitable action, and therefore that the same equities are to be considered as would prevail in a court of equity; and it is argued that the husband would be liable in equity to pay the expenses of his wife's funeral. But I think there is nothing inequitable in allowing this action. The defendant, as agent for the wife's executor, claims a sort of equitable set-off for the funeral expenses; but if the executor has made such a payment, it was a payment in his own wrong; for he is not a general executor, but an executor for a specific purpose only, and has therefore but a limited interest in the property of the deceased.

[403] The remaining point is, that the money was received by the defendant as an agent, and has been paid over by him to his principal. The answer to that is, that in taking the money the defendant was a trespasser. In *Stephens v. Badcock* the receipt was rightful; whereas here, though innocent in fact, it was wrongful in point

(b) And see *Edwards v. Hodding*, 5 Taunt. 815, 1 Marsh. 377.

of law; and a party is bound to know the law. Under such circumstances it is no justification to an agent that the money has been paid over.

MAULE and CRESSWELL JJ. concurred.

Rule discharged.

PHILLIPS v. EMILY ANN BIRCH. May 28, 1842.

[S. C. 5 Scott, N. R. 178; 2 D. N. S. 97; 11 L. J. C. P. 297.]

A summons before a judge at Chambers, taken out after judgment in the cause, does not operate as a stay of proceedings.—Although it is the entry of the judgment of record on the judgment-roll, and not the entry of the minute of the judgment in the master's book, that constitutes the judgment itself, yet a summons taken out after the entry of such minute is not a summons taken out in the cause.—In debt, the plaintiff having signed judgment by nil dicit, the minute of the judgment was entered in the master's book, mentioning the whole amount demanded by the declaration. A fi. fa. was then issued for the amount really due, and costs. A summons having been taken out to set aside the fi. fa. for irregularity, by reason of its not corresponding with the judgment, the plaintiff, before the summons was attendable, perfected the roll by entering up judgment for the amount mentioned in the fi. fa., and entering a remittitur for the residue of the sum demanded by the declaration. At the hearing of the summons, the record so perfected was produced before the judge, who nevertheless made an order to set aside the fi. fa. This order was rescinded by the court.

Channell Serjt., in last Easter term (April 18th), obtained a rule calling upon the assignees of the defendant to shew cause why an order made in this cause by Lord Denman C. J., at chambers, should not be rescinded.

The following facts appeared from the affidavits. The [404] action was brought in debt on two promissory notes; the declaration contained three counts, and the aggregate sum demanded was 1500*l*. The real debt sought to be recovered was 514*l*. 16*s*. On the 28th of February the plaintiff signed judgment for want of a plea (*vide post*, p. 405 (a)). A writ of fieri facias was, on the same day, issued upon the judgment, and the sheriff thereby was commanded to cause to be made of the goods of the defendant 514*l*. 16*s*., which the plaintiff then lately had in, &c. recovered against her, and 8*l*. 4*s*. for costs, with interest upon these two sums at 4 per cent. On the 1st of March the sheriff levied upon the goods of the defendant under this writ, and sold them on the 9th, and two following days. On the 7th of March a fiat in bankruptcy issued against the defendant, under which she was declared a bankrupt; and (the petitioning creditor under the fiat having set up a claim to the goods seized) the sheriff applied for relief under the interpleader act; and thereupon an order was made that the sheriff should pay the proceeds into court, and that an issue should be tried to ascertain the right to them. On the 15th of March the plaintiff's attorney was served with a summons to shew cause why the fi. fa. and all proceedings thereon, should not be set aside for irregularity, with costs, on the ground that there was no judgment to warrant the execution, and that the writ did not correspond with the judgment signed in the cause.

The affidavit of the plaintiff's attorney, upon which the present rule was obtained, stated "that the alleged irregularity urged in support of such summons was, that by the entry made by the clerk of the judgments (b) in his book, on the said plaintiff so signing [405] judgment in this cause in manner aforesaid, it appeared that the said plaintiff had so taken judgment for the aforesaid penal sum of 1500*l*., whereas, in truth and in fact, the said plaintiff had only taken judgment for her aforesaid real debt of 514*l*. 16*s*. and costs of suit; such erroneous entry arising from the general practice of merely entering an incipitur on the judgment-paper at the time of signing judgment, and consequently the clerk of the judgments does not see the award of judgment entered or completed on such judgment paper or on the roll, the roll being

(b) In point of fact, there is now no such officer as the clerk of the judgments; the office was abolished by the statute 1 Vict. c. 30. The business is transacted at present in one of the masters' offices.

usually afterwards completed and filed and docketed with the proper officer; and that in consequence of its appearing that the said plaintiff had taken judgment for such penal sum of 1500l. and the mandatory part of the aforesaid writ of fi. fa. not corresponding therewith, inasmuch as such writ of fi. fa. only directed the said sheriff to levy the real debt of 514l. 16s., such variance was argued to be a sufficient irregularity for the said writ of fi. fa. and all proceedings under the same being set aside"^(a).

[406] The summons was returnable on the 16th of March, but the plaintiff's attorney did not attend on that day. The summons was renewed and made returnable on the 17th. On that day the plaintiff's attorney completed the judgment on the roll, entering a remittitur for 985l. 4s. parcel of the said sum of 1500l., and a prayer of judgment for the residue (514l. 16s.), together with costs; and on the same day it was filed and docketed.

On the 19th of March the summons was heard before Lord Denman C. J. at chambers, when the judgment-roll was produced in conformity with the writ of fi. fa. His lordship, however, made the order, now sought to be rescinded, in the terms of the summons.

Sir T. Wilde Serjt. now shewed cause. Under the circumstances the order of Lord Denman was quite correct. The entry in the master's book was, in fact, the entry of the judgment, and it could not afterwards be altered. The costs of perfecting the roll are allowed in practice, although only the incipitur is entered. The amount for which the judgment is signed being stated, in the entry made in the master's book, to be the whole sum mentioned in the declaration, viz., 1500l., and the fi. fa. having issued for 514l. 16s. which was therein stated as the sum recovered by the plaintiff, there was clearly [407] a variance between the judgment and the writ, and consequently the latter was irregular. While things were in this state, a summons was taken out before the judge to set aside the fi. fa. for this irregularity; but before the summons came on to be heard, the plaintiff, behind the defendant's back, entered a remittitur on the roll, so as to make the judgment-roll correspond with the fi. fa. The case of *King v. Birch* (2 Gale & Dav. 513), decided by the Queen's Bench last term, will be relied on by the other side, where, under somewhat similar circumstances, that court rescinded an order like the present. That judgment appears to have proceeded upon the ground that the incipitur is merely a warrant to enter

(a) Some discussion arose in the course of the argument as to whether the amount for which judgment was signed, would appear, except upon the roll. The course of practice in the master's office has been ascertained to be as follows:—The attorney, who signs judgment, produces a judgment-paper, that is, a paper on which is transcribed the commencement of the declaration (hence called the incipitur) down to the words "For that whereas" inclusive, (with the exception that the date at the heading is the day on which judgment is signed, instead of being that on which the declaration was filed or delivered). At the foot of this (in ordinary cases) the master writes—

"Allowed £———" (leaving a blank for the costs).

"Signed," &c. (the date on which judgment is signed).

No entry is made of the amount for which judgment is signed; but where the action is in debt, as in the present case, the sum demanded would of course appear in the commencement of the declaration so transcribed. The master then makes a minute in the daybook to this effect:—

"1500l.,^{*1} Middlesex,^{†1} *Phillips v. Birch* (*Emily Ann*), D.,^{*2} King,"^{†2} and the judgment-paper is returned to the attorney. Subsequently, a transcript of the above minute is made in the judgment-book, but omitting the sum, and commencing with the venue.

Another question raised was,—whether or not it appeared by the judgment-roll that judgment had been signed on a different day from that stated in the affidavit. The roll was examined by the court; but it appeared there was no entry upon it of the day when the judgment was signed.

^{*1} The sum demanded, in debt; the amount of the damages laid in the declaration, in actions which sound in damages.

^{†1} The venue.

^{*2} I.e. Debt.

^{†2} The name of the plaintiff's attorney.

judgment for the sum stated in the declaration, and not for more. But, unless under particular circumstances, the incipitur is the only judgment entered, the judgment-roll being, in practice, but rarely carried in. At any rate, after the summons had been taken out to set aside the fi. fa. for the irregularity, it was too late to make an entry on the roll for the purpose of making the judgment correspond with the writ; as the summons would operate as a stay of proceeding from the time it was attendable, even though it were not, in fact, attended. Although, between the original parties to the suit, the court might have allowed an amendment of the writ, they will not do so where the rights of assignees have intervened, as in this case; *Hunt v. Pasman* (4 M. & S. 329); *Webber v. Hutchins* (8 M. & W. 319).

Channell Serjt. (with whom was Pashley), in support of the rule. The facts in this case are nearly the same as those in *King v. Birch*, the sole difference being in the figures. The court there decided, that the only thing that could be looked at was the judgment-roll; [408] and the roll having been perfected before the order was made at chambers to set aside the writ for irregularity, the court rescinded such order with the full concurrence of Lord Denman, by whom it had been made. There, the court adopted the argument, that the incipitur was the mere leave of the court, by its officer, to enter up judgment for the sum mentioned, or any smaller sum. The first summons in this case not having been attended, would not operate as a stay of proceedings, so as to prevent the party from perfecting the roll. Under the old practice, three summonses were necessary; but now, by the new rules (T. 1 W. 4, r. 9), the second summons is peremptory. There is no general rule that there is to be a stay of proceedings from the return of the first summons. In *Lush's Practice* (page 803), it is laid down that, "as a general rule, a summons does not operate as a stay of proceedings, unless it be a part of the application 'why in the meantime all further proceedings should not be stayed;' nor does an order, unless it so expresses. The exceptions are, where the applicant has to take the next step, and the application relates to the time or mode of taking that step; as where the summons is for time to plead; for leave to plead several matters; to strike out a count, &c.; cases where a stay of proceedings is necessarily implied." This case, certainly, does not fall within the principle of those exceptions. [Maule J. In *Archbold's Practice* (page 1201, 7th ed., by Chitty) it is said, "When the object of the summons is collateral to the time for pleading, as to discharge the defendant out of custody on filing common bail, it will not, in general, operate as a stay of proceedings. A summons to tax an attorney's bill, though served, does not operate as a stay of proceedings from its return, so as to prevent the attorney issuing a writ, [409] the defendant not having signed an undertaking to pay the amount of the taxation."] The same rule is laid down in *Tidd's Practice* (a).

TINDAL C. J. I think this rule must be made absolute. At the time when Lord Denman made the order in question, a roll of court was in existence, and was produced before him, which sanctioned the writ that had been issued; shewing that the judgment was not for the whole sum of 1500l., but only for 514l. 16s. This record of the judgment was therefore, at that time, among the rolls of the court. If the defendant had any ground of complaint that the entering up of judgment on the roll was irregular, as having been done behind his back, he should have made some application to vacate such roll, and to be placed in the same condition in which he was before; but no such application has been made.

I am not satisfied that the summons was to be considered as a stay of proceedings. The authorities that have been cited, rather shew that a summons does not of itself in all cases operate in that manner, but only whilst a cause is going on. After judgment, however, there is an end of the proceedings in the ordinary sense of the words; and this summons, therefore, cannot be said to have been taken out in the cause.

The other judges (b) concurred.

Rule absolute.

(a) Page 470, 9th ed. And see *Tidd's New Prac.* 256.

(b) *Coltman, Maule, and Cresswell JJ.*

[410] HALL v. BETTY. May 31, 1842.

[S. C. 5 Scott, N. R. 508; 11 L. J. C. P. 256. Applied, *Went v. Stallibrass*, 1873, L. R. 8 Ex. 185.]

The declaration stated that it was agreed between the plaintiff and the defendant that the plaintiff should purchase two houses of the defendant for the residue of a term of years, &c.; that the defendant should paper them, &c.; that the plaintiff should pay part of the purchase-money, on the completion of the conveyance of the houses; and further, that the defendant should make a good title. At the trial, an agreement was produced as follows:—"Mr. H. (the plaintiff) having agreed to purchase of Mr. B. (the defendant) two leasehold houses, &c., Mr. B. hereby agrees to paper, &c.; Mr. H. to pay, &c. at the time of the conveyance, &c." Nothing was said in the agreement as to making a title.—Held, that the agreement to purchase, though recited as an existing agreement, was to be considered as forming part of the agreement produced.—Held also, that there was no variance between the agreement stated in the declaration and the one produced in evidence, on the ground that the latter was silent as to the title, inasmuch as the contract to make a title was implied.

Assumpsit. The declaration stated that heretofore, to wit, on, &c. by a certain agreement then made by and between the plaintiff and the defendant, it was by the plaintiff and the defendant agreed as follows, that is to say, that he, the plaintiff, should and would purchase of the defendant, and that he, the defendant, should and would sell to the plaintiff, certain premises, to wit, two houses, situate, &c. for the then residue of a certain term of years then unexpired of and in the said houses, to wit, for the then residue of a term of fifty years, at and for the price or sum of 250l. to be paid, &c. And it was by the said agreement further agreed (then followed stipulations as to the defendant's papering and painting the premises, &c.), and that the plaintiff should and would pay to the defendant the sum of 250l., the purchase money of and for the said two houses in manner following, that is to say, the sum of 230l., parcel thereof, on the completion of the conveyance of the said houses to the plaintiff, and the sum of 20l., other parcel and residue of the said sum of 250l., on the fulfilment, by the defendant, in all things, of the said agreement on his behalf. And it was by the said agreement further agreed by and between the plain-[411]-tiff and the defendant, that the defendant should and would make to the plaintiff a good title to the said two houses for the residue of the said term within a reasonable time then next following. Mutual promises. Averment of performance on the part of the plaintiff. Breach: that the defendant had not, although a reasonable time for that purpose had elapsed before the commencement of the suit, and although after such reasonable time, and before, &c., to wit, on, &c., he, the defendant, was requested by the plaintiff so to do, as yet made to the plaintiff a good title to the said houses for the residue of the said term, but had hitherto wholly neglected, &c. Concluding by alleging special damage incurred by the plaintiff in endeavouring to procure such title, &c.

Plea: first, non assumpsit; secondly, a discharge; (which the court thought was not supported by the evidence).

The replication added the similitur to the first plea, and traversed the discharge.

At the trial before the Lord Chief Justice, at the sittings at Westminster, after last Hilary term, an agreement was given in evidence, which commenced thus. "Mr. Hall having agreed to purchase of Mr. Betty, for the sum of 250l., the two leasehold houses situate, &c. Mr. Betty hereby agrees to paper and paint, &c. Mr. Hall to pay 230l. at the time of the conveyance, and the remaining 20l. on the completion of the painting, &c.:" but the agreement contained no contract to make a good title.

On behalf of the defendant it was insisted that there was a variance. The plaintiff's counsel applied to the Lord Chief Justice to amend. This his lordship declined to do; but the above facts were indorsed on the nisi prius record, with liberty to the plaintiff to move for judgment, under the 3 & 4 W. 4, c. 42, s. 24. The damages were assessed, conditionally, at 6l. 7s. 8d.

[412] Bompas Serjt., in last term, obtained a rule nisi accordingly, to enter judgment for the plaintiff on the whole record, upon the verdict found at the trial, for 6l. 7s. 8d. damages.

Talfourd Serjt. now shewed cause. The question is, whether the allegation in the declaration, that the defendant agreed to make a good title to the premises, is supported by proof of an agreement in which nothing whatever is said about the title. It will be argued on the other side that the agreement has been set out according to its legal effect; but that is not so. This is not an agreement for the sale of the freehold of the houses; if it were, possibly a covenant for title might be implied. But it is an agreement in writing, as required by the statute of frauds, for a chattel interest in lands; and there is nothing on the face of the agreement from which any implication can arise that the parties were contracting with respect to the title. Non constat, but that the title may have been previously inspected and approved. Under such an agreement there is undoubtedly an implied contract that the vendor has title to sell whatever interest he has in the premises, but nothing more; and the implication rather would be, that all matters of title had been previously investigated. If any inference is to be drawn from the language of the agreement as to making a title, it would be—not that the title was to be made within a reasonable time—but “at the time of the conveyance,” when the bulk of the purchase money was to be paid; for it might be that at that time the defendant could produce a good title. Besides, the agreement given in evidence is not one for the purchase of the lease; for it recites that such an agreement had been entered into between the parties. If this former agreement was in writing, it is not the contract declared upon; if not, it would be [413] void by the statute of frauds. [Tindal, C. J. Although it is put in the preterpluperfect tense, is it not, in fact, all one transaction? Coltman J. Is there any case to shew that a contract to sell implies a contract to make a good title? But that seems to be admitted.] Perhaps that is too large an admission.

Bompas Serjt. in support of the rule. There is no doubt that where a party sells property, he impliedly contracts that he has a good title; and that rule applies to the sale of a lease. In *Ogilvie v. Foljambe* (3 Meriv. 53) the Master of the Rolls (Sir W. Grant), in giving judgment, observed, “The right to a good title is a right, not growing out of the agreement between the parties, but which is given by law. The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it” (ib. 64). [Maule J. In *George v. Prichard* (Ry. & Moo. 417), which was an action by the purchaser against the vendor of a lease, for the deposit, it was ruled by Lord Tenterden at nisi prius, that a vendor was not bound to produce his lessor’s title without an express stipulation to that effect.] That case was expressly overruled in *Souter v. Drake* (5 B. & Ad. 992; 3 Nev. & M. 40), where it was held that, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor’s title to demise, as well as that of the vendor to the lease itself, and that such implied undertaking is available at law as well as in equity.

TINDAL C. J. I do not think my brother Talfourd can get over that case. Per Curiam, Rule absolute.

[414] SPENCER v. HANDLEY AND BURGESS, Executors of Richard Heald.
June 1, 1842.

[S. C. 11 L. J. C. P. 250.]

Debt on bond. Plea, that the bond was obtained by fraud and covin. At the trial it appeared that C., being about to purchase a medical business, consulted H. on the subject, who was of opinion that it was worth 300l., and consented to be security for C. to that amount. A., the party having to dispose of the business, through his attorney R., required the sum of 425l., and it was ultimately agreed that C. should give his separate bond for 125l., and that H. should join him in a joint and separate bond for 300l., (being the bond in suit). H. was ignorant of the existence of the agreement as to the separate bond at the time he executed the other. C. was called as a witness, and stated that it was agreed between himself and R. that the bond for 125l. should be concealed from H.; but this was contradicted by R. The judge told the jury, that it was not sufficient to shew that C. had committed a fraud on H., but that they must be satisfied that the plaintiff or his agent was a party to it. Held, a correct direction.—The verdict having been

returned for the plaintiff, the court refused to disturb it, the existence of fraud being a question for the jury (a)¹.

Debt, on the bond of Richard Heald (the testator), dated January 31st, 1835, conditioned for the payment by one John Carpenter, and the testator Heald, or either of them, their or either of their heirs, &c., to one George Bass Billson, since deceased, and the plaintiff, or either of them, of the sum of 300l., before or upon the 31st of January 1842, with interest in the meantime at 5l. per cent. The declaration assigned a breach in the non-payment of interest by Carpenter, or Heald, during his life, or the defendants as executors of Heald, to Billson, during his life, or to the plaintiff.

Plea; that the said supposed writing obligatory was obtained from the said Richard Heald, in his lifetime, and he was induced to execute and enter into the same by the plaintiff, and the said G. B. Billson, and others in collusion with them, by and by means of the fraud, covin, and misrepresentation of the plaintiff and the said G. B. Billson, and the said others in collusion with them. Verification.

[415] Replication, traversing the fraud, &c.; and issue thereon.

At the trial before Coltman J., at the sittings for Middlesex after last Hilary term, it appeared that some years ago Mr. Carpenter, a general practitioner in medicine, at Rothwell, in Northamptonshire, sold his practice to one Abraham Billson, and entered into a bond not to practise again at Rothwell. In January 1835 A. Billson died, having appointed his brother, George Bass Billson, and the plaintiff, his executors. Carpenter soon afterwards wished to resume his practice at Rothwell, but the executors of A. Billson contended, he had no right to do so, and a treaty was entered into, between the executors and Carpenter, for the repurchase of the practice by the latter. This treaty was carried on chiefly through the medium of Mr. Robinson, the attorney to the executors. Carpenter, who, as a witness for the defendants (a)², proved all these facts, also stated that Robinson required, in the first instance, 450l. as the purchase-money, but that the demand was afterwards reduced to 425l.; that he, Carpenter, had had a previous interview with his friend Dr. Heald, the testator, on the subject; and that he told Robinson, that he was not prepared to give the sum required, as Dr. Heald thought 300l. sufficient; and that Dr. Heald would join him in a bond for that amount, if that was considered enough, but that he would do no more. The witness then stated that Robinson had asked him if he could get other parties to join him for the remainder, and that he answered he could not; that Robinson then asked him if [416] he would give his own bond for 125l. more, which he agreed to do; but said he thought if Dr. Heald knew it, he would not join in the bond for 300l.; and that Robinson replied there was no necessity for Dr. Heald's knowing it; that ultimately it was agreed that two separate bonds should be given, one by Carpenter alone for 125l. and the other for 300l., in which Dr. Heald was to join: that the two bonds were executed accordingly (the separate bond being executed three days after the joint bond), and that the witness never mentioned the bond for 125l. to Dr. Heald. It appeared also that Carpenter had been sued on the last-mentioned bond (which was the first time that Dr. Heald knew of its existence), and a judgment had been recovered in the action, to satisfy which Carpenter's goods had been taken in execution. Since that time Dr. Heald had paid interest on the joint bond.

Robinson was called as a witness on the part of the plaintiff, for the purpose of contradicting Carpenter. He was objected to as directly interested in the event of the suit, inasmuch as in case of the defendants obtaining a verdict, he would be liable to the plaintiff in an action for negligence in preparing the securities. The learned judge, however, thought the case fell within the twenty-sixth section of the 3 & 4 W. 4, c. 42, and having indorsed Robinson's name on the record under the provisions of that section, admitted him as a witness. Robinson, in his examination,

(a)¹ See *Pitcairn v. Ogbourne*, 2 Vez. sen. 375; *Green v. Gosden*, ante, vol. iii. 446.

(a)² He was objected to at the trial, as being the co-obligor with the testator in the bond in suit, on the authority of *Slegg v. Phillips*, 4 A. & E. 852, 6 N. & M. 360; but the learned judge ruled that he was an admissible witness, on the authority of *Russell v. Blake*, ante, vol. ii. p. 374. He was examined, however on the voir dire, and stated that he had been released by the executors.

positively denied the statement made by Carpenter, as to there having been any agreement or proposal that the bond for 125l. should be kept secret from Dr. Heald.

The learned judge, in summing up the case, told the jury that to support the plea it would not be sufficient to shew that a fraud had been committed by Carpenter alone: that they must be satisfied that the plaintiff or his agent was a party thereto; that if they thought Dr. [417] Heald was induced to execute the bond for 300l. by the concealment of the other bond, and that Mr. Robinson was a party to such concealment, they should find for the defendants; and that this would turn materially on the credit they gave to the witnesses on either side. The jury returned a verdict for the plaintiff.

Sir T. Wilde Serjt. in last Easter term (a)¹, moved for a new trial upon the ground, first, that Robinson was not an admissible witness (even under the stat. 3 & 4 W. 4, c. 42 (b)); secondly, that there had been a misdirection. Upon this latter point he contended that the question presented by the learned judge, as to Robinson's being a party to the fraud, was calculated to mislead them; inasmuch as it was not necessary that he should have been an active party therein, but that it would have been sufficient if he was aware that Carpenter concealed from Dr. Heald the fact that he was to pay more than 300l. for the practice; as that would have been an acquiescence in the fraud so as to avoid the bond; and also that the jury must have understood they had to decide whether Carpenter's evidence or Robinson's was true; whereas, there had been fraud, even on the latter's own showing.

A third ground upon which the rule was moved for was, that the verdict was against the evidence.

The court granted a rule on the first (a)² and third points; but refused it on the second point, observing that the direction of the learned judge amounted to saying, that if the jury thought Robinson was cognizant of the fraud, he would be a party to it; and that the jury could hardly have understood the direction otherwise.

May 31.—Merewether and Channell Serjts. on a former day shewed cause. The verdict can only be set aside on the ground that there had been a fraud committed on Dr. Heald; but even the evidence of Carpenter, supposing it to be true to the letter, would not establish legal fraud. The case is distinguishable from *Stone v. Compton* (5 N. C. 142). In that case there had been, on the face of the security, a positive misrepresentation of a fact, by which the party had been misled. The court in giving judgment lay down the rule thus:—"Now the principle to be drawn from the cases to which reference has been made in the course of argument we take to be this; that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent

(a)¹ 18th April. Before Tindal C. J., Coltman, Erskine, and Cresswell JJ.

(b) The argument on this point is not reported, as it ultimately became unnecessary for the court to pronounce any judgment upon it.

Sir T. Wilde, on obtaining the rule, cited the following authorities:—*Morish v. Foote*, 8 Taunt. 454, 2 B. Moore, 508; *Boorman v. Brown*, 9 A. & E. 487, 1 P. & D. 364; *Miller v. Falconer*, 1 Campb. 251; *Groom v. Bradley*, 8 C. & P. 500; *Steers v. Carwardine*, ib. 570; *Pickles v. Hollings*, 1 Moo. & Rob. 468; *Creevey v. Bowman*, ib. 496; *Yeomans v. Legh*, 2 M. & W. 419; *Mitchell v. Hunt*, 6 C. & P. 351; *Faith v. McIntyre*, 7 C. & P. 44.

Merewether Serjt. on shewing cause, referred to *Green v. The New River Company*, 4 T. R. 589; and *Bent v. Baker*, 3 T. R. 27 (see also the cases collected and commented upon, 1 Phill. Ev. 101-118, 9th edit.). He argued that if Robinson was ever liable to the plaintiff for negligence, such liability had ceased at the time he was called as a witness, inasmuch as the remedy would be barred by the statute of limitations, the bond in question having been executed in January 1835, and the trial of the principal cause having taken place in February 1842.

Sir T. Wilde, on the authority of the case of *Short v. McCarthy*, 3 B. & Ald. 626, shewing that an action against an attorney for negligence must be brought within six years after the act of commission or omission complained of, admitted that this was an answer to the objection raised against the admissibility of the witness.

(a)² See the last note.

of the surety's liability might be thereby in-[419]creased, the security so given is void at law, on the ground of fraud." *Pidcock v. Bishop* (3 B. & C. 605; 5 D. & R. 505) is to the same effect. [Tindal C. J. referred to *Jackson v. Duchaire* (3 T. R. 551).] Fraud is sought, in this case, to be inferred from the form of the bond; but it was a mere money bond, from which no such inference can legitimately be drawn.

Sir T. Wilde Serjt. in support of the rule. It is clear that a fraud was practised upon Dr. Heald; and the plaintiff is affected with it, through his agent, Robinson. There is nothing to shew that, at the time he executed the bond, Dr. Heald knew the true state of facts; and these were purposely concealed from him. It was in evidence that he thought the business was worth only 300l. The form of the bond is material; for it keeps out of sight the amount of money that was really to be paid for the business. *Pidcock v. Bishop* resembles the present case. There, no communication between the creditor and the surety appears. That case establishes that a party ought to have full information on all the material facts in connection with which he is about to incur liability. The whole of the arrangements ought to be communicated to him. If he is prevailed upon to enter into the contract by a belief—whether induced by the form of the security or otherwise—that the principal will have a certain benefit, any collateral bargain between the principal and the creditor, varying the amount of the benefit, ought to be communicated to him. At any rate, there was enough in this case to make Robinson suspect that Heald thought the bond for 300l. was the only one that was to be given. [Maule J. Is there any case of such a defence as the present succeeding in an action on a bond? The cases cited were on [420] parol guarantees.] There was a similar plea in *Raphael v. Goodman* (8 A. & E. 565), which was an action on a bond to the sheriff. [Maule J. There is no doubt that some sort of fraud might formerly have been given in evidence under non est factum. Tindal C. J. In former times there appears to have been no such plea as the present. Maule J. Selwyn, in the last edition of his *Nisi Prius*, does not mention it (b). Channell Serjt. referred to *Mason v. Ditchburn* (cited 2 C. M. & R. 720, n.).] In that case, as also in *D'Aranda v. Houston* (6 C. & P. 511), which, like the present, was an action given on a bond to secure the payment of the purchase-money for a medical business, there was a plea of fraud and covin.

Cur. adv. vult.

TINDAL C. J. now delivered the following judgment.

In this case, which we required some time yesterday to look into, it appears that there was some evidence on both sides; and as it was a question undoubtedly and peculiarly for the consideration of the jury—namely, whether any fraud had been committed—we think we ought not to interfere with their finding. If the court had been in the situation of the jury, we are not prepared to say that we should have decided as they have done; but, at the same time, we cannot say the jury are wrong in the conclusion at which they have arrived. The court, therefore, think there ought to be no new trial.

Rule discharged.

[421] ALBON AND OTHERS v. PYKE. June 1, 1842.

[S. C. 5 Scott, N. R. 241; 11 L. J. C. P. 266.]

The loan societies act, (5 & 6 W. 4, c. 23), authorized the trustees to lend money under certain circumstances, and to take promissory notes in the name of the treasurer as security for repayment. The act (s. 8) authorized a justice of the peace upon complaint of the treasurer, to summon such party and award payment to be enforced by distress.—Held, that the jurisdiction of the superior courts was not thereby taken away; especially in an action brought upon a promissory note, which did not appear, from the pleadings, to have been given in respect of a loan (vide post, 426 (a)).

Debt, by the plaintiffs, described in the declaration as trustees of a certain society,

(b) That it is competent to an obligor to plead and to prove the real nature of the transaction, for the purpose of avoiding his bond, see *Collins v. Blantyre*, 2 Wils. 347; *Paxton v. Popham*, 8 East, 408; *Greville v. Atkins*, 9 B. & C. 462, 4 Mann. & Ryl. 378. And see *Buckler v. Millerd*, 2 Ventr. 107; *Mason v. Watkins*, ib. 109.

called The City of London Loan Society, the rules and regulations of which said society were, previously to the making of the promissory note thereafter mentioned, duly certified, deposited, and inrolled, pursuant to the provisions of the statute in that behalf made and provided. The declaration (filed the 25th October 1841), then stated: That on the 22d of April 1840, the defendant made his promissory note in writing, and thereby promised to pay to the treasurer of the society 5l., for value received, by weekly payments of 2s. each; that the defendant then delivered the said promissory note to the said society, and agreed with the said society to pay them the same, according to the tenor and effect thereof; and the plaintiffs, suing as such trustees as aforesaid, averred, that although the time for payment of the whole of the said sum of 5l. had elapsed, and the said note had become due and payable long before the commencement of the suit, yet the defendant had not paid the amount of the said note, or any part thereof; whereby, &c.

Demurrer; and joinder.

The causes of demurrer were stated to be, that the plaintiffs were not enabled to sue or maintain the action as trustees of the society, called The City of London Loan Society, upon the promissory note mentioned and set forth in the declaration in the cause, by the provisions of the statute 5 & 6 W. 4, c. 23, or of any other act relating to loan societies.

[422] Bompas Serjt. in support of the demurrer. The question in this case is, whether, upon the proper construction of the statute 5 & 6 W. 4, c. 23, the plaintiffs, as trustees of a loan society, were not bound to proceed against the defendant for the debt, which is the ground of the present action, in the manner pointed out by the eighth section of the act (vide *infra*, p. 423), instead of suing him in a superior court. The recital to that act (*b*) shews, that it was intended for the benefit of the labouring classes. By the fourth section (*c*), the property of the [423] society is vested in the trustees thereof, and all actions and other proceedings are to be conducted in their name. By the seventh section, no note or security for the repayment of any loan made under the act, is to be liable to stamp duty; and by sect. 8 (*a*), all such notes,

(*b*) "Whereas certain institutions for establishing loan funds have been, and may be, established in England, &c., for the benefit and advantage of the labouring classes of His Majesty's subjects, and it is expedient to give protection to the funds of such institutions, and to afford encouragement to the formation of other institutions of a like kind, &c."

(*c*) Sect. 4 enacts, "that all moneys, goods, chattels and effects whatsoever shall be vested in the trustee or trustees of such institution for the time being, for the use and benefit of such institution and the respective members thereof, their respective executors and administrators, according to their respective claims and interest; and, after the death, resignation or removal of any trustee or trustees, shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever; and also shall for all purposes of action or suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be and shall in every such proceeding (where necessary) be stated to be the property of the person or persons appointed to the office of trustee or trustees of such institution for the time being, in his or their proper name or names, without further description; and such person or persons shall and they are hereby respectively authorized to bring or defend, or cause to be brought or defended, any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right, or claim aforesaid of such institution, and to sue and be sued, plead and be impleaded, in his or their proper name or names, as trustee or trustees of such institution, without other description; and no suit, action or prosecution shall be discontinued or abate by the death of such person or persons, or his or their removal from the office of trustee or trustees as aforesaid, but the same shall and may be proceeded in by the succeeding trustee or trustees in the proper name or names of such person or persons commencing the same, any law, usage or custom to the contrary notwithstanding; and such succeeding trustee or trustees shall pay or receive like costs as if the action or suit had been commenced in his or their name or names for the benefit of, or to be reimbursed from, the funds of such institution."

(*a*) Sect. 8 enacts, "that all notes and securities entered into for the payment of

&c., are to be made payable to the treasurer or [424] clerk of the institution ; and in default of payment after demand, it is expressly enacted, that a justice of the peace may summon the party making default, and award payment to the treasurer, which may be enforced by distress. The subsequent statute, 3 & 4 Vict. c. 110, was passed after the making of the note on which this action is brought (a) ; but having the same object in view as, and being in *pari materia* with, the 5 & 6 W. 4, c. 23, the two acts may be considered in conjunction. The 5 & 6 W. 4, c. 23, is repealed by the 3 & 4 Vict. c. 110, which, however, enacts, that the provisions of the former statute shall be in force for the recovery of all sums lent previously to the passing of the 3 & 4 Vict. c. 110. The sixteenth section is similar to the eighth section of the 5 & 6 W. 4, c. 23 ; and the seventeenth section (b) enacts, that notwithstanding these provisions, the treasurer or clerk may proceed to enforce payment of a note in any county court, or court of requests, where the amount is within their jurisdiction. This shews that the legislature considered that, by the former act, the jurisdiction of the courts at Westminster had been taken away. [Tindal C. J. The general rule undoubtedly is, that the jurisdiction of the superior courts is not taken away, except by express words or necessary implication (c). Maule J. By the [425] eighth section of the 5 & 6 W. 4, c. 23, no execution is given but by a quasi *fieri facias*. There is no power to send the party making default to prison ; and it might be argued that such a power cannot be implied.] In *Cates qui tam v. Knight* (3 T. R. 442), the general rule was recognised, that the jurisdiction of the superior courts is not ousted but by express words. In that case the question turned upon the construction of the 25 G. 3, c. 51 ; which, having created penalties of 50l. and of 10l., enacted that the former should be sued for in any of the courts at Westminster, and provided that it should and might be lawful for justices of the peace to hear and determine the latter penalties, with a power to them to mitigate, &c., and it was decided that such proviso, by implication, ousted

such loans shall be made payable to the treasurer or clerk for the time being of the said institution ; and if the party or parties liable to pay the same shall fail to make full payment in money of the sum in the note or security mentioned, or any part thereof, for seven days after demand made on each party, or left at his usual place of abode, by or on behalf of the treasurer or clerk for the time being of the said institution, it shall and may be lawful for any one or more of His Majesty's justices of the peace for the county, riding, city, division or place where the person, &c. respectively so refusing to pay any of such notes or securities as aforesaid, shall or may happen to be or reside ; and such justice or justices is and are hereby required, upon complaint made by such treasurer, &c., to summon the person, &c., against whom such complaint shall be made ; and after his appearance or in default thereof, upon due proof upon oath of such summons or warning having been given or left as aforesaid, such justice, &c. shall proceed to hear and determine the said complaint, and award such sum to be paid by the person, &c. respectively liable to the payment of any such note or security to such treasurer, &c., as shall appear to such justice, &c. to be due thereon, together with such a sum for costs not exceeding the sum of 10s., as to such justice, &c. shall seem meet ; and if any person, &c. shall refuse or neglect to pay or satisfy such sum of money as upon such complaint as aforesaid shall be adjudged, upon the same being demanded, such justice, &c. shall, by warrant under his hand and seal, &c., cause the same to be levied by distress and sale of the goods of the party so neglecting or refusing as aforesaid, together with all costs and charges attending such distress and sale, and returning the overplus, if any, to the owner ; and no such proceedings shall be removed by certiorari or otherwise into any of his Majesty's superior courts of record."

(a) The statute received the royal assent on the 11th of August 1840.

(b) Sect. 17 declares and enacts, "that notwithstanding the provisions hereinbefore contained, the treasurer or clerk of such society, for the time being, may proceed for recovery of the sum due on such note, against the party or parties liable to pay the same, in any county court, or court of conscience or request, having jurisdiction to the amount so due, according to the course and practice of such courts ; and in such case the act or acts, and all provisions therein relating to such court and the powers thereof, shall be applicable to the recovery of the sum so due on such note."

(c) See *Agard v. Candish*, Sav. 134, Cro. El. 326, S. C. in error, Sir F. Moore, 564, 2 Anderson, 127. And see *Cates qui tam v. Knight*, 3 T. R. 442 ; *Shipman v. Henbest*, 4 T. R. 109.

the jurisdiction of the superior courts as to the 10l. penalties (b). [Maule J. The jurisdiction of the superior courts seems to be reserved by the express words of the fourth section of the 5 & 6 W. 4; for it authorises the trustees "to bring or defend any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right or claim aforesaid of such institution." Suppose the society were possessed of a chattel and sold it, and the purchaser gave a promissory note to secure the payment, that would not be a case for proceeding before a magistrate, not being a case of a loan. There is nothing in this declaration to shew that the note sued upon was given in respect of a loan.] It is certainly not so stated expressly; but it is to be collected from the whole of the declaration.

Talfourd Serjt., *contra*, was not called upon.

[426] TINDAL C. J. I do not think that last objection can be got over. Besides, there are no exclusive words in the statute under consideration; and it is perfectly clear, therefore, that the jurisdiction of the superior courts is not taken away. The proceedings under the eighth section must be before a justice of the peace for the county where the party making default resides; so that if such a party lived in Northumberland, and the treasurer in London, according to the construction contended for, the latter would be compelled to go to Northumberland to lay his complaint before the magistrates.

Bompas prayed leave to amend; but the court intimated, it would be better for the defendant that they should not accede to the request.

Judgment for the plaintiff (a).

[427] JOSEPH HOWARTH v. TOLLEMACHE, ESQ. June 1, 1842.

Trover against the sheriff. Plea, that a *fi. fa.* was delivered to the defendant at the suit of A. against B.; that the goods in the declaration were the goods of B., and that before the time when, &c., B. fraudulently delivered to the plaintiff possession of the goods under colour of a feigned, covinous, and fraudulent conveyance, to the intent to delay A. contrary to the form of the statute; and that whilst the goods were so in possession of the plaintiff, and whilst the writ was in force, the defendant, as sheriff, did seize, &c. Held, that the plea was bad, as amounting to an argumentative denial that the plaintiff was possessed, as of his own property.

This was a special action of trover. The declaration recited that the plaintiff

(b) See also *Fleming v. Bailey*, 5 East, 313; *Ex parte Langston*, 1 Mont. & Bligh, 142; S. C. per nom. *Ex parte Benson*, 1 Dea. & Chitt. 324; *Dundalk Railway Company v. Tapster*, 1 Q. B. Rep. 667.

(a) In *Timms v. Williams*, 2 G. & D. 621, which was decided a few days subsequently to the above case, the court of Queen's Bench held that no action is maintainable at the suit of the treasurer of a loan society upon a note given to the trustees to secure the re-payment of a loan from the society. The declaration there stated that the note was given for securing the payment of 10l. lent by the society. The court seem to have decided the case principally upon the ground that, by the fourth section of the 5 & 6 W. 4, c. 23, (ante, p. 422 (c)), the note would vest in the trustees of the society, and that the treasurer could only recover payment of it by a summary proceeding before a magistrate, under the provisions of the eighth section (ante, p. 423 (a)).

Lord Denman C. J. and Patteson J. appear to have considered also that by the statute the jurisdiction of the superior courts was taken away, Patteson J. observing, "I think the remedy upon these notes is confined to the summary proceedings before a magistrate. Not that the jurisdiction of the superior court is taken away without express words, but that the statute enacts an instrument of such a nature, that express words were necessary to enable the treasurer to sue upon it, and such words are not to be found. Even with regard to the trustees, there is no power given to them to sue upon these securities.

Neither this, nor the principal case, can perhaps be considered as an express decision upon the point whether the jurisdiction of the superior courts is taken away by the 5 & 6 W. 4, c. 23, in an action by the trustees of a loan society on a note expressed to be given for money lent by the society.

before, &c., was a publican and beer-seller, and the trade of a publican and beer-seller had used and carried on in a certain messuage of the plaintiff, parts of which said messuage he was then in the habit of letting out as furnished lodgings for certain rents or sums of money, to him payable on that behalf. And that the plaintiff, on, &c., was lawfully possessed, as of his own property, of certain goods and chattels, used and employed by him as furniture and necessities in his said messuage, and his said trade of a publican and beer-seller, to wit, twenty tables, &c. After stating the conversion in the usual form, the declaration proceeded to allege special damage as follows; whereby and by reason of the premises, the plaintiff's said messuage had become, and was wholly destitute of the said necessary articles for furnishing the same, and the plaintiff had been wholly prevented from carrying on his said trade as a publican and beer-seller, and from procuring tenants for his said lodgings; and the plaintiff had lost and been deprived of, not only, all the profit and advantages which would have accrued to him in respect of the exercise of his said trade, but had also lost, and been deprived of, all the profits and advantages which otherwise might and would have accrued to him in respect of his said lodgings; and also, by reason of the premises, the plaintiff had incurred divers charges and expenses, to wit, to the amount of 50l., [428] in and about procuring lodgings at other houses for himself and servants for a long space of time, to wit, &c.

Fourth plea, that before the said time when, &c., to wit, on, &c., a certain writ of fieri facias at the suit of one T. B. against the said J. H., was duly issued out of the court of, &c., and was indorsed, &c., and was duly delivered to the now defendant, being sheriff, to be executed according to law. And, further, that before the said time when, &c., to wit, on, &c., the said goods, &c., were respectively the goods, &c. of the said J. H., and of right belonged to him; and that afterwards, and before the said time when, &c., to wit, on, &c., the said J. H. fraudulently and collusively gave and delivered to the plaintiff possession of the said goods, &c., under colour of a feigned, covinous and fraudulent alienation, bargain and conveyance thereof from him to the plaintiff then made, to the end, intent and purpose, to delay, hinder and defraud the said T. B. and the other creditors of the said J. H. of their respective just and lawful actions, debts and demands against the said J. H., contrary to the form of the statute in such case made and provided. And further, that the plaintiff afterwards, to wit, at the said time when, &c., well knowing the last mentioned premises, claimed title to the said goods, &c., (the same then being in the possession of the plaintiff as last aforesaid and not otherwise,) under colour of the aforesaid feigned covinous and fraudulent alienation, bargain and conveyance thereof. And further, that afterwards and whilst the said goods, &c. were so in the possession of the plaintiff as last aforesaid, and whilst the said writ was in full force, to wit, at the said time when, &c., he, the defendant, as such sheriff as aforesaid, within his said bailiwick, did, by virtue of the said writ and indorsement thereon, seize and take the said goods and chattels [429] for the purpose of levying thereout the moneys so directed to be levied by the said indorsement on the said writ as aforesaid; as it was lawful for him to do for the cause last aforesaid; which is the supposed conversion in the declaration mentioned. Verification.

Demurrer to the fourth plea; for that the defendant had, by his same plea in an indirect and argumentative manner, attempted to traverse and deny the allegation in the declaration, that the plaintiff was possessed of the goods therein mentioned as of his own property, the same plea shewing facts establishing that the plaintiff's possession was fraudulent, and therefore insufficient to give him even a *prima facie* right to sue in trover; and also for that the same plea should have concluded to the country, and not with a verification. Joinder.

Bompas Serjt. in support of the demurrer. The fourth plea amounts to nothing more than an argumentative statement, that the plaintiff was not possessed as against the defendant. It is, therefore, bad, as neither traversing, nor confessing and avoiding, the allegation of possession in the declaration. In *Nicolls v. Bastard* (2 C. M. & R. 659; Tyrwh. & Gra. 156), there was a precisely similar plea; but the plaintiff, instead of demurring, took issue on the fraudulent sale. Parke B. there observed, "The whole defence stated in the last plea would, in truth, have been admissible under the second," (which denied that the goods were the property of the plaintiff); "the plea of no property in the plaintiff, means no property as against the defendant; which the plaintiff could not have, if the sale was fraudulent." In *Rowe v. Ames* (6 M. & W.

747), which was an action on the case against the sheriff for neglecting to sell the goods of R. W. that had been seized by him in execution, the defendant, among other pleas, pleaded [430] that R. W. became a bankrupt, and that within two months after the issuing of the writ in the declaration mentioned, and the delivery thereof to the defendant, and of the seizure of the goods, and before the passing of the 2 & 3 Vict. c. 29, and before the defendant could or ought to have sold the said goods, a fiat issued, and the said R. W. was declared a bankrupt; and that, before the commencement of the action, an official assignee was appointed, in whom the said goods so taken in execution became and were vested; and this plea upon demurrer was held bad. [Maule J. It may be a question, whether, in the present case, the deed set out in the plea, is good even as between the parties.]

Channell Serjt. was then called upon to support the plea. First, as to the deed not being good as between the parties. The difficulty arises from the statement in the plea, that John Howarth gave the plaintiff possession "under colour of a feigned, covinous and fraudulent alienation, &c." But the word "feigned" is used in the statute 13 Eliz. c. 5, which, in sec. 1, is declared to be passed "for the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, &c.; which feoffments, &c. have been and are devised and contrived of malice, fraud, covin, &c., to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, &c." And then by sect. 2 it is enacted, that "every feoffment, gift, grant, &c., to or for any intent or purpose before declared and expressed, shall be deemed and taken (only as against that person or persons, his or their heirs, &c., whose actions, &c., by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall, or might be in any wise disturbed, hindered, &c.), to be clearly and utterly void, &c." So that it is clear, the "feigned alienation" mentioned in the plea would, [431] under the statute be void only as against creditors, and would be valid as between the parties themselves. The plaintiff complains of the conversion of his goods. The object of the plea is to give colour to him, by shewing that he was in possession of the goods with certain rights; the deed of alienation being valid as between himself and John Howarth though it would be "feigned, covinous; and fraudulent" as against the creditors, whom the plea alleges that the deed was given "to delay, hinder and defraud, contrary to the form of the statute." The deed would be valid under the statute, not only as between the parties, but as against all the world but the creditors of John Howarth.

It is extremely doubtful, whether the defence raised by the plea could have been given in evidence under the plea of "not possessed," notwithstanding what was said by Parke B. in *Nicolls v. Bastard*, which appears to have been the expression of an opinion formed at the moment, and certainly was not the point decided in the case. In *Howell v. White* (1 Moo. & Rob. 400), Patteson J. ruled that, under the plea of "not possessed," the defendant could not shew that a sale of the goods to the plaintiff had been fraudulent. So, in *Samuel v. Duke* (3 M. & W. 622), which was an action of trover against the sheriff and the execution creditor, it was held, that it was not competent to the sheriff, under that plea, to give in evidence certain facts justifying the seizure, which distinguished his case from that of the other defendants; but that such a defence should have been specially pleaded. Here, the defendant admits possession and some property in the plaintiff, as against all but certain parties who put him, the defendant, in motion. [Tindal C. J. The defendant is sheriff; he stands in the shoes of the creditors, against whom the deed is void: it is void, therefore, for the purpose of [432] this action.] The sole object in this case, is to comply with the rule that requires pleadings in confession and avoidance to give colour. The leading authority on that doctrine is *Leyfield's case* (10 Co. Rep. 88 a.), which is thus stated and commented on in Stephen on Pleading (pages 229, 230, 4th ed.). "To an action of trespass for taking the plaintiff's corn, the defendant may plead, in confession and avoidance, that he was rector, and that the corn was set out for tithe, and that he took it as such rector. Now it is to be observed that this is not an absolute confession, that he took the plaintiff's corn as alleged in the declaration. The defendant asserts, on the contrary, a title to the corn in himself. But still he admits that the plaintiff was the original owner, and entitled against all the world, except the defendant. There is, therefore, a confession so far as to admit some sort of apparent right or colour for the action; and the plea consequently complies with the terms of the rule now under consideration, and is sufficient." The rector there alleged the goods were his; and in the same manner the defendant here

says, the goods belonged to the creditors. [Bompas Serjt. The statute of Elizabeth speaks of "feigned," covinous and fraudulent conveyances; they need not be the same thing; "feigned" means "pretended," and has a different signification from "fraudulent."] The plaintiff cannot set up his own fraud to avoid his own deed; *Doe dem. Roberts v. Roberts* (2 B. & A. 367. See also *Prole v. Wiggins*, 3 N. C. 230; *Reed v. Thoyts*, 6 M. & W. 410). [Maule J. He is not doing so; he merely says the defendant has used the word "feigned" in a particular sense. Tindal C. J. The only point upon which the court feel any difficulty is, whether the plea is rightly framed for the purpose of giving colour.]

[433] Bompas Serjt. in reply. The defendant in giving colour, was bound to shew that which would have amounted to a good conveyance to the plaintiff; but he has shewn that which is null against him the defendant, and which, indeed, is no conveyance at all; for he pleads that the plaintiff was put into possession under colour of a feigned conveyance. The case of *Howell v. White* was decided at nisi prius very soon after the new rules came into operation, and there might have been some difficulty as to their application (a). It was argued in that case, by the counsel for the plaintiff, that under the plea of not possessed, it was not competent to the defendant to do more than shew that no sale in fact had taken place; and this reasoning appears to have been assented to by the learned judge; but if the defendant might shew no sale in fact, why might he not shew no legal sale—the sale not being expressly in issue! *Samuel v. Duke* is in truth an authority for the plaintiff. Parke B., in giving judgment, says, "if the conversion had been the sale of the goods, then the sheriff must have previously seized; and probably it would have been competent to him, under the denial of the plaintiff's right of possession, to shew that, at the time of the sale of the goods, the plaintiff had no possessory right, but that the sheriff had a right to seize them."

[434] TINDAL C. J. I think the plea is bad for one or the other of the causes of demurrer assigned. Either the plea consists only of a statement of evidence, that the plaintiff was not possessed as of his own property against the defendant, and is therefore bad as an argumentative traverse of that allegation; or, if it is to be taken as a direct traverse, it is informal in concluding with a verification. It seems to me that the plea states matter which might have been given in evidence under the plea of "not possessed."

COLTMAN J. concurred.

MAULE J. I also think the plea is bad, as being an argumentative denial of the plaintiff being possessed as of his own property. If the facts could be pleaded at all, they should have been pleaded with a traverse of that allegation; but, I think, they might have been given in evidence under the plea of "not possessed." A defendant in such a case may have no notice of the existence of the instrument under which the plaintiff claims; it may be started upon him at the trial, and it seems hard that he should be put to the necessity of pleading a plea like the present. The statute of Elizabeth (13 Eliz. c. 5) avoids several things, viz.: fraudulent feoffments, gifts, grants, alienations, bargains and conveyances, as well as fraudulent bonds, suits, judgments and executions. A plaintiff might set up a claim under any one of these—an execution for instance—for which the defendant might not be prepared, but which I think he certainly ought to have the liberty to contest under the plea of "not possessed" (b).

Judgment for the plaintiff.

(a) R. H. 4 W. 4, reg. 1, No. 3, directs, that "all matters in confession and avoidance, including not only those by way of discharge but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." This rule is, in terms, confined to actions of assumpsit, but by r. iv. (which applies to actions on the case, including trover) No. 2, "all matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit." In trover, the plaintiff states that he is possessed of certain goods as of his own property; and this is a material allegation. The defendant in the principal case seeks to shew that although the plaintiff is possessed of the goods in question, he is not possessed as of his own property, by reason that the possession is fraudulent.

(b) Cresswell J. was absent.

[435] ELIZABETH O'CONNOR AND ANOTHER, Administratrixes of George Garrow, Deceased, v. MARJORIBANKS AND OTHERS. June 6, 1842.

[S. C. 5 Scott, N. R. 394; 11 L. J. C. P. 267; 6 Jur. 507.]

In trover by the personal representatives of A., his widow is not admissible as a witness for the purpose of shewing that she pledged the goods with the defendants by her husband's authority.

Trover, by the plaintiffs, as administratrixes of George Garrow, deceased, for a chest of plate; laying the possession in the intestate, and the conversion after his death.

Pleas; first, not guilty; secondly, that the intestate was not possessed as of his own property, &c.; upon both of which issue was joined.

Thirdly; that before any of the times in the declaration mentioned, to wit, on, &c., the said G. G. then being lawfully possessed of the said goods, &c., as of his own property, delivered the same to one John Hodgson, to be possessed by him or his bankers for the time being, on his behalf, as a security for certain advances of money then, at his request, agreed to be made to him by the defendants, at the request and on the responsibility of the said J. H.; and thereupon, with the consent of the said G. G., the same goods, &c. then were, by the said J. H., delivered to and deposited with the defendants, who then and thenceforth were and have been the bankers of the said J. H.; and it was thereupon then agreed by and between the said G. G. and the said J. H., that the said goods, &c. should remain and continue in the possession of the said J. H. or his bankers, until the advances to be made as aforesaid, should be fully repaid and satisfied. The plea then stated that the money had been repaid by G. G., but that other advances were made by the defendants to him, at the request and on the responsibility of J. H., upon an agreement that the said goods, &c. should continue and [436] remain in the possession of the defendants, or other the bankers of the said J. H., and be subject to his control, and stand and be charged in his favour with the lien until the advances to be made as last aforesaid should be fully paid and satisfied by the said G. G. The plea then averred that the sums of money so advanced as last aforesaid, still remained wholly unpaid and unsatisfied by or for the said G. G. or his representatives; wherefore the defendants, as the bankers of the said J. H., and at his request, and according to the terms of the said last-mentioned agreement, had retained and kept, and still did retain and keep, the said goods, &c. in respect of the aforesaid lien; as they lawfully might, &c.; and in so doing, and not otherwise, had converted, &c. Verification.

Replication to this plea, that it was not agreed by and between the said G. G. and the said J. H., modo et formâ. Whereupon issue was joined.

The cause was tried before Maule J., at the sittings for Middlesex in last term, when the following facts appeared. Mr. Garrow the intestate was, in the year 1836, residing in India; his wife remaining in England. A letter was given in evidence, written by Mr. Garrow to his wife, towards the close of that year, authorising her to draw on him for money, or to sell his plate, and some other property. She applied to the defendants (Coutts and Co., through whom her husband had been in the habit of making remittances to her), for an advance of 600l.; and they advanced her that sum, upon her draft on her husband being indorsed by Mr. Hodgson, a customer of theirs; the chest of plate in question being deposited by Mrs. Garrow with the defendants as a security for Mr. Hodgson. The draft was accepted and paid by Mr. Garrow; and, in 1838, his wife obtained a further advance of 250l. from the defendants upon another draft on her husband, and a written [437] guarantee given to them by Mr. Hodgson; it being agreed that the plate should remain with the defendants on the same terms as before. This latter draft was accepted by Mr. Garrow, but he died before it fell due. The learned judge intimating an opinion, that the evidence to establish the wife an agent for the purpose of depositing the plate was very weak, the defendants tendered an examination of Mrs. Garrow, taken after her husband's death, upon interrogatories under a commission in Canada, where she had resided since that time. This was objected to on the part of the plaintiffs, but was received by the learned judge, who, however, reserved the point. In the examination in question, Mrs. Garrow deposed that her husband had, previously to 1837, authorised her to sell

and dispose of any articles of plate or furniture belonging to him, as well as to manage his affairs generally while she remained in England. His lordship left it to the jury to say, whether Mrs. Garrow had authority from her husband to pledge the plate in question; and if so, to find a verdict for the defendants on the second and third issues; which they accordingly did.

Talfourd Serjt., in the same term, obtained a rule nisi to enter a verdict for the plaintiffs on these issues, or for a new trial, on the ground that Mrs. Garrow's evidence was inadmissible in an action by the representatives of her late husband, in a matter touching his estate. He cited *Monroe v. Twisleton* (Peake, Add. Ca. 219), and *Doker v. Hasler* (b).

[438] Bompas Serjt. (with whom was J. Henderson) now shewed cause. The question is, whether Mrs. Garrow could not be called as a witness after her husband's death, in any matter affecting his estate, whether she had an interest in the suit or not. The interest of a widow must be taken to be, to increase her late husband's estate; but here the evidence of Mrs. Garrow went to decrease it. Although, therefore, she would not have been a competent witness for the plaintiffs, she was, for the defendants. In *Monroe v. Twisleton*, Lord Alvanley held, that a woman who had been divorced by act of parliament, was not competent to prove a contract made by her husband previously to the divorce; but the ground upon which his lordship so ruled, was, that it could not be permitted that occurrences intrusted to the wife, while the most perfect and unbounded confidence existed between her and her husband, should be divulged in a court of justice; in other words, that confidential communications between husband and wife should be held sacred. *Doker v. Hasler* was decided upon the same principle. But the object of the widow's evidence in this case is, not to disclose any thing of a confidential character, but merely to prove that she was authorised, as her husband's agent, to make a certain contract. In *Aveson v. Lord Kinnaird* (6 East, 188, 2 J. P. Smith, 286), Lord Ellenborough put the principle on the right footing. Upon *Monroe v. Twisleton* being referred to (from Peake's Evidence (App. lxxxix. of 4th ed.)), his lordship said, "That goes on the ground, that the confidence which subsisted between them at the time, shall not be violated in consequence of any future separation." And again, "I doubt whether, what Lord Alvanley there said, was meant to be applied to the circumstances of that [439] case (a), for it is generally considered that matters of domestic concern are intrusted to the wife. I rather consider him to have mentioned it as general doctrine, that trust and confidence between man and wife shall not be betrayed; and as such, it is sound doctrine." A wife may be a witness in an action for goods sold between third parties, to prove that the goods were sold on the credit of her husband, though such evidence operates against his interest; *Williams v. Johnson* (1 Str. 504). In *Henman v. Dickinson* (5 Bingh. 183), which was an action by the indorsee against the acceptor of a bill of exchange, the wife of the drawer was admitted by Best C. J. at the trial, to prove that her husband had altered the amount of the bill before he indorsed it; and the court were disposed to uphold the decision of the Chief Justice, but the case was determined upon another point. In *Rex v. The Inhabitants of Bathwick* (2 B. & Ad. 639), upon a question as to the settlement of E., the wife of C., the respondents proved, by the testimony of C., his marriage with the pauper in 1829. The appellants, in order to prove such marriage void, upon the ground that C. had been married in 1826 to M. B., called the latter; who stated that she, in 1826, went with C. before a reputed clergyman of the established church, in Ireland, who, in his private house, there read to them the marriage ceremony; and it was held that M. B. was a competent witness to prove the first marriage, although her husband

(b) Ry. & Moo. 198.

The rule nisi was also obtained upon another point, reserved at the trial, viz., that as the guarantee by Hodgson was not given in evidence, there was no proof that he had made himself responsible for the second advance. But Bompas Serjt., on shewing cause, observed that the guarantee was not in issue, inasmuch as the plea stated that "the defendants, at the request, and upon the responsibility of the said J. H. did advance the money," which allegation was not traversed; and Talfourd Serjt. abandoned the point.

(a) It was an action for the board and lodging of the defendant's infant child, and the wife was called to prove the contract. It does not appear whether the contract had been made by her.

had been before examined, and proved the second marriage. The case of *Beveridge v. Minter* (e), however, is a decisive authority in favour of the defendants. It was there held, that the widow of a deceased person was a competent witness for the plaintiff, in an action brought against the executors of such person, on a promise made by him in his lifetime (a). The broad principle laid down in the old authorities has been very much narrowed by the recent cases; and it must now be considered to be only applicable to cases where the evidence of the wife would directly charge the husband, or where the husband is directly interested.

Talfourd Serjt., (with whom was Bramwell) contra. The admission of such evidence might have the worst consequences, if a widow were actuated by hostile feelings towards her husband's representatives; and it would violate the sacredness of conjugal communications. [Maule J. The rule can hardly stand upon that ground. If the question had arisen between third parties, the widow might clearly have been called to prove she had pledged the plate with her husband's consent, or by his authority. That puts an end, therefore, to the sacredness of conjugal communications as the foundation of the rule contended for.] *Rex v. Bathwick* only shews that the evidence of a wife may be admitted, although it raise an imputation against her husband, which may possibly be made the ground of a charge against him. But it goes no further. In Buller's *Nisi Prius*, 286, the rule is laid down, with the reason for it: "Husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because [441] contrary to the legal policy of marriage." [Tindal C. J. In an action against the husband, you might prove the agency of the wife aliundè, and then give her admissions or acts in evidence against the husband. The argument now insisted upon would, in every case, preclude the wife from proving her agency, and giving effect to her husband's intentions.] The argument must certainly go to that extent. In an action against the husband, acts and admissions of the wife must be proved aliundè, not by herself. The common law principle of not allowing the wife to be a witness for or against the husband was recognised by the legislature, in passing the old bankrupt act, 21 Jac. 1, c. 19; in sect. 5, of which it is recited that, whereas "the commissioners have power to examine the bankrupt himself and such persons as are suspected to have or detain any of the estate, goods or chattels of the bankrupts; but some doubt hath been made, whether the commissioners have power to examine the wives of the bankrupts touching the same;" and then by sect. 6, it is enacted that the bankrupt's wife may be examined by the commissioners.

The authorities at nisi prius, on this subject, appear to be pretty evenly balanced. *Beveridge v. Minter* is certainly an authority in favour of the competency of the witness; but it appears the widow was there called to prove a promise made by her deceased husband to the debtor, not any communication to herself. Here, the whole transaction to be proved was a communication between husband and wife alone. In *Aveson v. Lord Kinnaird*, Lord Ellenborough C. J. clearly recognised the principle laid down in *Monroe v. Twistleton*; and though in the subsequent passage, which has been cited on the other side, he seems to doubt the application of that principle to the particular facts of that case, it was upon the ground that matters which are in the ordinary scope of the wife's authority, stand on a very different [442] footing from those that rest upon any extraordinary authority; which is the present case; and the inference is, that statements by the wife as to matters in the former class of cases may be admissible, but that they are not admissible as to the second class. In *Aveson v. Lord Kinnaird*, the admissions of the wife as to the state of her health, were considered in the nature of acts, as part of the *res gestæ*, like the exclamations of a party when suffering pain. [Maule J. They may be considered as statements accompanying a fact; but here the question is, whether the wife is an admissible witness to prove the

(e) 1 C. & P. 364. The verdict being for the defendant, the objection could not be brought before the court.

Peake's Additional Cases had not then been published.

(a) In *Humphreys v. Boyce*, 1 Moo. & Rob. 140, declarations by a woman, during coverture, of the nonpayment of money lent to her before marriage, were held by Lord Tenterden C. J. to be admissible in evidence for the plaintiff, in an action against her husband as her administrator. And see *Barker v. Dixie*, Cas. T. Hardw. 264; *Pedley v. Wellesley*, 3 C. & P. 558.

fact.] In that case Lord Ellenborough referred to *Thompson v. Trevannion* (Skin. 402), where, in an action by the husband and wife for wounding the wife, Holt C. J. allowed what the wife said immediately on the hurt being received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gestæ*; and his lordship said that the case then under consideration fell within the principle of that decision (6 East, 193, 196). [Tindal C. J. It seems clear that if the husband were alive and were the plaintiff in this suit, the wife could not be called as a witness for the purpose in question; and this is an action brought by his personal representatives.] The exclusion therefore still exists after the death of the husband.

TINDAL C. J. It is impossible to gain much light from the cases decided at nisi prius relative to this subject, as the two principal ones appear to be in direct opposition to each other. We must see, therefore, which of them best accords with the general principles of law. And it appears to me that, of the two, *Monroe v. Twisleton* (Peake, Add. Ca. 219) is the sounder; and that the doctrine therein laid down is built upon the general rule of law, which, [443] subject to certain well-known exceptions, is this; that a wife never can be admitted as a witness either for or against her husband; she cannot be a witness for him, because her interest is precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury. There are cases to shew that this intimate relation subsisting between the parties is not to be considered as dissolved by death, so as to let in the evidence of either party as to transactions occurring during their joint lives; but we are asked to confine the rule to cases where the communications between the husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application; and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character. Upon the whole, I think it better to adopt Lord Alvanley's rule in *Monroe v. Twisleton*; and to hold therefore that the evidence of the widow was improperly admitted in this case. Consequently, the rule must be made absolute for a new trial.

COLTMAN J. In the argument in this case a distinction has been taken; and it has been contended that, as to some things, a wife may be examined after the death of her husband, though not as to such matters as were in the nature of confidential communications between them. But undoubtedly that is not the rule during the lifetime of both parties; for the rule then is, that, with the exception of certain well-known instances, neither husband nor wife can be admitted as a witness for or against the other; and I think that no such distinction as that now attempted to be set up, arises upon the death of one of the parties. With respect to the [444] authorities we are obliged to make our election between conflicting cases; and I agree that the doctrine laid down in *Monroe v. Twisleton* is the sound one,—that, although the relation of husband and wife may have ceased to exist, by the divorce of the parties, the objection, as to the admissibility of the evidence of either, still subsists; and I think it makes no difference that the relation has been put an end to by death. There must be a new trial; and if the parties think the question of sufficient importance, they may put it on the record and carry it up to a court of error.

MAULE J.(a). I also am of opinion that this evidence was inadmissible. *Beveridge v. Minter* (1 C. & P. 364) is favourable to the admissibility of the witness; but the previous case of *Monroe v. Twisleton* is the other way. I certainly think that more weight is due to the latter case; for it appears to have been more considered and more fully argued, and it does not seem to have been cited (*vide ante*, 439 (e)) in *Beveridge v. Minter*. In *Monroe v. Twisleton* Lord Alvanley lays down the rule with clearness and precision: "To prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or any thing else, which happened during the coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband." This shews that the presumption was, not so much that there was confidence in the particular case, but that there might have been. In *Beveridge v. Minter*, where the evidence of the widow was objected to in a case which certainly bore a close resemblance to the present, Abbott C. J. said, "She is appearing against her own interest.

(a) Erskine J. had left the court.

This is an action brought against her hus-[445]-band's executors. If you (that is the executors) had called her, the other side would have asked if she took any benefit under the will." The sole ground therefore of the Lord Chief Justice's opinion seems to have been, that the widow was appearing against her own interest; and when his lordship was pressed by the counsel for the defendants with the observation that if the husband had been alive, and the action had been brought against him, she could not have been a witness, it is stated that he merely replied, "At present I do not see any objection:" so that there does not appear to have been much discussion in that case.

Upon principle, however, I think we ought to decide against the admission of this witness. The text-books generally give, as the reason for the rule as to excluding the testimony of husband or wife, the necessity of preserving the confidence of the conjugal relation (a)¹; and that may be so. But it by no means follows that the rule is co-extensive with the reason given in support of it; and indeed it would be very inconvenient if it were so; as the question would frequently be raised as to whether or not some particular communication or fact occurring between husband and wife was of a confidential character; which would give rise to endless embarrassment and distrust. A rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule. For instance, the statute of frauds (29 Car. 2, c. 3) was passed to prevent, amongst other things, the setting up of fraudulent agreements; but if it had laid down the rule that no instrument obtained by fraud should be valid, it would have left the question in every case open to great difficulty as to whether there had been fraud or not. Instead of that, a clear and simple rule is established—that the agreement must be in [446] writing, and signed by the party to be charged therewith. And so the policy of the law (in order to ensure conjugal confidence) has laid down a definite rule, that, in no case, shall husband and wife be allowed to give evidence for or against each other. That rule extends to this case; for, though the husband is dead, the reason for the rule applies as strongly as if he were alive. It would just as much embarrass married persons if they knew their communications might be divulged after the death of either party. I think, therefore, Mrs. Garrow was as much prevented by the rule of law from giving evidence in this case as she would have been if her husband had been alive and plaintiff in the action; and, consequently, that her examination ought not to have been received.

Rule absolute (a)².

BELL, Public Officer, &c., v. FRANKIS. June 8, 1842.

[S. C. 5 Scott, N. R. 460; 11 L. J. C. P. 300.]

Where, in an action by the indorsee against the drawer of a bill of exchange, the defendant had told a witness he expected to receive by post a notice of its dishonour, and afterwards gave him a letter he received by post, and requested him to negotiate a renewal of the bill; and the letter, which had found its way to the plaintiff's hands, was not produced at the trial: Held, that the jury were warranted in finding no notice of dishonour had been given.

Assumpsit, by the plaintiff, one of the public officers of the National Provincial Bank of England, against the defendant as drawer of a bill of exchange, indorsed by him to the bank. The declaration alleged presentment, non-payment and notice in the usual form.

Pleas: first, that the defendant did not draw the bill; secondly, that he had not due notice of non-[447]-payment; concluding to the country. Upon both of which issue was joined.

At the trial before Maule J., at the sittings for London in last term; it appeared that the bill, which fell due on the 22d July 1841, was on the day following returned

(a)¹ See 1 Phil. Evid. 69, et seq. 9th ed.

(a)² On the second trial, the defendants having again obtained a verdict, a motion was made to set it aside as being against evidence, but the court refused to grant a rule.

dishonoured to the house of management in London. On the same day it was forwarded to the branch bank at Worcester, and arrived there on the 24th; on which day the manager of that branch bank forwarded it to Ledbury, where it arrived on the morning of the 25th, on which day the manager of the Ledbury bank wrote a letter to the defendant. This letter was not produced at the trial, nor was any evidence given of its contents. But a witness was called, who stated that he met the defendant in Gloucester on the morning of the 25th of July, and was asked by him, to go with him to the post-office, as he expected to find a letter there respecting the dishonour of a bill. That they went together to the post-office, where the defendant received a letter which he handed to the witness, and desired him to take it to one of the other parties to the bill, to endeavour to get it renewed. That the witness did accordingly see the party in question, but the bill was not renewed, and the letter was ultimately handed over to the plaintiff's attorney.

The learned judge having left it to the jury to say whether due notice of the dishonour of the bill had been given, they answered in the negative; and a verdict was accordingly entered for the defendant.

Bompas Serjt., had applied for a rule for a new trial, on the ground that it should have been left to the jury, that the defendant's admission dispensed with direct evidence of notice; and also that the verdict was against the evidence. The court intimated that it was a proper question for the jury; and that it had been [448] properly left to them; but they granted a rule nisi on the second point.

Talfourd Serjt. now shewed cause. It was formerly considered that a promise to pay a bill amounted to an admission of the receipt of notice of its dishonour. But it is now properly considered a question for the jury, whether notice has or has not been given, although undoubtedly they may infer it from such a promise. *Hicks v. Duke of Beaufort* (4 N. C. 229), *Brownell v. Bonney* (1 Q. B. Rep. 39). Here, the evidence falls far short of a promise to pay. In *Cumming v. French* (2 Campb. 106, n.), the drawer of a bill, having been arrested in an action brought upon it, was asked by the clerk to the plaintiff's attorney, what he had to propose by way of settlement, and the defendant said he was willing to give his bill at two or three months; but Lord Ellenborough ruled that the offer was neither an acknowledgment, nor a waiver, so as to obviate the necessity of proving notice of the dishonour of the bill. Here, the jury have expressly found that there was not notice. After *Solarte v. Palmer* (7 Bingh. 530), due notice of dishonour can hardly be inferred. [Coltman J. If the inference is to be drawn that there had been notice, the defendant might shew that the notice given was an insufficient notice.]

Bompas Serjt. in support of the rule. Many things relating to bills of exchange, that originally were considered as matters of fact, have now become matters of law: such as whether a notice is within reasonable time. Where a party distinctly acknowledges his liability on a bill by applying to have it renewed, that is a sufficient admission that he has received due notice of its dis[449]-honour. It is very important that there should be a fixed and general rule upon the subject.

TINDAL C. J. The jury have found, there was no notice of dishonour; and under the circumstances of this case I do not think that there is any ground to disturb their verdict.

COLTMAN J. concurred.

MAULE J. At the trial I had at first some doubt whether there was any evidence at all of a notice of dishonour having been given to the defendant: but on consideration I thought that there was some evidence upon the point; and the case was accordingly submitted to the jury. If they had found for the plaintiff, I do not say that they would have done wrong; but I think they have done quite right as it is. I am not dissatisfied with their verdict. The plaintiff might have proved the letter containing the notice, if any such notice was in fact given. By not doing so he justified the jury in coming to the conclusion at which they arrived upon the subject.

CRESSWELL J. was of the same opinion.

Rule discharged.

[450] ASHCROFT AND OTHERS v. MORRIN AND ANOTHER. June 8, 1842.

[S. C. 11 L. J. C. P. 265 ; 6 Jur. 783. Referred to, *Joyce v. Swann*, 1864, 17 C. B. N. S. 105.]

An order for goods "on moderate terms," is a sufficient memorandum within the seventeenth section of the statute of frauds.

Assumpsit for goods sold and delivered. Plea: non assumpsit.

At the trial, before Cresswell J., at the London sittings after last Hilary term, it appeared that the plaintiffs were coopers in London, and the defendants were storekeepers at St. Vincent's. The action was brought to recover 80l. 7s. 9d. for porter sold by the plaintiffs to the defendants. To prove the order, the following letter, addressed to the plaintiffs and signed by the defendants, was put in:—

"St. Vincent, April 3d, 1840.

"Messrs. W. Ashcroft and Son.

"Gentlemen,—In our line of business we dispose of a good deal of malt liquor, &c., and Captain Neilson, of the ship 'Emerald,' has recommended us to try your house for this article. We therefore annex you an order for what we will require just now, which please send by return of the 'Emerald.' Let the quality be fresh and good, and on moderate terms. The 'Emerald' will only be in London about ten days. The amount of invoice we will either pay to Captain Neilson or remit you in a bill, payable in London, as soon as we know the amount.—We are, &c.

"JOHN AND SAMUEL MORRIN."

To this letter the following order was annexed:—

"Order for porter, &c.

"1 4 Hhds. porter.
4 Barrels ditto.
4 Punchns. or butts brown stout ditto.
2 Hhds. ale or beer, not the weakest, but a good body. John and Samuel Morrin."

[451] The goods were shipped on board the "Emerald," which vessel was wrecked on her voyage out.

On the part of the defendants it was contended that there was no sufficient note or memorandum of the bargain, within the seventeenth section of the statute of frauds (29 Car. 2, c. 3), inasmuch as no price was mentioned in the order; and also that the acceptance by the captain of the "Emerald" was not an acceptance by the defendants within that section; *Hanson v. Armitage* (b). The plaintiffs were nonsuited; but leave was reserved to them by the learned judge to move to set aside the nonsuit and enter a verdict for the sum claimed.

Channell Serjt. obtained a rule nisi accordingly on the first point, contending that the defendants' letter was a sufficient note within the statute.

Bompas Serjt. now shewed cause. The alleged contract was only an order for goods, without naming any price. It cannot, therefore, amount to a contract, for a contract to be valid must be binding on both sides. [Cresswell J. A written proposal accepted by parol has been held sufficient (c).] This case resembles *Elmore v. Kingscote* (5 B. & C. 583, 8 Dowl. & R. 343), where no price was mentioned.

TINDAL C. J. The order here is, to send certain quantities of porter and other malt liquor on moderate terms." Why is not that sufficient? That is the contract between the parties.

[452] The other judges concurring,
Rule absolute (a).

(b) 5 B. & Ald. 557. See also *Astley v. Emery*, 4 M. & S. 262.

(c) In *Boydell v. Drummond*, 11 East, 142, it was held, that, although a contract may be collected from several different documents, provided the connection appear on the face of them, such connection cannot be supplied by parol evidence.

(a) If a specific price be agreed upon, it must be mentioned in the contract; *Elmore*

MAUND v. THE MONMOUTHSHIRE CANAL COMPANY. June 8, 1842.

[S. C. 5 Scott, N. R. 457; 3 Railw. Cas. 159; 2 D. N. S. 113; 11 L. J. C. P. 317; 6 Jur. 932: at Nisi Prius, Car. & M. 606. Referred to, *Mill v. Hawker*, 1874-75, L. R. 9 Ex. 323; L. R. 10 Ex. 92.]

Trespass lies against a corporation aggregate for an act done by their agent within the scope of his authority.

Trespass, for breaking and entering locks on a canal, and seizing and carrying away barges and coal.

Pleas: not guilty (by statute) (36 G. 3, c. cii.); and payment of money into court.

At the trial, before Cresswell J., at the last assizes for Monmouthshire, it was proved that the trespasses in question had been committed by one Cooke, who was the agent of the company, which was incorporated by act of parliament (36 G. 3, c. cii.); and that the barges and coal had been seized for tolls claimed to be due to them. The only question raised was, whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of his authority. A verdict was taken for the plaintiff, damages 50l., leave being reserved to move to enter a verdict for the defendants.

Talfourd Serjt. in last term, obtained a rule nisi accordingly, or to arrest the judgment. He cited the case of *Sutton's Hospital* (10 Co. Rep. 32), *Anon.* (12 Mod. 559), *Morgan v. The [453] Corporators of Carmarthen* (3 Keb. 350), *Thusfeld and Jones's case* (Skin. 27), Com. Dig. tit. Franchises (F. 19), 6 Vin. Abr. tit. Corporations (B. a.).

Ludlow Serjt. now shewed cause. The act of parliament by which the company is incorporated provides that they may sue and be sued: it also empowers them to enter on lands. If they enter improperly, it would seem, that they may be sued for the trespass. The whole doctrine that a corporation cannot be sued in trespass rests on one passage in Bro. Abr. Corporations, 43 (c); where the reason given is, that neither

v. Kingscote, ubi supra. See also *Kain v. Old*, 2 B. & C. 627, 633; *Acebal v. Levy*, 10 Bingh. 376, 383. But if no price be agreed upon, the contract will be understood to be for a reasonable price: and in a declaration upon such contract no price need be stated; *Hoadly v. M'Laine*, 10 Bingh. 482.

(c) "Nota, per Thorpe, that trespass lies not against commonalties, to wit, by the name of corporation, but against the persons who did it, by their proper names; for neither capias nor exigent lies against a commonalty: nor shall a commonalty implead or be impleaded but with the mayor or bailiffs, if they have mayor or bailiffs; and there by him (i.e. according to Thorpe) there may be a corporation by name of a commonalty, without mayor, bailiff, or other head." Citing 22 Ass. p. 67 (22 Ass. fo. 100, pl. 67).

In Bro. Trespass, pl. 239, Lord Brooke abridges the same case thus: "Nota, per Thorpe, that trespass lies not against a commonalty, but shall be brought against the persons by their own names; for neither capias nor exigent lies against a commonalty."

In the Book of Assizes, the case is thus reported at large:—

"Nota, by Thorpe" (Chief Justice of the King's Bench), "that a writ of trespass lies not against a commonalty; but it is necessary in such writs that the persons be named in certain; for he said that a man shall never have a capias or exigent against a commonalty; et hoc patet in a bill of trespass brought by J. A. W. against certain persons and the commonalty of the town of J. Also he said that the commonalty of any town shall never be named in any action, defendant or plaintiff, unless the mayor or bailiff be named, if there be a mayor or bailiff, &c., and if there be no mayor or bailiff, then the commonalty may be solely named, &c."

In the case of *The Mayor, Sheriffs, and Commonalty of Norwich*, M. 21 E. 4, fo. 12, pl. 4, Catesby J. (fo. 14) says, "It cannot be denied that the mayor, sheriffs, and commonalty are one entire body, which cannot be severed, and which cannot do any corporal wrong." But a writ of trespass for disturbance in taking the profits of liberties against a corporation (sued jointly with an individual) was held to be maintainable; *Archbishop of York v. Mayor and Commonalty of Hull and Another*, H. 45 E. 3, fo. 2, pl. 5. So, for disturbance in holding a court-leet; *Prior of Merton v. Mayor of New Windsor and Others, Burgesses of the said Town*, T. 18 H. 6, fo. 11, pl. 1.

And see *The Mayor and Commonalty of Winchester's case*, 31 Ass. fo. 188, pl. 19;

capias nor exigent can go against them. A distringas, [454] however, may be issued against a corporation. It has been decided that trover will lie against a corporation; *Yarborough v. The Bank of England* (16 East, 6); where Lord Ellenborough C. J., in giving the judgment of the court, reviews all the authorities upon the subject. [Tindal C. J. That case was after verdict. It was a motion in arrest of judgment: no leave appears to have been reserved.] But the broad doctrine is laid down that trover would lie; and there is no difference in principle between that action and trespass. The payment into court in this case admits that the action is rightly brought. An indictment will lie against a corporation, although all the ordinary consequences cannot follow (see 1 Kyd, Corp. 225). Various instances are collected in Kyd on Corporations (vol. i. pp. 223-225), where trespass has been brought against a corporation (d). Other authorities are mentioned in [455] 1 Wms. Saund. 340, n. The principle that a corporation is liable in tort for the tortious act of its agent, done in its ordinary service, is further carried out in *Smith v. The Birmingham Gas Company* (1 A. & E. 526). [Tindal C. J. The process is the same both in case and in trespass—namely, by attachment, distress, capias and outlawry. If case will lie, it is difficult to see why trespass should not lie also.]

Talfourd Serjt. was then called upon to support the rule, and admitted that he had nothing to rely upon but the old authorities; and that in *Regina v. The Birmingham and Gloucester Railway Company* (2 Q. B. Rep. 47, 1 G. & D. 457, 2 G. & D. 236), the court of Queen's Bench had, in this term, refused to quash an indictment against a corporation. The doctrine in Bro. Abr., however, is imported into Com. Dig. tit. Franchises (F. 19) (c).

TINDAL C. J. The process in case and trespass being the same; it is impossible to see any distinction between the two actions.

Per curiam. Rule discharged.

[456] NICHOLLS v. STOCKBRIDGE. June 9, 1842.

The venue was laid in Middlesex, and the time for pleading expired on the 30th of May. On that day, the defendant obtained a rule to change the venue to Surrey, which was served on the plaintiff between ten o'clock A.M. on the 31st. On that day the plaintiff signed judgment. Held, that as the change of the venue made the cause a country cause, the defendant had further time to plead, and the judgment was irregular.—Semble, that if the plaintiff had brought back the venue on the usual undertaking, as the time for pleading would have been out, he might then have signed judgment.

In this case the venue was originally laid in Middlesex, and the time for pleading expired on the evening of the 30th of May. On that day the defendant obtained a

M. 8 H. 6, fo. 1, pl. 2; M. 9 H. 6, fo. 36, pl. 9; *Great Yarmouth case*, M. 20 H. 6, fo. 9, pl. 19; *Kedwelly's case*, M. 15 E. 4, fo. 2, pl. 2; T. 4 H. 7, fo. 13, pl. 11.

(d) The author nevertheless draws this conclusion:—"Notwithstanding these examples, it may well be doubted whether, at this day, such an action could be maintained against a corporation aggregate; the action supposes a personal act, of which the corporation is incapable in its collective capacity: the act therefore, which is the foundation of the action, must be done by some individual in order to assert the right of the corporation, and the action being brought against that individual, will answer the purpose of bringing the right to a judicial determination.

"It is accordingly decided that a replevin cannot be maintained against a corporation aggregate, because it is founded on a distress, which the corporation cannot take but by its bailiff." Citing Brownl. 175, Bac. Abr. tit. Corporations, (E. 2).

(c) Where it is also said that "process of outlawry does not lie against a corporation aggregate; 45 E. 3, 2, 3 (the reference is to *The Archbishop of York v. Mayor and Commonalty of Hull and Another*, H. 45 E. 3, fo. 2, pl. 5), ante, 454, n., not a subpoena; for it has no conscience, D. 2 Bul. 233." (The reference is to *The Company of Shipwrights of Redderiffe's case*.)

It is observable, that the dictum of Thorpe C. J. in the Book of Assizes, does not, in terms, apply to all corporations aggregate, as such, but to municipal corporations only.

rule to change the venue of Surrey, upon the usual affidavit that the cause of action arose in that county. This rule, which was drawn up with a stay of proceedings, was served, on the plaintiff before ten o'clock on the morning of the 31st of May. Upon the same day he signed judgment for want of a plea.

Gaselee Serjt. had obtained a rule nisi to set aside this judgment, and all subsequent proceedings, for irregularity.

Channell Serjt. now shewed cause. This is, in fact, a new method of obtaining time to plead. The rule to change the venue is made absolute in the first instance, on the common affidavit; and the plaintiff could have restored the venue directly on giving the usual undertaking to give material evidence arising in Middlesex. [Tindal C.J. We must assume that the defendant's affidavit is true. Perhaps the plaintiff was not in a situation to give the requisite undertaking to bring back the venue. By the change of venue, the cause is in another county, where the defendant would have eight days to plead.] In Archbold's Practice (page 960, 7th ed.) it is said, "a rule, or order, to change the venue does not, in general, operate as a stay of proceedings; and the parties are [457] bound to take the next step as if no such order had been made."

Andrews Serjt., in support of the rule. When the venue was changed it became the duty of the plaintiff to amend his declaration accordingly. If he had done this, all the incidents would have attached as though the action has been originally brought in Surrey. He referred to Tidd's Practice (page 468, 9th ed.).

TINDAL C. J. It appears to me that the plaintiff has been too rapid in his proceedings. The effect of the rule to change the venue was, to turn the action and declaration brought in Middlesex into an action and declaration in Surrey, with all concomitant circumstances. The rule laid down in the books of practice is, that a copy of the rule is to be served upon the plaintiff's attorney, who is thereupon to alter the declaration (2 Arch. Pr. 821, 4th ed.). The plaintiff in this case might, if it was in his power to do so, have immediately given the usual undertaking, and so have brought back the venue; and then the action being in Middlesex, and the time of pleading then having expired, he might have signed judgment.

The rest of the court concurred.

Rule absolute.

[458] BLUNT v. COOKE. June 9, 1842.

An action was brought for work and labour in 1837, in which year particulars of the plaintiff's demand were delivered. In 1841 the cause was referred. After several meetings had taken place under the reference, the court allowed the plaintiff, on payment of costs, to amend his particulars by the insertion of other items, in respect of services during the period covered by the former particulars; it not being suggested that the defendant wished to have the option to abandon the reference or to plead *de novo*.

This was an action for work and labour brought against the defendant as one of the directors of a projected railway company. The action was commenced on the 3d of July 1837; and in November in that year the plaintiff delivered his particulars of demand under a judge's order, by which he claimed the sum of 2127l. 12s. 6d. The defendant had pleaded (*inter alia*) payment and a set-off. The cause came on for trial at the sittings after Michaelmas term 1841, when a verdict was taken for the plaintiff, subject to a reference of the matters in difference in the cause.

Bompas Serjt., in this term, had obtained a rule nisi, that the plaintiff might be at liberty to amend his particulars by adding certain items, amounting to 187l. 15s. It appeared from the affidavit of the plaintiff's attorney, on which the rule was grounded, that the additional sum was claimed in respect of services rendered during the period over which the original particulars extended: that the plaintiff, from having been in pecuniary difficulties, had been unable to communicate freely with the deponent, and that the deponent had framed the original particulars partly from the plaintiff's instructions, and partly from documents in the deponent's possession; that he had since been furnished with other documents, from which it appeared that the plaintiff was entitled to make the charges, now sought to be inserted in the particulars; and that the deponent believed that orders for the greater portion, if not all, of the work,

&c., in question were inserted in the minute-book of the company ; and, therefore, that the de-[459]-fendant could not be taken by surprise by having the particulars amended as prayed.

Talfourd Serjt., now shewed cause, upon an affidavit of the clerk of the defendant's attorney, stating, that there had been several meetings under the reference, and that, during the proceedings, he went through the books of the company with the plaintiff's attorney, and compared the same with the particulars of demand, to see whether it could be made appear that the particulars were supported thereby ; that, at no time during such comparison, or during the proceedings under the reference, except at the last meeting, did the plaintiff's attorney suggest any alteration in, or addition to, the particulars of demand ; and that the deponent believed the same to have been an after-thought of the plaintiff's attorney, arising out of his not being able to prove some of the items in the particulars, at the last meeting.

The learned serjeant contended that the case was one entirely of the first impression. When the cause was referred, it was referred as it then stood ; and the particulars could not have been amended at nisi prius. [Tindal C. J. The plaintiff fears, that if the particulars are not amended, he may lose his claim. At nisi prius, before the jury were sworn he might have withdrawn the record, and have amended his particulars.] But here the jury have been sworn, and a verdict has been taken. It is very doubtful from the affidavits whether the application is made bonâ fide. If the original particulars had included the items now proposed to be inserted, the pleas, might possibly have been different.

Bompas Serjt. was then called upon by the court, for some authority for the application. He argued that it rested rather on principle than authority. The bill of particulars is a mere description of the cause [460] of action. In *Staples v. Holdsworth* (4 N. C. 144) the defendant, having acted as agent for the plaintiffs, left their employment in 1827, and gave in his accounts, in which he debited himself to a certain amount for moneys received for them. In the same year they commenced an action against him for that sum, and delivered particulars of demand, framed upon the accounts he had given in ; but no further steps were taken till the early part of 1837, when they demanded a plea. They subsequently discovered that the defendant had received various other sums for which he had not accounted ; and they were allowed to amend their particulars, by the insertion of these sums, the defendant having liberty to plead the statute of limitations to the new items of demand. And in *Jones v. Corry* (6 N. C. 247), the plaintiff had, in 1835, sued the defendants as executors for work done to a house of their testator, and he had delivered his particulars in July 1837, after commencing a second action against them in their personal capacity, for work done to the same house subsequently to the testator's death. Both actions being referred to arbitration, an award was made which was set aside in Hilary term 1839. The plaintiff having abandoned his second action, was allowed, in Trinity vacation 1839, to amend his particulars in the first, by adding certain items which had been contained in the particulars in the second action. [Maule J. Suppose the matter is allowed to lie by until the parties go before the arbitrator : it would be hard upon the defendant that the plaintiff, after going into his case, should have liberty, unconditionally, to amend his particulars.]

TINDAL C. J. The difficulty is to see upon what terms the application should be granted. The amend-[461]-ment of the particulars will substantially enlarge the plaintiff's capability of recovery ; and at nisi prius it would not have been made, as the cause would have been gone into instantly. It is not suggested that the defendant desires to have the option either to decline going on with the arbitration, or the liberty to plead de novo. A bill of particulars is undoubtedly a creature of the court ; and it is not, regularly, part of the record. Under the circumstances, I think that the rule may be made absolute on payment of costs.

Per curiam. Rule absolute accordingly.

OUCHTERLONY v. GIBSON. June 13, 1842.

[For subsequent proceedings see 5 Man. & G. 579.]

On the 8th of February the defendant obtained a judge's order for time to plead, upon the terms that he should "try, at all events, at the adjourned sittings." The cause

coming on for trial at these sittings, it was discovered, after the jury had been sworn, that no date had been inserted in the award of the process of venire and habeas corpora as set out in the nisi prius record; and on this ground, an objection was taken on the part of the defendant to the authority of the judge to try the cause. The trial, however, proceeded, and the plaintiff obtained a verdict. The defendant afterwards brought a writ of error coram vobis, and the plaintiff made up the judgment-roll properly.—Held, upon cross motions, first, that the defendant's objection was against good faith; secondly, that it was waived by bringing a writ of error; and, thirdly, that the plaintiff might be allowed to amend the nisi prius record.

This was an action of trover for books, &c., brought against the defendant, who had acted as provisional assignee under a fiat against the plaintiff, which had been superseded. The venue was laid in London. The action was commenced in January last. On the 8th of February (the defendant having twice before obtained time to plead), the following order was made by Cresswell J. at chambers:—

"Upon hearing the attorneys, &c., I do order that the defendant shall have, till Saturday next (February [462] the 12th) time to plead; the defendant undertaking to plead only 'not guilty' and 'not possessed,' and to try, at all events, at the adjourned sittings; without prejudice to any application founded on the actual opening of the fiat of bankruptcy against the plaintiff" (a).

The defendant delivered his pleas late in the evening of Saturday the 12th; and on Monday the 14th (the adjournment day) issue was joined, and notice of trial was given for those sittings; but in consequence of the marshal's declining to set down the cause, as being too late for the sittings, the following memorandum was indorsed by the learned judge on his order:—

"This cause should be entered; the plaintiff having obtained time to plead on the express undertaking to try at the adjourned sittings."

And the following order was made by the Lord Chief Justice:—

"I order that the marshal be at liberty to enter this cause in the list of causes for trial at the present adjourned sittings in London. Dated, the 14th day of February, 1842. "N. C. TINDAL."

The clerk of the plaintiff's attorney, who passed the record, being in doubt, under the circumstances, how the jury process should be filled up, left the dates in blank, both in the award of the venire and in that of the habeas corpora (b).

[463] The cause being called on, after the jury were sworn, and the plaintiff's counsel had begun to open his case, an objection was taken by the defendant's counsel, that the nisi prius record was defective in these particulars; and, therefore, that the trial could not take place, as being coram non judice. The Lord Chief Justice however said, that as the jury had been sworn, the cause must proceed; and that the objection ought to have been taken before they were sworn. The trial proceeded, and the plaintiff obtained a verdict.

The defendant brought a writ of error coram vobis; whereupon the judgment-roll was properly made up.

In last Easter term cross rules were obtained (which were enlarged), one, on the part of the defendant, to set aside the trial and verdict; the other, on the part of the plaintiff, for leave to amend the nisi prius record.

(a) It appeared that another fiat was about to be issued against the plaintiff.

(b) At the trial the record was in this state. After the similiter, it proceeded thus:—"Thereupon the sheriffs are commanded that they cause to come here on the day of twelve, &c., by whom, &c. and who neither, &c. to recognise, &c., because as well, &c."

"Afterwards on the day of in the year 1842, the jury between the parties aforesaid is respited here until the day of , unless the Right Honorable Sir Nicolas Conyngham Tindal Knt. shall first come on the day of at the Guildhall of the city of London, according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear. Therefore let the sheriffs have the bodies of the said jurors accordingly."

Sir T. Wilde Serjt. now shewed cause against the rule that had been obtained by the defendant. First, the application is in contravention of the judge's order, and against good faith; the omissions in the record having been caused by the proceedings on the part of the defendant, who had asked for and obtained indulgence to the last moment. Secondly, the writ of error brought by the defendant amounts to a waiver of all matters preceding the judgment, as it was brought upon the judgment itself. The defendant also waived the objection by appearing at the trial. Thirdly, the objections are cured by the statutes of jeofails (see 8 Hen. 6, c. 12 and 15. See also 21 Jac. 1, c. 13). Tidd's Practice, pp. 923, 925, 928, 712, 9th ed. [Tindal C. J. That would rather be an argument on the writ [464] of error.] At any rate, the court will grant the plaintiff's application for leave to amend.

Bompas Serjt. was then called upon to argue the point of waiver by bringing the writ of error. The only authority the judge had to try the cause, was by the nisi prius clause under the statute of Westminster 2d; and that clause being imperfect, he had no authority to try at all. This, therefore, was not such an objection as could be waived. [Tindal C. J. You do not say that no writ was issued?] None ever is issued. [Tindal C. J. Yes, the nisi prius writ, and the writ of habeas corpora, which certainly issued in this case, as the jury were there, and were sworn before the objection was taken.] Still, the judge had no authority to try the cause without a sufficient award of the venire. In *Crowder v. Rooke* (2 Wils. 144), the cause was at issue, and the record was made up for trial at a certain sitting. The trial did not take place then, but on a day subsequent to the day of nisi prius mentioned in the record. The plaintiff having obtained a verdict, cross motions were made to amend the habeas corpora and jurata, and to set aside the verdict. The court were clearly of opinion, that the trial had been coram non iudice; but they awarded a venire de novo. The cases of *Child v. Harrey* (1 Ld. Raym. 511, S. C. 1 Salk. 48, 12 Mod. 274, Carth. 506) and *Rogers v. Smith* (1 A. & E. 772, 3 N. & M. 760) are to the same effect. In Com. Dig. tit. Amendment (C. 1), it is said, "A misprision in the venire, distringas or jurata, by which the judge has no authority to try the cause, shall not be amended after verdict: as, if a distringas be of a jury tres Trin. for tres Mich. nisi J. Holt, 27 Jun. prius venerit; for it is impossible quod iudex prius venerit; and then he has no authority." [Cresswell J. When the case was before me at chambers, an [465] application for time to plead was made on the ground of the illness of the petitioning creditor, which, it was said, prevented the opening of the fiat. It was then agreed that the defendants should go to trial forthwith unless the fiat were opened. It was certainly understood that the trial was to take place at that time. It appeared to me, that the delay arose on the part of the defendant.] The objection is, that there were no valid writs of venire or habeas corpora. [Cresswell J. How does that appear? The nisi prius record is not the writ. The sheriff has the writ.] The nisi prius record was the only authority the Lord Chief Justice had to try the cause. [Maule J. It seems that the record contained too large an authority, rather than none at all. The judge may try on any day before the return. Tindal C. J. The two writs are generally pinned to the nisi prius record.] In the writs the day of return is equally a blank as in the nisi prius record.

TINDAL C. J. I think that, under the judge's order, which was obtained in this case by the defendant, the present objection is made against good faith. The defendant put off the trial as long as possible; and the plaintiff's attorney being called upon at the last moment, may not have known how the blanks in the venire were to be filled up. I think, under the circumstances, the defendant ought not to be heard upon this objection. But, independently of the order, it seems to me that the writ of error brought by the defendant, which could only be brought upon a judgment, amounted to a waiver of this objection.

The other judges concurred.

Defendant's rule discharged.

Sir T. Wilde then prayed that his rule to amend might be made absolute, as, the roll being perfected, there was something to amend by.

[466] Bompas Serjt. was heard contra.

Per Curiam. Plaintiff's rule absolute (a).

(a) See *Cheese v. Scales*, 10 M. & W. 488.

BROWN AND ANOTHER v. LANGLEY. May 30, 1842.

[S. C. 5 Scott, N. R. 249; 12 L. J. C. P. 62.]

A. borrowed a sum of money from a loan society, and the defendant joined him in a joint and several promissory note for the amount. At the time of the loan a printed book of the society's rules was given to the defendant. By these rules it was stated, that after default by the principal, notice would be given to the surety, and that if the money was not then paid, legal proceedings would be taken. The book was not signed.—Held, that these rules did not constitute an agreement in writing contemporaneous with the note, so as to be admissible to vary the contract on the note.—Semble, that if the rules had been admissible as such an agreement, they would not have sustained a plea, alleging “that if the money was not paid after notice to the surety, legal proceedings would be taken, but not before.”

Debt, by the payees against the maker of a promissory note, dated the 18th of November 1840, for 10l., payable at two months date.

Pleas: first, non fecit; whereupon issue was joined. Secondly, that the note was made by the defendant, and delivered to the plaintiffs as trustees and agents to a society of persons whose names were to the defendant unknown, carrying on business, as a loan society, by the name of “The Holborn Loan and Investment Society,” for the purpose of securing to the plaintiffs, as such trustees and agents, the repayment of a certain loan and sum of money, to wit, 9l. 4s., then lent and advanced by the said society to one Richard Thornton, together with certain interest thereon; that it was at the time of lending the said money, and of making the said note, to wit, on the 18th of November 1840, agreed in writing between the plaintiffs, the defendant, the said R. Thornton, and the said society, that the said loan and interest, [467] amounting together to 10l. 4s., should be repaid to the said society by R. Thornton, by instalments of 4s. each; the first instalment to be paid on Thursday next after the said loan was granted, and to be continued on each succeeding Thursday until the whole of the said sum of 10l. 4s. should be repaid; and that if R. Thornton should make default in payment of two instalments, notice by post or otherwise should be sent to him; and that if he did not pay the arrears within the time therein specified, the defendants should be written to; and that if the money was not paid according to such letter or notice, legal proceedings should be taken upon the said note, but not before; that the defendant then made the said note and delivered the same to the plaintiffs, and the plaintiffs then received the same from the defendant upon the terms and conditions in the said agreement contained, and upon the faith and understanding that the same should be observed and performed. Nevertheless, the defendant never had any letter or notice of the default of R. Thornton at any time before the commencement of this suit, either from the plaintiffs or from the said society, as required by the said agreement. Verification.

Thirdly, as to 5l. 4s., parcel, &c., payment before action brought. Fourthly, as to 5l., the residue due upon the note, payment after action brought.

The replication traversed the agreement set up by the second plea, and the payment alleged in the third and last pleas respectively. Whereupon issue was joined.

At the trial before Coltman J., at the sittings at Westminster after last Hilary term, the following facts appeared.

The note upon which the action was brought, was a joint and several note of Thornton, (mentioned in the pleadings,) the defendant, and one Orpwood. The consideration [468] for the note was a loan from a society, called “The Holborn Loan and Investment Society” (a) to Thornton, of 10l. 4s., the amount of the note; but of this sum Thornton only received 9l. 3s.; the difference being retained partly as discount and partly as the price charged for a book containing the regulations of the society. The loan was to be repaid by fifty-one weekly instalments of 4s. The defendant and Orpwood had joined in the note as sureties to Thornton. The latter had paid twenty-five instalments and then had made default; whereupon the present action was brought.

(a) The society was not inrolled under the statutes 5 & 6 W. 4, c. 23, and 3 & 4 Vict. c. 110.

The book of regulations having been produced in evidence by the plaintiffs, the following rules were relied upon by the defendant in support of the second plea.

"Loans will be made in sums exceeding 10l., upon approved surety, to be repaid by weekly instalments within twelve months, for which 2s. in the pound will be charged as discount, and must be paid at the time the loan is advanced, and security given for the repayment thereof by a joint promissory note of the borrower and two or more approved sureties; to be paid only to persons whose character and circumstances afford a reasonable guarantee that the money will be usefully employed, so as to enable the borrower to meet the instalments regularly as they become due, to be made in the following manner:—

"On 10l. 4s. ; for twelve months 4s. }	each week for which it is required, as may be agreed on : and so in proportion to the amount and length of time.
On 15l. 6s. }	
&c. }	

"The repayments of the instalments to commence [469] the first Thursday after the loan is granted, and to be continued every succeeding Thursday, at the office, between the hours of ten in the morning and six in the evening, until the loan is repaid, at which time the borrower must produce his or her book, in which the repayment will be entered and the receipt acknowledged by the signature of the officer in attendance.

"A fine of 1d. on each shilling per week for forbearance will be charged on such instalments as shall be in arrear.

"Notice by post or otherwise will be sent after the second default to the borrower; and if the arrears be not paid by the time therein specified, the surety or sureties will be written to, for which 4d. will be charged for each letter to borrower, surety or sureties, post paid; and if the money be not paid according to such letter or notice, legal proceedings will be taken against the several parties for the amount remaining unpaid.

"In order to give the necessary information to borrowers, these rules and regulations, with leaves properly ruled for entering the repayments, shall be published at the charged of 1s., to be purchased by every person to whom a loan shall be granted."

It was contended, on the part of the plaintiffs, that as these rules were not signed, they did not constitute any such agreement in writing, as was alleged in the second plea; or that, even if they did amount to such an agreement, the defendant could not avail himself of it to vary, by extrinsic evidence, the contract in the promissory note. The learned judge was of opinion that as the book was handed to the borrower at the time of the loan, it might be considered as evidence of the agreement under which all parties acted with reference to the note.

It was admitted that Thornton had paid 5l. 4s. before action brought; and it was proved that Orpwood (who [470] had also been sued) had since paid the residue, minus 1s., which, by an arrangement between Orpwood and the plaintiffs, remained unpaid, in order that the latter might be able to proceed with the present action against the defendant, who had refused to pay the costs. The verdict, under his lordship's direction, was returned for the plaintiffs on the first and third issues, and for the defendant on the second and fourth, leave being reserved to the plaintiffs to move to enter a verdict for themselves also upon the second issue, if the court should be of opinion that the evidence was not sufficient to sustain the second plea.

Talfourd Serjt., in last Easter term, obtained a rule nisi accordingly. He cited *Hoare v. Graham* (3 Campb. 57), *Rawson v. Walker* (1 Stark. N. P. C. 361), *Moseley v. Hanford* (10 B. & C. 729, 5 Mann. & Ryl. 607), and *Foster v. Jolly* (d). [Tindal C. J., at the time the rule was granted, referred to *Bowerbank v. Monteiro* (4 Taunt. 844); and his lordship said that, although the general rule was that the absolute contract contained in a bill or note could not be varied by a parol agreement, the rule did not apply to a contemporaneous agreement in writing between the parties; and that the present rule was only granted upon the question whether there was such an agreement in this case.]

Bompas Serjt. now shewed cause. The book of the rules of the society, which was given to Thornton at the time of the loan, may be considered as the real agreement between the parties, upon which they consented to act, and did in truth act, during the

(d) 5 Tyrwh. 239, 1 C. M. & R. 703. S. C. per nom. *Foster v. Sibley*, Gale, Exch. Rep. 10.

whole transaction. [Tindal C. J. The book is not signed by any one.] The absence of a formal signature will not defeat the [471] obvious intention. There is no case which shews that it is necessary that the contemporaneous written document should be signed. Signature is immaterial except where it is expressly required by statute. Although the note does not refer to the rules, the book refers to the note. It is clear that this is such a note as was contemplated by the rules. The book may, therefore, be considered as connected with the note. An inventory referred to in a deed becomes part of the deed, although not signed by the parties. [Maule J. Here the book is a sort of schedule to a verbal agreement.] Every thing here is in writing. [Cresswell J. Except the connection between the book and the note. Maule J. Suppose the parties had agreed in writing that they would be bound by the contents of the book. Would not that have been a material part of the contract between the parties? That you have not got in writing. Coltman J. Suppose at the trial you had merely handed it in without connecting the parties with the book; it could hardly have been contended that the book would have controlled the effect of the note.] If a printed signature was used you might shew that the party adopted such signature by handing over the document so signed. [Maule J. Perhaps, if there were a printed agreement, purporting to contain the terms between the company and the surety, it might be sufficient. But that is different from the case supposed, of this book being handed over without any explanation. Tindal C. J. This rule was granted upon the question whether the agreement was such an agreement as is set up in the plea.]

Talfourd Serjt., in support of the rule. This is a case in which the plaintiffs sue as the payees of a negotiable security. The contract evidenced by the note [472] is express, and free from all ambiguity. When the motion was made, the court refused to grant a rule, on the ground that the contract to pay, according to the tenor of the note, could be controlled by any contemporaneous document; and the case then referred to by the court appears to be in point. But the very ground of that refusal shews that it is necessary to produce a contemporaneous agreement in writing between the parties, to the effect stated in the plea. The agreement, to be admissible, must be contained in an instrument complete in itself, and of equal validity and force with the written contract which is sought to be varied; for otherwise, parol evidence would be admitted to vary a written contract. But the rules in question constitutes no agreement; they are not binding. In *Woodbridge v. Spooner* (3 B. & A. 233, 1 Chitt. Rep. 661), which was cited at the trial, it is said to be an inflexible rule, not to admit parol evidence to contradict a written instrument unless the consideration be illegal. Therefore where a testatrix gave in her lifetime to the plaintiff a promissory note to pay him or order, on demand, the sum of 100l. for value received, and his kindness to me, with a verbal agreement on the part of the plaintiff, that the note should not be demanded till after death; it was held, in an action upon the note, that parol evidence should not be received to shew that it was not given for a valuable consideration. [Maule J. A party may contract without notice, if the case be not within the statute of frauds. Here, there is nothing to connect the book with the particular transaction. The book itself does not shew that notes to be given to secure loans might be given in the absolute form in which this note is made. Nor is there any proof of what passed when this note was signed.]

[473] TINDAL C. J. It appears to me that the plea is not made out in the terms in which it is pleaded. First, the agreement is pleaded as being in writing, by which it must be understood that there was an express agreement in writing to the effect stated. But the link which is to bind the note and rules together is not in writing. Besides, if the book could be taken as the agreement between the parties I do not think that it would maintain the plea; which states that it was agreed that notice of non-payment by the principal should be sent to the sureties and that if they made default, legal proceedings should be taken upon the note, but not before. But there are no such negative words in the rule in question. The plea, therefore, fails upon both grounds.

COLTMAN J. I am of the same opinion. There is nothing in writing to connect the note and the rules with each other; and consequently there is no valid agreement to vary the express contract on the face of the note. For it is a well-established rule that a party to a bill or note shall not be allowed to contradict or vary the express engagement he has thereby entered into, except by a contemporaneous agreement in writing.

MAULE J. I can discover nothing in the book given in evidence that purports to be any agreement between the parties. In order to shew that the rules were to have that effect, it was necessary to resort to extrinsic evidence; but that evidence not being in writing, there was no proof of any written agreement so as to support the plea in question.

CRESSWELL J. concurred.

Rule absolute.

[474] KENNARD AND ANOTHER *v.* KNOTT. June 1, 1842.

[S. C. 5 Scott, N. R. 247; 11 L. J. C. P. 314.]

To an action against the drawer of a bill, it was held to be no defence that the plaintiff, before the commencement of that suit, had consented to a judge's order in an action brought by him against the acceptor, that upon payment of the principal and interest on a certain future day, all further proceedings should be stayed, otherwise judgment; it not appearing that such future day was posterior to that on which judgment could have been obtained in the action against the acceptor (*vide tamen post*, 476 (c)).

Assumpsit, by the indorsees against the drawer of a bill of exchange for 15l. 16s. 7d., dated the 4th of March 1841, payable at two months date, drawn upon, and accepted by, one John Smith.

Plea: that, after the said bill had become due, to wit, on the 29th of May 1841, the plaintiffs commenced an action upon the said bill against the said J. Smith in this court, and that whilst the said action was pending, and before the commencement of this suit, to wit, on the 8th of June in the year aforesaid, it was agreed between the plaintiffs and the said J. Smith, that in consideration that the said J. Smith, then consented to the order hereinafter mentioned, the plaintiffs then consented to the same order, and then consented and agreed to stay proceedings in the said action, and to give the said J. Smith time to pay the said bill until the time in the same order mentioned; and thereupon, in pursuance of the said agreement, and upon hearing the attorneys or agents of the plaintiffs and the said J. Smith, and by consent, it was in due manner ordered by the Hon. Sir W. H. Maule, Knight, one of the justices of the said court, that upon payment of 17l. 8s. 6d.,—being the amount due to the plaintiffs upon the said bill for which the action was brought, together with interest and costs to be taxed,—on the 20th of July 1841, all further proceedings in the said action should be stayed; and that, in case default should be made in payment as aforesaid, the plaintiffs should be at liberty to sign final judgment for the damages in the declaration, and issue [475] execution or executions for the amount, with costs, &c.; and the plaintiffs thereby then gave time to the said J. Smith for payment of the amount of the said bill; and the said agreement was made between the plaintiffs and J. Smith, and the said time given by the plaintiffs to the said J. Smith, without the consent of the defendant. Verification.

Special demurrer, assigning for causes—that the defendant had not alleged or shewn in the said plea, nor could it be gathered therefrom, that more time was given to the said J. Smith for payment of the said bill by the consent and judge's order in that plea mentioned, than the said J. Smith would have had before judgment could have been obtained by the plaintiffs in the said action against the said J. Smith, had the same been duly prosecuted without such consent or judge's order as aforesaid; that the plea merely shewed that some time was given by the plaintiffs to the said J. Smith by the said consent and judge's order; which did not discharge the defendant from his liability upon the said bill, unless more time was given than would have elapsed before judgment would, or could, have been otherwise obtained in the said action against the said J. Smith; which did not appear in or from any part of the said plea; and that, after action brought by the holder against the acceptor of a bill to enforce payment thereof, a judge's order made in such action, postponing the time of payment and judgment, was no discharge of the drawer's liability on the bill, though he did not consent to such order. Joinder in demurrer.

Channell Serjt., in support of the demurrer. The plea does not shew that any time was given by the judge's order to the acceptor, which he would not otherwise

have had. [Maule J. It appears that the right of action had already accrued against the drawer.] That being [476] so, if time had been given to the acceptor it would not have discharged the drawer (*sed vide infra* (c)). [Cresswell J. I do not see that any time was given. The action was going on.]

Talfourd Serjt. was then called upon by the court; and the learned serjeant, after referring to *Hall v. Cole* (4 A. & E. 577, 6 N. & M. 124) (to shew that where time was given to an acceptor, after the dishonour of the bill, it operated as a discharge to all the other parties), admitted that *Price v. Edmunds* (c) was a strong authority against him, and prayed leave to amend.

Leave to amend granted (d).

[477] SKINNER, Secretary, &c., v. LAMBERT. June 6, 1842.

[S. C. 5 Scott, N. R. 197; 2 D. N. S. 132; 11 L. J. C. P. 237.]

By a private act, for enabling a joint-stock company to sue and be sued in the name of a director or secretary, it is provided, that all actions and suits against any person or persons indebted or who may hereafter be indebted to the company, and all actions, suits, &c., at law or in equity, upon or in respect of any present or future liability or liabilities to the company, or upon any bonds, covenants, bills of exchange, promissory notes, contracts, or agreements which already have been or hereafter shall be given or entered into with the company, or to or with any person whatsoever in trust for the company, or to or with any person or persons for the use or benefit thereof, and generally all other proceedings whatsoever, at law or in equity, to be carried on by or on behalf of the company, or wherein the company is or shall be concerned or interested, against any person or persons, &c., whether such person or persons, &c., is or are, or shall be, or shall have been, a proprietor or proprietors of the company or not, shall be carried on in the name of the secretary of the company for the time being, or in the name of any one of the elected directors for the time being of the company, as the nominal plaintiff, &c., on behalf of the company; and it shall be lawful for the company to sue and proceed against any person or persons, &c., notwithstanding such person or persons, &c., is, or are, or shall be, or shall have been, a proprietor or proprietors of the company, and that, solely or jointly with any other person or persons in respect of any claim or demand which the company may have against such person or persons, &c., either solely or jointly as aforesaid, the same as if such person or persons, &c., was, or were not, or had never been, a proprietor or proprietors of the company.—Held, that the enacting

(c) 10 B. & C. 576, 5 M. & R. 287. In that case, B., principal, and C., surety, gave their promissory note to A. A. sued B., and took from him a cognovit payable by instalments, the first of which would become payable before the time at which A. could have signed final judgment had no cognovit been given. The court held that C. was not discharged, inasmuch as no longer time had been given to B., than he would have had if the suit had proceeded.

It is, however, observable that if the cognovit given by B. and accepted by A. did not discharge C., it would have been competent to A. to arrest C. on the very day on which the cognovit had been given, and if C. had paid the money, which it would be his interest as well as his duty to do, he might have arrested B. as soon as he could have issued a writ, and B., who had waived his defence to the action brought against him in order to purchase his liberty, at all events until the day appointed for the payment of the first instalment, might have found himself in custody at a much earlier period, precisely as if no cognovit had been given. It would therefore appear to be necessary, in order to enable A. to keep faith with B., that until the first instalment became payable, A.'s right of action against C. should be suspended; and a right of action, if suspended, is destroyed.

In *Price v. Edmunds*, B. and C., as joint-makers, were both primarily liable on the face of the note, though C. was, in fact, a surety; whereas in the principal case the drawer, being only liable in default of the drawee, was, *ex facie*, merely a surety.

(d) See *Jay v. Warren*, 1 C. & P. 532; *Lee v. Levi*, *ib.* 555, 675: 4 B. & C. 390; 6 D. & R. 475; *Stevenson v. Roche*, 9 B. & C. 707; *Stevenson v. Crease*, 4 M. & Ryl. 561; *ibid.* 563 (a); *Hulme v. Coles*, 2 Sim. 12.

words were sufficiently large to authorize the company to sue the defendant, a proprietor of shares in the company, in the name of the secretary, for an instalment of the capital secured by a deed of settlement in which the defendant, and each of the other proprietors, had covenanted with certain trustees for payment of the instalments.—In debt at the suit of the secretary for an instalment, the declaration alleged that the defendant was the proprietor of sixty shares; that, by an indenture of settlement bearing date a certain day and year, to wit, the 25th of October 1836, executed by the defendant, it was covenanted, amongst other things, that there should be a board of directors; that such board, when they should think proper, might resolve that the proprietors of shares in the capital of the company (except the proprietors for the time being of certain shares by the said indenture exempted from the payment of calls), should be called upon to pay, at any time after the expiration of three calendar months from the date of the indenture, and after the expiration of three calendar months from the time appointed for payment of any former instalment, such further instalment not exceeding, &c., upon every share (except as aforesaid), as the board should from time to time think necessary; that certain notices should be given of calls; and that every present or future proprietor or holder of shares (except as to the shares so exempted), should pay every instalment that might be called for in respect of each of his or her shares on or before the day and at the place appointed for the payment thereof; provided that no further instalment should be payable until at least three calendar months should have elapsed after the day appointed for the payment of any previous instalment. The declaration then alleged that afterwards, and whilst the defendant was such proprietor of sixty shares, &c., to wit, on the 22d of December 1840, the board of directors duly made a call according to the provisions of the deed of settlement, to wit, a call or instalment of 2l. 10s. upon every share in the capital of the company (except the said exempted shares), to be paid and payable on the 16th of January then next following, “the same not being so payable as aforesaid till more than three calendar months after the day appointed for the payment of any previous instalment;” that the proportion or instalment of the defendant so called for in respect of his said sixty shares in the capital of the said company amounted to a large sum of money, to wit, 150l.; that the defendant had due notice of the call, &c.; and that by reason of the premises, “the said defendant then became liable to pay the said company, on the said 16th of January 1841, the sum of 150l., being the said amount of the said proportion or instalment in respect of the said sixty shares of the defendant as aforesaid.”—Held that the declaration shewed, by necessary implication and intentment, that the defendant’s shares were not exempted shares.—Held also, on special demurrer, that the declaration contained a sufficient averment that the call had not been made until after the expiration of three calendar months from the date of the deed of settlement, and that such call had not been made payable until after the expiration of three calendar months from the time appointed for the payment of any former instalment.

Debt by the plaintiff as “the secretary for the time being, duly appointed and inrolled in that behalf, of a certain company, called ‘The Monmouthshire Iron [478] and Coal Company,’ being a company mentioned in a certain act made at a parliament holden in the 3 & 4 Vict. (c. cxxvi.) to enable the said ‘Monmouthshire Iron and Coal Company’ to sue and be sued in the name of any one of their directors, or their secretary, and to raise money for carrying on their works.”

The declaration stated, that before and at the time of the making of the call for money thereafter mentioned, the defendant was the proprietor of divers, to wit, sixty shares in the said company; that a memorial of the name, residence, and description of the defendant as such proprietor as aforesaid, duly verified by the de-[479]claration required in that behalf, had been and was duly inrolled in the High Court of Chancery according to the provisions (s. 11) of the said act of parliament in that behalf made as aforesaid; that by a certain indenture of settlement, bearing date on a certain day and year therein in that behalf mentioned, to wit, the 25th of October 1836, and made by and between the several persons whose names and seals were thereunto subscribed and affixed (except R. Hopkins, Rice Hopkins, T. Hopkins, and W. T. H. Phelps therein described, and R. Welsh, H. Marsh, and the Rev. W. Phelps) of the first part, the said R. Hopkins, &c. of the second part, and the said R. Welsh,

&c. of the third part, it was and is provided and declared, and each of the persons parties to the said indenture (except the said R. Hopkins, Rice Hopkins, T. Hopkins and W. T. H. Phelps), did for himself and herself respectively, and his and her respective heirs, executors, and administrators, covenant, promise, and agree to and with the said R. Hopkins, &c., their executors and administrators, and each of them the said R. Hopkins, &c., did for himself, his heirs, executors, and administrators, covenant, promise, and agree with the said R. Welsh, H. Marsh, and W. Phelps, their executors and administrators, amongst other things in manner following, that is to say, that there should be a board of directors of the said company, and that certain persons in the said indenture mentioned should be the first directors of the said company, and that every registered proprietor for the time being of forty or more shares in the capital of the said company, and who should either be a party to and have executed the said indenture, or have become or be and have been a registered proprietor of forty or more shares therein for the space of six calendar months, and who should not hold any office or place of emolument or profit in the [480] said company other than that of treasurer or trustee, and other than as thereafter mentioned, should, so long as he should be the holder of forty or more shares in the said capital, be also a director of the said company; that the said directors should meet together at certain days and times, and at certain places in the said indenture in that behalf particularly mentioned; and that it should be lawful for the board of directors, when and so often as they should think proper, to come to a resolution that the proprietors and other holders for the time being of shares in the capital of the said company (except the proprietors for the time being of certain shares in the said indenture mentioned, and thereby exempted from the payment of calls) should be called upon to pay at any time after the expiration of three calendar months from the date of the said indenture, and after the expiration of three calendar months from the time appointed for payment of any former instalment, such further instalment, not exceeding 2l. 10s. upon every share in the said capital (except as aforesaid), as the board of directors should, from time to time, think necessary, until the whole amount of the said shares respectively should be paid up; that at least ten days before the time to be appointed for payment of any future instalment, the board of directors should cause a circular letter to be sent by the post to every proprietor or holder for the time being of shares, signifying the amount of such instalment, and the time and place appointed for payment of the same, and stating that if such instalment should not be paid within three days after the time appointed for the payment of the same, interest after the rate of 5l. per cent. per annum would be payable thereon from the time when the same became due, and that if such instalment, with such interest thereon, should not be paid within two calendar months after [481] the time appointed for payment of the same, the share or shares in respect of which such instalment should be payable, should be liable to be forfeited to the said company; that within twenty-one days after the day appointed for the payment of any future instalment, the board of directors should cause to be sent in like manner to every proprietor or other holder who should not have paid the instalment on his or her share or shares, a circular letter containing a second application for the payment of the same, and setting forth the statements to be made in the first circular letter in regard to the payment of instalments and the liability to forfeiture; that subject and without prejudice to the powers thereinbefore given to the general meetings, the board of directors should have the entire management of, and superintendence over, the affairs and concerns of the company, and should, in all cases provided for by the said indenture, or thereafter to be provided for by the general meetings, act in strict conformity to the laws and regulations thereby established, or thereby to be established; that every present and future proprietor or other holder or holders of any of the shares in the capital of the company, (except as to the shares exempted from the payment of calls as thereinbefore provided as aforesaid,) should pay every instalment that might be called for in respect of each of his, her, or their shares, on or before the day, and at the place appointed for the payment thereof, and mentioned in the circular letters for calling the same; provided that no further instalment should be payable until at least three calendar months should have elapsed after the day appointed for the payment of any previous instalment; that if any instalment should not be paid within three days next after the day mentioned for that purpose in the circular letters for calling the same, then interest after the rate of 5l. per cent. per annum should be paid on such instalment by the pro-[482]-prietor or pro-

prietors, or other holder or holders of such share, from the time when the same ought to have been paid up to the time when the same should be actually paid; that in no case should the instalment for the time being required on any share exceed the instalment required on any other such share, and in no case should there be required in respect of any one share more than the sum of 50l. in full for the same, exclusive of the premium, when the same might have been sold at a premium, or more than the difference between the amount of the discount and the sum of 50l., when the same might have been sold at a discount, and no instalment thereafter to be called for on any one of the said shares should exceed the sum of 2l. 10s.; as by the said indenture reference being thereunto had would, amongst other things, more fully and at large appear. Averment: that after the making of the said indenture and within twelve calendar months after the passing of the said act of parliament, a memorial of the names, residences, and descriptions of the secretary, and of the several elected directors for the time being of the said company, in the form and to the effect expressed in the schedule to the said act, was verified by a declaration in writing, in the form in and by the said act of parliament required, by the secretary for the time being of the said company, and the same, when so verified, afterwards, and within twelve calendar months from the passing of the said act, to wit, on the day and year aforesaid, was inrolled in the High Court of Chancery, according to the directions of the said act, and that proper memorials of the names, residences, and descriptions of such new secretaries and directors as had since from time to time been elected and appointed, and of such persons as had ceased and discontinued to be proprietors of the said company, had been duly verified and inrolled from time to time in the said High Court [483] of Chancery, at the times and in the manner in and by the said act mentioned and required; that afterwards, and whilst the defendant was such proprietor of sixty shares in the capital of the said company, and after the execution by the defendant of the said deed of settlement as aforesaid, to wit, on the 22d of December 1840, certain persons then being proprietors and directors of the said company for the time being, duly inrolled in that behalf, as required by the said act of parliament, and duly constituted, and being, a board of directors for the management of the affairs of the said company, according to the provisions of the said indenture of settlement, at a certain meeting held pursuant to the said indenture of settlement, at the office of the said company at Bath, duly made a call of money, for the purposes of the said company, according to the provisions of the said indenture of settlement, of and from the proprietors, to wit, a call or instalment of 2l. 10s. upon every share in the capital of the said company, (except the said exempted shares,) to be paid and payable by the said proprietors on the 16th of January then next following, such call or instalment not exceeding in respect of any one share the call or instalment required on any other such share, and not requiring in respect of any one share more than the sum of 50l., exclusive of any premium or discount in respect thereof, and the same not being made so payable as aforesaid, till more than three calendar months after the day appointed for the payment of any previous instalment; that the proportion or instalment of the said defendant, so called for in respect of his said sixty shares in the capital of the said company, amounted to a large sum of money, to wit, the sum of 150l., and that the said board of directors after the making of the said call, and at the distance of ten days and more from the time so appointed for payment thereof as aforesaid, to wit, on the 26th of De-[484]cember 1840, caused to be sent and delivered to the defendant a circular letter, signifying the amount of the said proportion or instalment, and the said time so appointed for the payment thereof as aforesaid, and also that the said amount thereof should and might be paid by the defendant to, &c. &c., and that if the said amount or instalment should not be paid within three days after the time so appointed for the payment thereof as aforesaid, interest at the rate of 5l. per cent. per annum would be payable thereon from the time when the same become due, and that if such amount or instalment, with such interest thereon, should not be paid within two calendar months after the time so appointed for payment of the same as aforesaid, the shares in respect of which the same was payable would be liable to be forfeited to the said company; by means of which said several premises respectively, the defendant then became liable to pay to the said company on the said 19th January 1841, the said sum of 150l., being the said amount of the said proportion or instalments in respect of the said sixty shares of the defendant as aforesaid; that no part of the said sum being paid by the defendant on the said day so appointed for the payment

thereof as aforesaid, the said board of directors, within twenty-one days afterwards, to wit, on the 5th of February 1841, caused to be sent and delivered to the defendant a second application for the payment of the said sum and setting forth the statement so made in the said first circular letter in regard to the payment of the said instalment and the liability to forfeiture: nevertheless the defendant had not paid to the company the said sum of 150l., or any part thereof, but had hitherto wholly neglected and refused so to do; and the same, together with a farther large sum of money, to wit, the sum of 2l. 15s. 9d. for interest upon the same, after the rate aforesaid, from the said [485] 16th of January in the year last aforesaid, was still wholly due and unpaid to the said company; whereby an action had accrued to the plaintiff, as such secretary as aforesaid, for and on behalf of the said company and according to the form of the statute in that case made and provided as aforesaid, to demand and have of and from the defendant the said several sums of 150l. and 2l. 15s. 9d., amounting together to the sum of 152l. 15s. 9d., being the said sum above demanded: yet the defendant had not paid the said sum above demanded, or any part thereof; to the damage of the said company of 10l.; and thereupon the plaintiff, as such secretary as aforesaid, and for and on behalf of the said company, and according to the form of the statute in such case made as aforesaid, brought his suit.

Special demurrer, assigning for causes—that the declaration did not shew with sufficient or any certainty that the present action was brought for any injury or wrong done to any real or personal property of the company therein mentioned, or upon or in respect of any liability or liabilities to the said company, or upon any covenants, contracts, or agreements entered into with the said company, or to or with any person or persons whatsoever, in trust for the said company, or to or with any person or persons for the use and benefit thereof, or wherein the said company was interested; that it did not with sufficient or any certainty shew a cause of action in respect of which the plaintiff was entitled to sue as secretary for the said company; that it did not shew any cause of action existing before the suit commenced, and did not state the inrolment of the memorial therein mentioned with sufficient certainty and precision; that it did not with sufficient certainty state or shew that three months, or any time from the date of the said indenture had elapsed before the commencement of the suit, or the time of payment of the alleged call at [486] all; that it did not state or shew with sufficient or any certainty that the indenture therein mentioned was the indenture referred to in the act of parliament therein mentioned; and that it was in other respects uncertain, informal, and insufficient, &c. Joinder (a).

The case was argued in last Hilary term.

Channell Serjt. in support of the demurrer. One important question in this case is, whether, supposing the defendant is liable to be sued, the action can be brought in the name of the plaintiff as the secretary of the company. The deed set out is of a peculiar character. The parties thereto of the first part, including the defendant, enter into certain covenants with the parties of the second part, who are not described

(a) On the part of the defendant, the points marked for argument were,—“That it did not sufficiently appear from the declaration, that the action was carried on for the benefit of the company mentioned in the declaration. That, consistently with the declaration, the calls therein mentioned were not payable to the company, or to any person in trust for the company, and the company might not have any interest therein. That the declaration did not shew with sufficient certainty any cause of action whereon the plaintiff is entitled to sue as secretary for the company. That it did not shew any cause of action existing before the commencement of the suit. That it did not sufficiently, or at all shew that three months, or any time from the date of the said indenture had expired. That it did not sufficiently shew that three months from the date of the said indenture had expired at the time of the proprietors of the said company being called upon to pay the calls in the declaration mentioned.”

The plaintiff's points were,—“The plaintiff, on the argument of this case, will maintain the affirmative of the six several points set down for argument on behalf of the defendant; and that, under the provisions of the statute 3 & 4 Vict. c. cxvi., referred to in the declaration, he is entitled to sue as secretary for calls due to the company; and that the declaration, in its present form, is sufficient to entitle him to recover such calls, and discloses a good cause of action, as well under the statute aforesaid as under the deed of settlement set forth in the declaration.”

as [487] trustees or directors of the company. It will be contended on the other side that the defendant, being a party to the deed, has, in effect, contracted to pay any instalments that may become due on his shares. Even assuming the calls to have been properly made, the act does not apply to a case like the present, but is confined to cases where the name of the secretary is to be used in order to avoid the necessity of suing in the names of the whole company. Here the four covenantees may sue the defendant. The deed of settlement is in the nature of a deed of copartnership, and the act could not be intended to apply to a case of a member of the company sued for calls. The enacting clause is to be construed with reference to the preamble, which is the key to the whole of the first section (a). The principle laid down in the [488]

(a) The 3 & 4 Vict. c. cxxvi., intituled "An act to enable the Monmouthshire Iron and Coal Company to sue and be sued in the name of any one of their directors or their secretary, and to raise money for carrying on their works," after reciting that a number of persons has some time since formed themselves into a company or co-partnership under the name or firm of "The Monmouthshire Iron and Coal Company," for the purpose of erecting and establishing iron and coal works on certain premises respectively situate at Bedweltye and Abercarne, in the county of Monmouth, comprised in a certain indenture of declaration of trust and covenant, bearing date the 25th of October 1836, and made between Roger Hopkins, Rice Hopkins and Thomas Hopkins, and William Truman Harford Phelps of the first part, and R. Welsh, H. Marsh and W. Phelps, of the second part; and for the carrying on the iron and coal trade: (sic) and that the affairs and concerns of the company had been carried on and conducted and managed under and subject to the rules, regulations and provisions contained in a certain indenture also bearing date the 25th of October 1836, and made between the several persons whose names and seals are thereunto subscribed and affixed (except the said Roger H., Rice H., T. H., W. T. H. P., and R. W., H. M. and W. P.) of the first part, the said Roger H., Rice H., T. H. and W. T. H. P. of the second part, and the said R. W., H. M. and W. P. of the third part, purporting to be the deed of settlement of the company, by which it was provided that the capital of the company might consist of 300,000l. to be raised or created in, and divided into, 6000 shares of 50l. each and no more; and further, that the board of directors of the said company should proceed to carry into effect the objects and purposes of the company, without delaying the same until the whole of the 6000 shares should have been subscribed for and appropriated, and notwithstanding that a part only of such shares should have been subscribed for and appropriated: and that the capital or joint stock of the company consisted of 204,400l. divided into 4088 shares and no more, of which capital the sum of 146,000l. had been actually paid up by the proprietors of shares in the company, and 450 were free shares: and that difficulties had arisen and might arise in recovering debts and moneys due to the company, and in maintaining actions for damages done to the company or to the property of the company, since, by law, all the members for the time being of the company must be named in every action or suit carried on for such purpose, and it would be convenient that persons having demands against the company should be entitled to sue the secretary of the company or any one of the elected directors thereof for the time being, and that prosecutions for embezzlement, robbery or stealing the property of the company, or for fraud, or for any other offence against the company, should be instituted and carried on in the name of the company, or name of the secretary or one of the elected directors thereof for the time being: and that it was expedient that certain powers should be granted to the company to raise a sum of money; and that the company should be regulated in other respects as hereinafter mentioned: enacts, "that all actions and suits whatsoever against any person or persons already indebted or who may hereafter be indebted to the company called, &c., and all actions, suits and other proceedings whatsoever at law or in equity, for any injury or wrong done to any real or personal property of the said company, or upon or in respect of any present or future liability or liabilities to the said company, or upon any bonds, covenants, bills of exchange, promissory notes, contracts or agreements which already have been or hereafter shall be given or entered into, to or with the said company, or to or with any person or persons whatsoever in trust for the said company, or to or with any person or persons for the use or benefit thereof, or wherein the said company is or shall be interested, and all instruments, petitions and other proceedings for or incidental

various authorities is, that if the words in the enacting clause go clearly beyond the preamble some effect is to be given to them; but if not, then such clause is to be [489] construed with reference to the preamble. In *Bac. Abr. Statute* (I.) 2, it is said that "it is in the general true that the preamble of a statute is a key to open the mind [490] of the makers as to the mischiefs which are intended to be remedied by the statute." So, in *Co. Litt.* 79 a. it is laid down that "the rehearsal or preamble of the statute is a good means to find out the meaning of the statute, and, as it were, a key to open the understanding thereof." In *Crespigny v. Wittenoom* (4 T. R. 790) it is said by Mr. J. Buller, "I agree that the preamble cannot control the enacting part of a statute which is expressed in clear and unambiguous terms. But if any doubt

to the issuing or prosecuting any fiat in, or commission of, bankruptcy in England or Ireland, or any sequestration in Scotland, against any person or persons already indebted, or who may be hereafter indebted to the said company, or to any person or persons in trust for the said company, or to any person or persons for the use or benefit thereof, and liable to be made bankrupt by the laws now or at any time hereafter to be in force relative to bankrupts and traders in England and Ireland, or to sequestrations in Scotland, and all proceedings at law or in equity under any commission of, or fiat in, bankruptcy, or under any sequestration by, for or on behalf of the said company, or wherein the said company is or shall be interested or concerned, and generally, all other proceedings whatsoever, at law or in equity, to be commenced, instituted or carried on by or on behalf of the said company, or wherein the said company is or shall be concerned or interested, against any person or persons, or body or bodies politic or corporate or others, whether such person or persons, or any of such persons or such body or bodies politic or corporate, or any member or members thereof respectively, is, or are, or shall be, or shall have been, a proprietor or proprietors of the said company or not, shall and lawfully may be commenced, made, executed, instituted, presented and prosecuted or carried on in the name of the secretary of the said company for the time being, or in the name of any one of the elected directors for the time being of the said company, as the nominal plaintiff, pursuer, complainer or petitioner, or as acting in any other character for or on behalf of the said company; and all actions, suits, and other proceedings at law or in equity, to be commenced, instituted or prosecuted against the said company by any person or persons, or body or bodies politic or corporate, whether such person or persons, or any of such persons, or such body or bodies politic or corporate, or any member or members thereof respectively, is, or are, or shall be, or shall have been, a proprietor or proprietors of the said company or not, shall and lawfully may be commenced, instituted and prosecuted against the secretary for the time being, or against any one of the elected directors for the time being of the said company, as the nominal defendant, respondent or defender in such last-mentioned actions, suits or proceedings for or on behalf of the said company, and the death, resignation or removal, or any other act or proceeding of such secretary or director, or any change in the members of the company, by the transfer of shares or otherwise, shall not abate, prejudice or render defective any action, suit, petition or other proceeding at law or in equity, commenced or instituted under this act, but the same may be continued, prosecuted, carried on, or defended in the name of the secretary for the time being, or any elected director for the time being of the said company, notwithstanding the death, resignation, or removal, or any other act or proceeding of such secretary or director, and notwithstanding such change in the members of the said company; and it shall and may be lawful for the said company at law, in equity, and in bankruptcy in manner aforesaid, to sue and proceed against, and to be sued and proceeded against, by any person or persons, or body or bodies politic or corporate, notwithstanding such person or persons, or body or bodies politic or corporate, or any member or members thereof respectively, is, or are, or shall be, or shall have been, a proprietor or proprietors of the said company, and that solely and jointly with any other person or persons, or body or bodies politic or corporate, in respect of any claim or demand which the said company may have against such person or persons, or body or bodies politic or corporate, either solely or jointly as aforesaid, or which such person or persons, or body or bodies politic or corporate, either solely or jointly as aforesaid, may have against the said company, the same as if such person or persons, or body or bodies politic or corporate, was, or were not, or had never been, a proprietor or proprietors of the said company."

arise on the words of the enacting part, the preamble may be resorted to to explain it." And Mr. J. Grose observes, "Though the preamble cannot control the enacting clause, we may compare it with the rest of the act in order to collect the intention of the legislature." In [491] *Mason v. Armitage* (13 Ves. 25) Lord Erskine says, referring to *Simon v. Metivier* (1 W. Bl. 599, 3 Burr. 1921), "It is said in the report that the preamble shews the intention; but the law is, that if the enacting part will bear only one interpretation, the preamble will not confine it. If that is doubtful, then the preamble may be applied to throw light upon it." So, in *Hallon v. Cove* (1 B. & Ad. 538) it is said by Lord Tenterden, "It is very true, as was argued for the plaintiff, that the enacting words of an act of parliament are not always to be limited by the words of the preamble; but must, in many instances, go beyond it. Yet, on a sound construction of every act of parliament, I take it, the words in the enacting part must be confined to that which is the plain object, and general intention, of the legislature in passing the act, and that the preamble affords a good clue to discover what that object was."

Here, all the words in the enacting clause, on which the other side rely, will have some meaning given to them by construing them with reference to the preamble. Each branch of the preamble points to a case where the whole of the members of the company either must or should, properly speaking, be joined in bringing any action. The deed bears date in 1836, but the act was not passed until 1840. The legislature seem either to have assumed, that all calls or shares had then been paid up, or to have left such calls to be recovered under the deed; for the act does not appear to have been intended to interfere with the deed; otherwise it would have contained a clause authorizing the company to make calls; and the absence of such a provision affords a strong presumption, that the enforcing of the calls was left entirely to the operation of the deed. In *Williams v. Beaumont* (10 Bingh. 260, 3 Moo. & Sc. 705), an act incorporating an in-[492]-surance company, after reciting that difficulties had arisen, and might thereafter arise, "in bringing and maintaining actions and suits for recovering debts and enforcing obligations now due, or hereafter to become due to the said society," enacted, "that all actions and suits commenced or instituted, &c., by or on behalf of the said society, &c., against any person, &c., for recovering any debts, or enforcing any claims or demands now due, or which may hereafter become due or arise to the said society, &c., shall, &c., be commenced or instituted and prosecuted in the name of the chairman or secretary, &c. as the nominal plaintiff, &c." It was held that the chairman might sue for a libel on the company. There, the judgment of the court seems to have proceeded very much on the ground taken in this case on the part of the defendant. Alderson J. says, "The construction of the act is, that where an action could have been maintained by naming all the individuals of the company, it shall be lawful to substitute for their names the name of the chairman. Whatever actions could have been maintained by the entire body, may be maintained by the chairman on their behalf, and, inasmuch as the entire body might have maintained an action for this libel, the chairman is authorized to sue for them in his own name." Here, however, all the members of the company could not have sued; for being a covenant under seal, none could sue but the four parties with whom it was made.

Secondly, it appears from the declaration that certain shares are exempted from the payment of calls; and it is not alleged that the defendant's shares are not exempted from such liabilities, or that they are shares on which the company are entitled to make calls. [Stephen Serjt. This objection is not taken as a ground of demurrer.] The objection is open to the defendant upon general demurrer. The other side will rely on the allegation that the proportion or instalment of the [493] defendant called for in respect of his shares amounted to 150l.; but that is a mere calculation, which, it is submitted, is not sufficient to obviate the objection.

Thirdly, the declaration does not allege that the day on which the call was made was more than three calendar months after the date of the deed of settlement, or that three calendar months had expired from the payment of any former instalment. There is nothing in the declaration from which any intendment can be drawn with respect to either of these points, inasmuch as the date of the deed and the day of the call are both laid under a videlicet. In *Parkinson v. Whitehead* (ante, vol. ii. 329) the declaration stated that theretofore, to wit, on the 31st of May 1825, by an agreement in writing, the defendant's testator agreed, within two years from Midsummer then next, to build certain houses; and alleged for breach that the houses at the commencement

of the action (1839) were unbuilt, contrary to the agreement. This court held the declaration bad on general demurrer, for not shewing that two years from Midsummer next after the making of the agreement had elapsed previous to the commencement of the suit. It is clear, therefore, that no cause of action is shewn to be existing at the commencement of the suit.

Stephen Serjt., *contra*. With respect to the main objection, that this action should not have been brought in the name of the secretary of the company, the preamble and the enacting part of the clause taken together, shew that this very case falls fairly within the provisions of the act. It appears from the recitals in which the deed of settlement is set forth, that only part of the capital has been paid up. The enacting portion of the clause provides that the secretary may sue "upon [494] any bonds, covenants, &c., contracts, or agreements which already have been or hereafter shall be given or entered into, to or with the said company, or to or with any person or persons whatsoever in trust for the said company, or to or with any person or persons for the use or benefit thereof, or wherein the company is or shall be interested." It is impossible to conceive words more studiously adapted to the present case than those employed. It is argued that the recital that "difficulties have arisen and may hereafter arise in recovering debts and moneys due to the said company," shews that the act was only meant to apply to cases in which it was necessary for all the members of the company to sue or to be sued; but it is an undoubted principle that a preamble cannot be admitted to control or restrain the enacting words of a clause where these are free from doubt or obscurity. "Where words in a statute are express, plain, and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the statute by reason of some subsequent clause from whence it might be inferred that the intent of the parliament was otherwise. And this holds with respect to penal, as well as other, acts:" *Bac. Abr. Statute (I.), 2*. The object of the act was, not only to provide against the inconvenience of naming all the proprietors as plaintiffs in actions brought by the company against third parties, but also to enable the company to sue its own members on contracts, whether made with the company or with the trustees of the deed of settlement. [Maule J. Has there not been a recent case on this subject in the Exchequer?] The case alluded to is *Hughes v. Thorpe* (5 M. & W. 656). The 6 G. 4, c. 42, s. 10 (the act for the better regulation of co-partnership [495] banks in Ireland), enacted that all actions and suits, &c. against any person who may be indebted to any such co-partnership, and all proceedings at law or in equity under any commission of bankrupt, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such co-partnership against any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, for receiving any debts, &c. due to such co-partnership, shall, from the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers, &c. of the said co-partnership. A question was there raised, but which it became unnecessary to decide, whether the act conferred upon the company a right to bring an action in the name of its public officer against one of its members for a debt due to the co-partnership. Parke B. said, "That is a point which I think admits of considerable doubt, and upon which I have not made up my mind. I believe the intention of the legislature was to give such a power; but I have considerable doubt whether the words admit of it." The words on which the doubt arose in that case are very similar to those contained in the middle of the present clause; but other words are added here, namely, "and it shall and may be lawful for the said company at law, in equity, and in bankruptcy in manner aforesaid to sue," &c. (see ante, p. 490), which appear to have been introduced to guard against the difficulty which was suggested in *Hughes v. Thorpe*. The fourth section of the act presents an incidental confirmation of the liability of a proprietor to be sued in the name of the secretary, for calls (b).

(b) "Provided also and be it enacted, that no person or persons, or body or bodies politic or corporate, having or claiming, or who shall or may have or claim, any demand or demands, or cause of action, or suit upon or against the said company, whether such person or persons or any of such persons shall be a proprietor or proprietors of the said company or not, shall bring more than one action or suit, or actions or suits in respect of such demand or cause of action or suit, or alleged cause

[496] With respect to the objection that the declaration contains no allegation that the defendant's shares are not exempted shares, it cannot be supported. The declaration avers that the defendant is the proprietor of sixty shares; and, after setting out, among other things, the deed whereby the defendant contracted with the trustees, and the call made of 2l. 10s. per share, it states that the proportion or instalment of the defendant so called for in respect of his said sixty shares, amounted to 150l.; that the defendant had due notice of the call, &c.; and that he then became liable to pay to the company, on, &c., the said sum of 150l., being the said proportion, &c. As this objection arises on general demurrer, the question is, whether the allegation that the defendant became liable to pay the company 150l. is not suffi-[497]-cient to shew that he was a proprietor of unexempted shares; for it could not be true, if he was not. It is submitted that the averment is equivalent to an allegation that he was a proprietor of unexempted shares, and a traverse might have been taken upon it. It is clear that the averment is not in the nature of a *virtute cujus*—an inference from preceding allegations. If the defendant meant to object to the form of the allegation, he should have demurred specially to it. *Davis v. Lovell* (4 M. & W. 678) shews that upon general demurrer this allegation is sufficient. [Maule J. Supposing the defendant's shares had really been exempted shares, ought he not to be able to raise that defence by a negative plea? Could he, on a traverse of the allegation in question, say, that his were exempted shares?] The affirmative would lie on the plaintiff; and, in order to make out that any sum was due, he must shew that the defendant was the proprietor of unexempted shares. If the defendant meant to say that the declaration contained no allegation upon which, as to this point, he could take an apt issue, he should have set that out as ground of special demurrer.

Another objection is, that it is not alleged that three months had elapsed between the date of the deed and the making of the call, or that there was an interval of a like period between the day appointed for the payment of the present and that appointed for the payment of any former call. It is averred, however, that the directors "duly made a call of money for the purposes of the company, according to the provisions of the said indenture of settlement," which, it is submitted, is a sufficient allegation of a compliance with the whole of the stipulations in the deed. It is a mistake to suppose, that where a variety of requisites are necessary previously to making a call, it is incumbent to state separately that [498] they have all been complied with. It is a well-known rule in pleading that, where a full statement would lead to inconvenience and prolixity, a condensed form of allegation is sufficient.

The remaining point is, whether any cause of action is shewn to have existed before the commencement of the suit. Such an allegation is clearly unnecessary: it has always been understood that where there is an averment of past matter, such matter must be taken to have occurred before the commencement of the suit. There is a clear distinction between a prospective allegation and one referring to a thing that is past; for if there were not, it would be necessary, in almost every case, to aver that events had happened before the action was brought. There is an allegation here that the directors, ten days after the time appointed for the payment of the

of action or suit; and in case the merits in respect of any such demand or cause of action or suit, actions or suits, or alleged cause of action or suit, actions or suits shall have been finally determined in any action or suit, then and in every such case the proceedings in such previous action or suit may be pleaded in bar of any such other or subsequent action or suit, or actions or suits which may be commenced or instituted in respect of the same demand against the secretary or against any other director or proprietor of the said company; and in case the merits in respect of any demand or cause of action or suit which the said company, or any person or persons in trust for them, or for their benefit, now has or have or hereafter may have upon any person or persons, or body or bodies politic or corporate, whether such person or persons, or any of such persons shall be or shall have been a proprietor or proprietors of the said company or not, shall have been determined in any other action or suit previously commenced or prosecuted by the secretary or any elected director of the said company, then, and in such case the proceedings in such previous action or suit may, in like manner, be pleaded in bar of any such subsequent or other action or suit, or actions or suits which may be commenced or prosecuted for the same demand by the same or any other secretary or elected director of the said company."

call, had called upon the defendant to pay the money. It is clear, therefore, that the day appointed for payment of the call had elapsed; for a bygone time is mentioned in the declaration, and that time is referred to as being subsequent to the day when the call became due.

Channell Serjt., in reply. The first objection to the form of the allegation is, not that no call was made, but that there is nothing to shew the defendant's liability to the call. The defendant could not have traversed the allegation which has been relied on. If he had done so, the plaintiff would have demurred, on the ground that it was uncertain whether the defendant meant to deny that he was a proprietor, or that the call had been duly made, or to say that his shares were exempt.

With respect to the objection that the declaration does not shew that either period of three months had elapsed, no such effect can be given to the words "duly made a call of money, &c., according to the provisions [499] of the said indenture of settlement," as has been suggested. The language of the declaration in *Parkinson v. Whitehead* was quite as strong as that which occurs here; and yet it was held insufficient. As regards the main objection, the conclusion of the clause in the act has been relied on, as obviating the doubt entertained in *Hughes v. Thorpe*; but, throughout the section, the general words are always used in connection with the words "at law or in equity." It does not follow that because the trustees may possibly be entitled to sue the defendants on the deed, the secretary of the company may sue him under the act; for that would be to give a construction to the act, which, it is submitted, cannot be fairly drawn from its provisions, when taken in connection with the preamble.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was an action of debt brought by the plaintiff, therein described as secretary, for the time being, duly appointed and inrolled in that behalf, of a certain company called "The Monmouthshire Iron and Coal Company," being a company mentioned in an act of parliament of the third and fourth years of the reign of Her present Majesty, which was passed to enable the said company to sue and be sued in the name of any one of their directors or their secretary, and to raise money for carrying on their works; and the action was brought upon a certain indenture of settlement, dated the 25th of October 1836, to which the defendant was a party, to recover the amount of a certain call made by the directors for the purposes of the said company, according to the provisions of the indenture, upon the shares in the capital belonging to the defendant. The defendant demurred to the declaration; and the principal ground of objection which was raised on the part of the defendant [500] was, that the statute only enabled the secretary to sue where the question was one in which the whole of the company were concerned on the one part, and third persons or strangers on the other; and that it never was intended to enable the company to sue in the name of the secretary one of its own members, for an instalment of the capital secured by a deed, in which each of the proprietors had covenanted with certain trustees to make due payment of the instalments. But we think, upon reference to the enacting words of the first section, they are sufficiently large to comprehend this case. Amongst those words will be found the following: "any covenants which already have been entered into with the said company, or with any persons in trust for the said company, or with any persons for the use of the said company;" which appear to us necessarily to include within them the covenant made by the defendant with the trustees in the deed of settlement for the benefit of the company. And the same section further enacts that the action shall be maintainable against the defendant, "whether he is a proprietor of the said company or not." And as, on the one hand, this construction may be beneficial to the company, by preventing the necessity of recourse to equity in case their trustees require to put the deed in suit; so, on the other hand, no injury can result to the defendant by giving this interpretation to the statute; as, by section 4, he can only be liable to one action on the same subject-matter of demand.

Other objections of a formal nature were urged against the sufficiency of the declaration; first, that it appears by the declaration, that there being a certain number of shares which were exempted from having calls made thereon, it does not distinctly appear that the shares of the defendant were not exempted shares. But we think that the direct allegation in the declaration, "that the proportion or instalment of the defendant, so called [501] for in respect of his sixty shares in the capital of the

company," amounted to such a sum of money, is, by necessary implication and intentment, an allegation that those shares were not exempted from liability; for, had that been the case, no proportion or instalment whatever would have been due upon them. And as to the more formal objections—that there is no allegation that the call was not made until after the expiration of three calendar months from the date of the indenture, or that it was not payable until after the expiration of three calendar months, from the time appointed for the payment of any former instalment,—we think there is no ground for either; for as to the last, the declaration, besides containing a distinct allegation, that the call was made according to the provisions of the said indenture, avers also, "that the same call was not made so payable till more than three calendar months after the day appointed for payment of any previous instalment;" and as to the former, namely, the want of an averment that it was not made until after three months from the date of the indenture, the declaration contains a substantive allegation, not under a *videlicet*, that the instalment became due and payable on the 16th of January then next, which by a subsequent averment, not under a *videlicet*, is alleged to be the 16th of January 1841; and as the statute,—which refers to, and recites, the deed,—received the royal assent on the 4th of August 1840, the day of payment of the call must have been more than three months after the date of the deed.

We think, therefore, that none of the grounds of objection are sustainable, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

[502] ALEXANDER BRYMER BELCHER AND OTHERS, Assignees of Robert Stockdale, a Bankrupt, v. GEORGE CAPPER AND OTHERS. 1842.

[S. C. 5 Scott, N. R. 257; 11 L. J. C. P. 274.]

By a memorandum of charter it was agreed that A. should let, and B. should hire A.'s vessel for six calendar months, during which time B. was to possess the entire and exclusive use and disposal of the whole reach and burthen of the vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of stores and provisions; that the master should from time to time, and as often as B.'s interest should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as B. or his agents should direct him to do; and that he should deliver the said goods agreeably to the bills of lading; that the freight and primage for such goods should be payable to B. or his order; that in the event of the completion of the six months whilst the vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain; that the owners or masters should keep the vessel tight, and manned, and provisioned and fitted with necessary stores. In consideration whereof B. agreed to pay to A. at a certain rate per ton per month, to be paid by—one month's pay in advance in cash,—one month's pay after the vessel should be entered outwards,—one month's pay that day two months,—and one month's pay at the expiration of each succeeding month, till the end of the term she might be employed,—and the balance in cash on her final discharge, together with port charges, &c.; that B. should have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, A. allowing whatever rate of wages A. paid his own master; and as the master was to be appointed by B. to superintend his interests, A. was not to be responsible for such master's acts and conduct, should he deviate from the charter, but B. was to be responsible to A. for the conduct and integrity of such master whilst he should have the navigation of the vessel. Held, that the possession of the vessel was given up by A. to B. during the continuance of the contract; that the master so appointed by B. was in possession of the cargo as his agent, and not as the servant of A.; that personal credit was given to B. for the payment of the hire of the vessel, and that no lien upon, or right of stoppage of, the goods, was reserved to the owners as a security for the payment of such hire.—Money having

become due under the charter from B. to A., and A. having brought an action against B., it was agreed that A. should withdraw his action, and that B. should deliver to C. certain bills of lading for the homeward cargo and should empower C. to receive the proceeds thereof for the purpose of paying A. any freight due to him under the charter, the balance to be paid to B.'s account with C. A. withdrew the action, and B. empowered C. accordingly. Upon the arrival of the vessel, A., in his own right, and as agent for C., took possession of the cargo, &c. At the time of making the agreement no part of the cargo was on board, nor were any of the bills of lading thereof in existence, nor were any such bills of lading at any time in the possession of A. or of B. or of C. Before the shipping of the cargo or the existence of the bills of lading, and before C. had any control over the cargo, and while B. was the apparent and reputed owner thereof, and whilst A.'s action was still pending, B. became bankrupt, and D. and E. were appointed assignees. The cargo was from the time of the shipping till the seizure thereof in the possession and control of D. and E., as assignees, and of one F., a master appointed by B. as their agent. Before the bankruptcy however, certain goods had been provided and shipped by B.'s agent as part of the homeward cargo, and on his account; which goods were carried from Y. to Z., where, for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before the bankruptcy of B., and remained there ready for shipment. Other goods, provided by B.'s agents at G., were also, before his bankruptcy, ready for shipment on his account, as a further portion of the homeward cargo. Both sets of goods were shipped accordingly; after which A. took possession thereof for the purpose of paying himself such freight, &c.—Held, that the portion of the cargo which had been brought from Y. to Z., was sufficiently in the possession of B. at the date of the agreement, as part of the homeward cargo mentioned in that agreement, to bring it within the terms thereof, as equitably assigned to C. for the purpose therein mentioned.—Semble also, that if the rest of the goods were within the possession of B.'s agents and before his bankruptcy, set apart and definitely appropriated as part of the homeward cargo, a similar result would follow.—But held, that as B. was left in the sole possession and management of the cargo, with full power to dispose of, or gain credit upon, any portion of it, having parted with no document essential to his power of disposal, such cargo passed to D. and E., under the 6 G. 4. c. 16, s. 72, as goods in the order and disposition of B. at the time of his bankruptcy.

Assumpsit. The declaration stated that before the said Robert Stockdale became bankrupt, to wit, on the 23rd of October 1839, by a certain charter-party [503] of affreightment memorandum of charter, then made between the defendants, therein described as George Capper and Nephews, merchants in the city of London, and owners of the ship or vessel called the "Maas," of the burthen of 137 tons, old measurement, or thereabouts, then on a voyage from London to Rotterdam and back to London, and the said Robert Stockdale, therein described as of London, merchant, the defendants agreed to let, and the said Robert Stockdale agreed to hire the said vessel for and during the term of six calendar months, [504] such term to commence fourteen days after the vessel should be ready to enter out at the custom house upon the terms and conditions following; to wit, that during the said term of that agreement, or as thereafter provided, the said affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; that the master should, from time to time, and as often as the interest of the said affreighter should require, take on board and properly stow all such lawful goods and merchandise to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as he, the said affreighter, or his agents, should direct him so to do; and that he should deliver the said goods and merchandise agreeably to the bills of lading, the act of God, the Queen's enemies, and all and every danger and accidents of the seas, rivers, and navigation, of whatever nature and kind, during the said voyage, always excepted; that the freight and primage on all such goods, merchandise, bullion, or specie should be for, and payable to, the said affreighter or to his order; that all cargoes were to be brought alongside, and taken from alongside at shipper's risk and expense, and that in

the event of the completion of the above-mentioned term of six calendar months, whilst the said vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the terms of that agreement should be prolonged until the discharge of her cargo after arrival at, or return to, a port in Great Britain; at which place the final completion of that agreement was to take place, unless otherwise mutually agreed between the owners and affreighters; that during the aforesaid term [505] of that agreement the said owners or master should keep the said vessel tight, staunch, and strong, sufficiently manned, provisioned, and properly provided, and fitted with all stores necessary for the due performance of the voyage or voyages she might be sent upon; in consideration of which the said affreighter thereby agreed to pay, or cause to be paid, to the owners of the said vessel at and after the rate of 22s. per ton old measurement, per register, per calendar month for so long as she should be by him employed as aforesaid under that agreement; such consideration to be paid as follows, viz. by one month's pay in advance in cash, one month's pay after the vessel should be entered on board, one month's pay that day two months, and one month's pay at the expiration of each succeeding month till the end of the term she might be employed, thus leaving one month's pay in abeyance, and the balance, in cash, on her final discharge, together with all port-charges and pilotage, except in Great Britain; the master to be supplied with such cash as he might require for ship's disbursements, at any of his loading or discharging ports by the charterer's agent, free of commission, taking the master's draft upon his owners for the same; which amount was to be paid by the owners, or deducted from the balance of freight due to the vessel; and it was by the charter-party further understood and agreed, that in case of damage to the ship by stranding or other accident, fourteen running days were to be allowed by the said affreighter for the necessary repairs beyond that period; the monthly payments to be suspended until the said vessel should be sufficiently repaired to prosecute her voyage; and, in the event of the loss of the ship, the affreighter was to pay the aforesaid rate of freight up to the time only when the vessel was lost, seen, or known to be in safety; but if the loss happened at sea, and the date could not be ascertained, then the charterer was to pay [506] half a month's hire. No goods were to be shipped that would not go down the hatchway. Dunnage, mats, boards, and nails, if required, to be found by the charterer. The vessel to be employed abroad, between the river Gambia and Sierra Leone, and between the Gambia and the Cape Verd Islands on the African coast, all inclusive; but not to be sent to any place where she could not lie afloat at any time of tide; and if ordered to London to discharge her homeward cargo, it would be in one of the regular docks, at the option of the charterer, the vessel to be entered and cleared outward, and reported on her return to London, by the said Robert Stockdale, free of charge; not to ship exceeding fifty tons weight of teak wood or timber, and no piece exceeding twenty-five cwt. The vessel to be ready for loading in the London Docks ten days after she should be cleared of her inward cargo from Rotterdam, provided she met with no accident requiring extensive repairs. The charterer to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores and paying his wages, the owners allowing the charterer whatever rate of wages they paid their own masters. It was also, by the same charter-party, agreed and understood that as the master was to be appointed by the charterer to superintend his interest, the owners were not to be responsible for his acts and conduct, should he deviate from that charter-party; but the charterer held himself responsible to the owners for the said master's honest and correct conduct and strict integrity whilst he should have the navigation of their vessel. In the event of sickness or death from the effects of the climate, the time occupied in procuring substitutes was not to be deducted from the freight. The commission upon that charter was $2\frac{1}{2}$ per cent, payable to Messrs. Leach and Clark. Penalty for non-performance of that agreement, 1000l. Averment: that [507] the said charter-party being so made as aforesaid, afterwards, to wit on the 18th of December 1839, in and by a certain memorandum or declaration in writing indorsed on the said charter-party and signed by the defendants and the said Robert Stockdale respectively, it was declared that the periods of payment of the said freight should be as follows: viz. one month's pay on the 10th of January 1840, one month's pay on the 10th of March following, and one month's pay on the 10th day of every succeeding month during the remaining period of that agreement. Mutual promises to perform the charter and memorandum, with a further promise by the defendants

to suffer and permit the master for the time being of the said ship or vessel to perform and fulfil all things by him to be performed and fulfilled as such master in pursuance of the said charter-party, and to suffer and permit the delivery, according to the terms of the said charter-party, of the cargo, goods, and merchandise which should be shipped on board the said ship or vessel in pursuance of the said charter-party, and to suffer and permit the said charterer to use the said ship or vessel according to the terms of the said charter-party and memorandum, during the continuance of the said charter-party and agreement therein contained, and during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions. Averment: that afterwards, and after the making of the said charter-party and memorandum thereon subscribed as aforesaid, and before the said Robert Stockdale became bankrupt, to wit, on the 1st of January 1840, the said ship or vessel did arrive in the said port of London from Rotterdam aforesaid, and afterwards, to wit, on, [508] &c. last aforesaid, the said ship or vessel was ready to enter out, and did enter out, at the custom house according to the terms of the said charter-party, and the said Robert Stockdale did then, to wit, on the day and year last aforesaid, put in the said ship or vessel a master of his own appointment, to wit, one James M'Cormick, according to the terms of the said charter-party; and the said ship or vessel did sail and proceed on her voyage under the command of the said James M'Cormick, according to the terms of the said charter-party of affreightment, to wit, to Gambia and Sierra Leone and the Cape Verd Islands aforesaid, and to divers places on the African coast, between the river Gambia and Sierra Leone, and between Gambia and Cape Verd Islands; and the said vessel was not sent to any place where she could not lie afloat at any time of the tide; and the said master did afterwards, at the said several places, to wit, on the 1st of March 1840, and on divers other days and times, between that time and the sailing of the said vessel for London, take on board and properly stow divers lawful goods and merchandise, in pursuance of, and according to, the terms of the said charter-party, to wit, to the extent of a full and complete cargo, and of great value, to wit, of the value of 10,000*l.*, and did then, to wit, on the 1st of August in the year last aforesaid, and after the bankruptcy of the said Robert Stockdale, proceed therewith on the homeward voyage of the said ship or vessel, to wit, to London aforesaid, according to the orders and directions of the plaintiffs as assignees as aforesaid; and the said ship or vessel being so loaded as aforesaid, did afterwards, and after the bankruptcy of the said Robert Stockdale, to wit, on the 1st of October 1840, arrive at London, at one of the regular docks there, to wit, at the West India Docks there; and the said term of six calendar months in the said charter-party mentioned, was completed after the said vessel [509] had commenced taking goods on board for her said voyage, to wit, on the 15th of July 1840, whereby the said agreement and the terms thereof were prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain. That the said Robert Stockdale, before he became bankrupt, and the plaintiffs as assignees as aforesaid, since the bankruptcy of the said Robert Stockdale, had respectively performed and fulfilled all things contained in the said charter-party and memorandum or declaration in writing, on their parts respectively to be performed and fulfilled, according to the true intent and meaning of the said charter-party and memorandum. Yet the defendants had not performed or fulfilled all things contained in the said charter-party and memorandum, on their parts and behalves, to be performed and fulfilled, and did not nor would suffer or permit the master for the time being of the said ship or vessel, to perform and fulfil all things by him to be performed and fulfilled as master of the said ship or vessel in pursuance of the said charter-party, and did not nor would suffer or permit the delivery of the said cargo, goods, and merchandise so, as aforesaid, shipped on board the said ship or vessel in pursuance of the said charter-party; but on the contrary thereof, although the said cargo, goods, and merchandise were, by the bills of lading thereof, made deliverable to the plaintiff Alexander Brymer Belcher, who, on the arrival of the said vessel, was, and from that time had been, ready to receive the same; and although the plaintiffs as such assignees as aforesaid, were then ready and willing to unload the same, to wit, in the West India Docks, being one of the said regular docks, and to take the same from alongside at the expense of them, the plaintiffs, and to deliver and cause the same to be delivered

to the said A. B. Belcher, according to the said bills of lading; of all which the defendants then, to wit, from [510] the time of the arrival of the said ship or vessel at London aforesaid, hitherto had notice, and were then during the time aforesaid often requested by the plaintiffs to suffer the same to be so delivered; and although the delivery of the said cargo, goods, and merchandise was not in any way hindered or prevented by the act of God, the Queen's enemies, or any danger or accident of the seas, rivers, or navigation of any nature or kind whatsoever; and although the said agreement in the said charter-party contained, being so prolonged as aforesaid, was then subsisting and continuing, and not terminated; they the defendants from the time of the arrival of the said ship or vessel, with the said cargo, goods and merchandise, hitherto had altogether refused to deliver, or to permit the said master of the said vessel or any other person to deliver the said cargo to the said A. B. Belcher, agreeably to the bills of lading, or to the plaintiffs; and had altogether hindered and prevented the delivery of the said cargo, goods and merchandise, or any part thereof to the plaintiffs, or any of them, and had detained, and still did detain the same, and every part thereof on board of the said ship or vessel, contrary to the true intent and meaning of the said charter-party and of the said memorandum. And that the defendants did not, nor would suffer the plaintiffs as assignees as aforesaid, after the bankruptcy of the said Robert Stockdale, to use or enjoy the said ship or vessel according to the terms of the said charter-party or of the agreement therein contained, or, during that time, to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; but that after the said bankruptcy, and after the arrival of the said ship or vessel as aforesaid, at London [511] aforesaid, and before the discharge of the said cargo, and the said ship not having discharged her cargo after arrival at, or return to a port in Great Britain, and during the continuance of the said charter-party and agreement therein contained, being so prolonged as aforesaid, to wit, on the said 1st October 1840, the defendants altogether deprived the plaintiffs of the use and enjoyment of the said ship or vessel, and every part thereof; and the defendants themselves seized and took possession of the whole of the said ship or vessel, and excluded the plaintiffs therefrom; and to suffer the plaintiffs to possess the use or disposal of any part of the same, or to remove or unload the said cargo so being on board of the same, and occupying other parts thereof than the space occupied with the cabin, or the room for the use and accommodation of the crew, or for the stowage of the ship's stores or provisions, had altogether refused, and still did refuse, and from thence hitherto had kept and detained, and still did keep and detain possession of the whole of the said ship or vessel, so having on board the cargo, goods, and merchandise; aforesaid, contrary to the true intent and meaning of the said charter-party and memorandum: whereby the plaintiffs had been unable to obtain possession of the said cargo, or to unload or dispose of the same or any part thereof; and by reason of the premises the said cargo, goods and merchandise had been, and were greatly deteriorated, &c., and had become of no value; and the plaintiffs as assignees aforesaid, had been deprived of the use and possession of the said goods and merchandise, and of the profits, benefits, and advantages which they otherwise would have derived therefrom, and had wholly lost and been deprived of many advantageous, and profitable opportunities of selling and disposing of the same.

The defendants pleaded, sixthly, that after the making [512] of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the bankruptcy of the said Robert Stockdale, and after the arrival of the said ship or vessel at London, and before her final discharge, to wit upon the 28th of September 1840, there was due and owing to the defendants, the said owners of the said ship or vessel, a certain large sum of money, to wit, 1348l. 19s. 6d. for the use of the said ship or vessel, according to the terms of the said charter-party, and for the freight and carriage and conveyance of the said cargo, goods, and merchandise in the declaration mentioned, according to the terms and provisions of the said charter-party and memorandum, and a certain other sum, to wit, 1570l. 0s. 1d. was payable to the defendants on the final discharge of the said ship or vessel according to the terms and provisions of the said charter-party and memorandum for the use of the said ship, and for freight and carriage and conveyance of the said cargo, goods, and merchandise to wit, on, &c. last aforesaid; yet the plaintiffs did not and would not then, to wit, on,

&c. last aforesaid, or at any other time, nor did the said Robert Stockdale, pay or offer to pay the said sums of money, or any part thereof, to the defendants; but the plaintiffs had always neglected and refused, and still did refuse, to pay the same, and the said sums of money were still due and unpaid respectively to the defendants; and, thereupon, and upon the refusal of the plaintiffs to pay the said sums of money respectively, the defendants did refuse to deliver, or to suffer or permit the said master to deliver, the said cargo to the said A. B. Belcher, and had hindered and prevented the delivery of the said cargo, goods, and merchandise to the plaintiffs, and had detained, and still did detain, the same on board the said ship, and had refused, and still did refuse, to suffer the plaintiffs to remove or unload the said cargo, and kept and detained, [513] and still did keep and detain possession of the whole ship or vessel so having on board the cargo, goods, and merchandise aforesaid, as they lawfully might for the cause aforesaid, and as and for a lien for the moneys so respectively due and payable according to the terms and provisions of the said charter-party and memorandum aforesaid; which were the same matters in the declaration in that behalf alleged, and therein supposed to be breaches of the promise and undertaking of the defendants. Verification.

Special demurrer, assigning, among other causes, that it did not appear that the defendants at the time of committing the said breaches of promise, were in possession of the said ship or cargo, or in a situation to enforce their lien (a).

Seventh plea. As to so much of the declaration as related to the said supposed breaches of promise by the plaintiffs in their declaration alleged, wherein they complained of the defendants not suffering or permitting the master to perform and fulfil all things by him to be performed and fulfilled as master in pursuance of the said charter-party, and not suffering or permitting the delivery of the said cargo, goods and merchandise so shipped on board in pursuance of the said charter-party, and refusing to deliver, or to suffer, or permit the master, or any other person, to deliver, the said cargo to the said A. B. Belcher agreeably to the bills of lading, or to the plaintiffs, and hindering and preventing the delivery of the said cargo, goods, and merchandise to the plaintiffs, and detaining the same on board the said ship, contrary to the true intent and meaning of the said charter-party and memorandum, and not suffering the [514] plaintiffs as assignees after the bankruptcy of the said Robert Stockdale, to use or enjoy the said ship according to the terms of the said charter-party and memorandum, or to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel with the exception therein mentioned, and the depriving the plaintiffs of the use and enjoyment of the ship, and seizing and taking possession of the whole of the said ship and excluding the plaintiffs therefrom, and refusing to suffer the plaintiffs to possess the use and disposal of any part of the same, or to remove or unload the said cargo, and keeping and detaining possession of the whole of the said ship or vessel so having on board the said cargo, goods, and merchandise,—that after the making of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the bankruptcy of the said Robert Stockdale, and after the arrival of the said ship at London, to wit, on, &c. last aforesaid, and before the final discharge thereof, the said cargo, goods, and merchandise were by the bills of lading thereof made deliverable to the plaintiff, A. B. Belcher, or his assigns, he or they paying freight for the same as customary, and although the said freight amounted to a large sum, to wit, 1400l.; and although there was then due and owing to the defendants, owners of the said ship, for the use of the said ship, for freight and carriage and conveyance of the said cargo, goods, and merchandise a large sum of money, to wit, 1348l. 19s. 6d., according to the terms of the said charter-party and memorandum; and although a certain other large sum, to wit, 221l. 0s. 7d., was payable to the defendants, the said owners of the said ship, on her final discharge, for use of the said ship, and for freight and carriage and conveyance of the said cargo, goods, and merchandise, according to the terms of the said charter-[515]-party and memorandum, to wit, on, &c. last aforesaid; and although the two last-mentioned sums so respectively due and payable to the defendants amounted to a large sum, to wit, to an amount not less than the

(a) Plaintiffs' points:—"The plaintiffs will contend that the defendants had no lien upon the ship or cargo, and they will also rely upon all or any of the causes of demurrer stated in the body of this demurrer."

amount of the said freight, to wit, to the sum of 1570l. 0s. 1d., payable as customary as in that behalf as aforesaid; yet the said plaintiff, A. B. Belcher, did not and would not then or at any other time, and the said other plaintiffs did not and would not pay or offer to pay the said sum above in that behalf mentioned, or any other sum for freight for the said goods as customary, or any part of such freight, but to pay the same or any part thereof neglected and refused, and had always hitherto neglected and refused, to wit, on, &c. last aforesaid; and thereupon the defendants refused to suffer the delivery of the said cargo, goods, and merchandise, or to permit the master or any other person to deliver the same to the said A. B. Belcher or to the plaintiffs, and detained the same on board their said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, and kept and detained possession of their said ship so having on board the said cargo, goods, and merchandise as they lawfully might for the cause aforesaid; which were the said supposed breaches of promises in the introductory part of this plea, and in the said declaration in that behalf alleged. Verification.

Replication, that the said freight so payable according to the terms of the said bills of lading by the said A. B. Belcher, or his assigns, as in the said seventh plea mentioned, was payable to the said James M'Cormick so by the said Robert Stockdale appointed master of the said ship as aforesaid; and that at the time of the arrival of the said ship, and at the time of seizing, taking, keeping, and detaining possession thereof by the defendants as in that plea and in the declaration mentioned, and of their said refusal to suffer the delivery of [516] the said cargo, goods, and merchandise, continued to be such master, and the said last-mentioned freight was so payable to the said James M'Cormick as the master and agent of the said plaintiffs as assignees as aforesaid; the said last-mentioned freight being, by the terms of the said charter-party, payable to the affreighter of the said vessel, and the said last-mentioned freight not being payable to the defendants or to the said James M'Cormick, as their agent in that behalf; and that on the arrival of the said ship, to wit, on the said 1st of October 1840, the plaintiffs as such assignees as aforesaid discharged the said A. B. Belcher from paying to the said James M'Cormick, and the said James M'Cormick from receiving from the said A. B. Belcher, the said last-mentioned freight, and then required the said James M'Cormick to deliver the said cargo, goods, and merchandise without payment of such freight in respect thereof; and the said James M'Cormick was then ready and willing to deliver, and, but for the hindrance, prevention, and refusal of the defendants in that behalf, and their so seizing and taking and keeping possession of the said ship and cargo, goods, and merchandise as in the said declaration aforesaid, would have then delivered the said cargo to the said A. B. Belcher according to the said bills of lading, and according to the requisition of the plaintiffs, without the payment of the freight aforesaid. Of all which premises the defendants before and at the time of the committing of the said breaches of promise in the declaration mentioned, or any of them, to wit, on, &c. last aforesaid, had notice. Verification.

Rejoinder: that the said James M'Cormick, the said master, was put in by the said R. Stockdale the charterer of the said vessel as aforesaid, of his own appointment, under and in pursuance of the privilege by the said charter-party of affreightment in that behalf, reserved and allowed, in manner and form as by the said charter-[517]-party of affreightment in the declaration in that behalf was alleged, as the defendants' master of the said ship, and as their agent and servant in respect of the said ship; and the said James M'Cormick became and was the agent of the said plaintiffs as such assignees, in such manner, and to such extent as by the said charter-party of affreightment in the declaration in that behalf was alleged and not otherwise; and that the said James M'Cormick had no other possession, control, or disposal of the said cargo, goods, and merchandise than in the character of such master of the defendants' vessel so appointed as aforesaid; that although the freight for such goods and merchandise was, by the said charter-party, eventually payable to the said affreighter in manner and form as was in the said charter-party in the declaration in that behalf alleged, yet the said James M'Cormick so being such master of the defendants' ship, did, as their master of the said ship, and as their agent, by and with the knowledge and consent of the plaintiffs or (a) of their agent, lawfully authorised, sign the said

(a) Sic; but not assigned as cause of demurrer.

bills of lading in the said plea mentioned, to wit on the day and year in that behalf in the said plea mentioned, and did thereby, on the behalf of the defendants undertake and promise that the said goods, wares, and merchandise in that plea in that behalf mentioned, should be delivered to the plaintiff A. B. Belcher or his assigns, he or they paying freight for the same, as customary, to the defendants; that at the time of the said signing of the said bills of lading, and thence hitherto a large sum of money, to wit, 311l. 6s. 6d. had become and was due and owing from the said R. Stockdale to the defendants according to the terms and provisions of the said charter-party; of which the plaintiffs then had notice; that after the said signing of the said bills of lading, according to the provisions of the said charter-party, divers other large sums of money be-[518]-come due and owing to the defendants in respect of the said freight therein mentioned, before, and on, the arrival of the said ship, to wit on the day and year in the replication to the seventh plea in that behalf alleged, amounting to a large sum of money, to wit 1000l., and that at the time of the supposed breaches in the introductory part of that plea mentioned, to wit on the day and year in that behalf therein mentioned, the plaintiffs had notice, and were informed by the defendants, that the said two sums of money therein mentioned, to wit the sums of 1348l. 19s. 6d., and 221l. 0s. 7d. were, according to the terms of the said charter-party and memorandum, due and payable respectively to the defendants, and were then unpaid, as therein in that behalf mentioned; and the plaintiffs were then by the defendants requested to pay the same, and the plaintiffs were and the said Alexander Brymer Belcher was then by the defendants requested to pay to them the said freight as customary, according to the terms of the bills of lading as aforesaid; and that they the defendants did not consent or agree that the said assignees should discharge the said A. B. Belcher from paying the freight or any part thereof. Without this, that the last-mentioned freight was not payable to the defendants, in manner and form as the plaintiffs had in their said replication to the said seventh plea in that behalf alleged; concluding to the country.

Special demurrer; and joinder.

Eighthly. The defendants pleaded as to so much of the declaration as related to the supposed breaches of promise alleged by the plaintiffs in their said declaration, wherein they complained of the defendants' refusal to deliver, or to suffer or permit the master to deliver, the said cargo to the said A. B. Belcher, or to the plaintiffs and of the defendants' detaining the same on board the said ship, and refusing to suffer the plaintiffs to remove or unload the said cargo so being on board the same,—[519] that after the making of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the said ship or vessel had sailed and proceeded on her voyage, as in the declaration mentioned, and before the bankruptcy of R. Stockdale, to wit, on the 13th of May 1840, a large sum of money, to wit, 311l. 6s. 6d. became and was due and owing from the said R. Stockdale to the defendants, according to the terms and provisions of the said charter-party and memorandum; and thereupon, to wit, on, &c. last aforesaid, the defendants commenced an action against R. Stockdale to recover the last-mentioned sum; and thereupon, afterwards, and before the bankruptcy of R. Stockdale, to wit, on, &c. it was mutually agreed between R. Stockdale and the defendants, that the defendants should withdraw their said action and all proceedings at law against R. Stockdale, and that R. Stockdale should deliver to one W. G. Colchester the bill of lading for the said intended homeward cargo, and should empower the said W. G. C. to receive the amount of the proceeds thereof, for the purpose of paying the defendants in the first place any freight that might be due to them on the said charter-party for the vessel, and the balance thereof to the account of R. Stockdale with W. G. C.; and afterwards, and before the bankruptcy of R. Stockdale, to wit, on, &c. last aforesaid, in pursuance of the last-mentioned agreement, the defendants withdrew their said action and all proceedings at law against R. Stockdale, and R. Stockdale empowered, authorized, and licensed W. G. C. to receive the amount of the said proceeds, for the purpose aforesaid; that afterwards, and after the arrival of the said ship or vessel in London, on the 28th of September 1840, a large sum of money, to wit, 1348l. 19s. 6d. for freight, became and was due to the defendants on the said charter-party for the said vessel, and the said sum still remained due and unpaid to the defendants; and there-[520]-upon, to wit, on, &c., the defendants, the said owners of the said ship or vessel, as well in their right as for and on behalf and as the agents of W. G. C., and with his consent, went on board

of the said ship and took possession of the said cargo, goods, and merchandise in the declaration mentioned, being the said homeward cargo of the said ship or vessel for the purpose last aforesaid; and in such right, and as such agents as aforesaid, in pursuance of such agreement, power, and authority and licence, refused to deliver, or suffer or permit the said master to deliver, the said cargo to the said A. B. Belcher or to the said plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, so being on board of the same; as they lawfully might for the cause aforesaid; which were the said supposed breaches of promise in the introductory part of that plea, and in the declaration, in that behalf alleged. Verification.

Replication, that at the time of making the agreement in the eighth plea mentioned, the said cargo, goods, and merchandise were not, nor was any part thereof, on board the said ship or vessel, and that the said bills of lading so agreed to be delivered to W. G. C. were not, nor were nor was any such bills or bill of lading, at the time of making the said agreement, made out or in any way in existence, nor had the same at any time come into the power, possession, or control of W. G. C., or the defendants, or R. Stockdale; and the said power, authority, and licence to receive the amount of the proceeds of the said cargo, so given by the said R. Stockdale to W. G. Colchester, were so given at the time of making the said agreement, and before the shipping of the said cargo, goods, and merchandise, or the existence of any such bills of lading; that after the making of the said agreement, and before the said cargo, goods, and merchandise were so shipped on board the said ship or vessel, [521] and before any such bills of lading were in existence, and before the said licence, power, and authority had conferred, or could confer, upon the said W. G. Colchester any title to, or control over, the said cargo, goods, and merchandise, and before the arrival of the said vessel, and before the said cargo, goods, and merchandise or vessel were in any manner in the possession of the defendants or the said W. G. Colchester, and whilst the said R. Stockdale was the apparent and reputed owner of the goods and merchandise, and before the defendant had withdrawn the said action in the said eighth plea mentioned, and whilst the same was still pending, to wit, on the 13th of June 1840, the fiat in bankruptcy against R. Stockdale, and under which he was and is such bankrupt as aforesaid, and under which the plaintiffs were appointed such assignees as aforesaid, was awarded, and the said R. Stockdale was found to be, and was, such bankrupt as aforesaid, and the plaintiffs were then, in due form of law, appointed such assignees as aforesaid; whereupon and whereby the said consent, power, and authority of the said R. Stockdale so given as aforesaid to the said W. G. Colchester, and the said agreement so made as, in the said last plea, aforesaid, between the defendants and R. Stockdale, were altogether revoked, annulled, defeated, and determined; of all which premises the defendants then and before the committing of the breaches of promise in the declaration mentioned or any of them, and before any exercise of the licence, power, or authority so given to the said W. G. Colchester as aforesaid, to wit, on, &c. last aforesaid, had notice; that the said cargo, goods, and merchandise and vessel were, from the time of the same cargo, goods, and merchandise being shipped on board the said ship or vessel until the same were so seized and taken possession of by the defendants, as in the declaration mentioned, in the possession, order, custody, [522] and control of the plaintiffs as such assignees as aforesaid, and of James McCormick as the agent of the plaintiffs as such assignees as aforesaid; and that the plaintiffs had not in any way confirmed, sanctioned, or assented to the said agreement in the said last plea mentioned, or the said licence, power, or authority so given by the said R. Stockdale to the said W. G. Colchester, as in the said last plea mentioned, but had altogether rejected and repudiated the same. Verification.

Rejoinder. That before the bankruptcy of R. Stockdale, and before any revocation by him of the agreement, power, authority, and licence in the said last plea mentioned, to wit, on the 30th of May 1840, divers large quantities of goods, wares, and merchandise were, and had been theretofore, provided by certain agents of R. Stockdale, and on his account, to wit, at Sierra Leone in Africa, and placed by them in and on board the said vessel as and for a part of the said homeward cargo of the said vessel, on account of the said R. Stockdale; which last-mentioned goods, wares, and merchandise were afterwards, and before the bankruptcy of the said R. Stockdale, to wit, on the 1st of June 1840, brought in the said vessel from Sierra Leone to the river Gambia in Africa, and then and there unloaded and discharged

from the said vessel, for the purpose of enabling the said vessel to proceed to take in divers quantities of timber, and for the purpose of more conveniently loading the whole of the homeward cargo in and on board the said ship; and the said last-mentioned goods, wares, and merchandise were landed on shore, to wit, on, &c. last aforesaid, and before the bankruptcy of R. Stockdale, and there remained, to wit, until the shipment thereof as hereinafter mentioned, destined, prepared, and ready for shipment in and on board the said vessel, as and for a part of the said homeward [523] cargo of the said vessel, on account of the said R. Stockdale; that afterwards, and before the bankruptcy of R. Stockdale, to wit, on the 4th of June 1840, divers other large quantities of goods, wares, and merchandise were, and had been theretofore, provided and prepared by certain agents of R. Stockdale, to wit, at the river Gambia in Africa, and were then by them prepared and destined and ready for shipment for or on account of R. Stockdale, and as and for a further portion of the said homeward cargo of the said ship or vessel; that afterwards, to wit, on, &c. last aforesaid, the said goods, wares, and merchandise in this rejoinder to the replication to the last plea first and lastly above mentioned, were shipped on board the said ship or vessel, as and for the said homeward cargo thereof; and thereupon afterwards, to wit, on the day and year, and for the purposes and causes, and in the right and by the power, authority, licence, and consent, in the said last plea in that behalf mentioned, the defendants went on board and took possession of the said goods, wares, and merchandise therein lastly referred to, to wit, of the said homeward cargo of the said ship or vessel, and refused to deliver or to suffer or permit the said master to deliver the said cargo to the said A. B. Belcher, or to the plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo so being on board of the same; as they lawfully might for the cause aforesaid; and that these were the supposed breaches of promise in the introductory part of the said last plea mentioned. Verification, and prayer of judgment, if, &c.

Special demurrer; and joinder (a).

[524] Channell Serjt., in support of the demurrers to the pleas. The first question is, whether the sixth plea in which the defendants set up a lien on the cargo for freight, can be sustained: and that will depend on the construction to be put upon the charter-party. It is submitted that, by the charter-party, there was an absolute letting or hiring of the ship to the charterer, and consequently that the claim of lien cannot be supported. By the memorandum the defendants "agreed to let" and the charterer "agreed to hire" the vessel for six calendar months, upon the terms and conditions "that during the said term of that agreement as thereafter provided, the said affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions." It is clear from these words that the intention of the parties was, to constitute the charterer the owner of the ship for the specified period. In *Hutton v. Bragg* (7 Taunt. 14, 2 Marsh. 339), which is still considered as one of the leading cases on this subject, it was held that the owner of a vessel has no lien for the hire stipulated by the charter-party for the voyage on the goods shipped by the charterer; because the [525] latter is the owner of the ship for the voyage, and the first owner has no possession of the ship or goods, without which there can be no lien. The case of *Newberry v. Colvin* (7 Bingh. 190, 4 M. & P. 876)

(a) Plaintiffs' points.

The plaintiffs will contend that the cargo, being in the reputed ownership of the bankrupt at the time of his bankruptcy, and subsequently, until the seizure by the defendants, in the possession and custody of the plaintiffs as assignees, and never having been in the custody of Colchester or the defendants, and the defendants not having abandoned their action, according to the terms of the agreement, such agreement not having been at all carried into effect at the time of the bankruptcy, and no bills of lading being then in existence (all which things are admitted by the rejoinder to the replication to the last plea), the agreement, even if otherwise binding, became of no effect, and any authority conferred by it would be revoked; and this, notwithstanding certain goods might have been prepared and destined for the cargo before the bankruptcy; and the plaintiffs will also insist and rely upon all or any of the causes of demurrer stated in the body of this demurrer.

is also a strong authority against the defendants. There the owners, among other things, covenanted that the ship should be taken into the service of one B. for a certain time, and B. covenanted to receive the vessel into his service during that time, and to pay for the use and hire of the said ship certain freight; and it was held (b), overruling the judgment of the court of King's Bench, that these stipulations were equivalent to an actual demise of the ship, and that the effect of the charter-party was to make the freighter the legal owner of the ship pro tempore. Here, the charter-party, in addition to other expressions which of themselves are equivalent to a demise of the ship, contains actual words of demise. *The Master, &c. of the Trinity House v. Clark* (4 M. & S. 288) is to the same effect. There, the defendant chartered his ship to the commissioners of the transport service on behalf of the Crown, to be employed as a transport, and the ship, in the course of such employment, made several voyages from Deptford to foreign ports and back; and it was held that, by the terms of the charter-party, coupled with the nature of the service, a temporary ownership passed to the Crown; so that the defendant, during the time of such service, was not to be considered as owner, within the charters granted to the Trinity House, which impose lighthouse duties, and for buoyage and beaconage on the masters and owners of ships. Lord Ellenborough, in the course of his judgment, observed: "The charter-party 'grants' the ship," "and 'lets it to hire and freight,' which [526] are proper words of lease, and would of themselves pass the possession." In *Saville v. Campion* (2 B. & Ald. 503), which will probably be cited on the other side, the charter-party contained no express words of demise; and there was, as observed in the judgment, nothing to shew that the delivery of the goods was to precede the payment of the stipulated hire in cash and bills. In *Tate v. Meek* (8 Taunt. 280, 2 B. Moore, 278) and *Yates v. Railston* (ibid. 293, ibid. 294) it is clear there was no demise of the ship, and that the delivery of the cargo and the payment of the freight were to be concomitant acts. Undoubtedly, in *Christie v. Lewis* (2 Brod. & B. 410, 5 B. Moore, 211), although the charter-party contained words of demise, a majority of the judges held that, taking the whole of the charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; but Dallas C. J. dissented, and thought the case governed by *Hutton v. Bragg*. The utmost extent to which *Christie v. Lewis* can be pushed is, that actual words of demise may be controlled by other stipulations in the charter-party, which are inconsistent with an intention to give the charterer possession of the vessel. But here there is nothing to limit or control the words of demise, for every portion of the charter-party is consistent with the charterer having the absolute possession of the ship. In *Campion v. Colvin* (3 New Cases, 17, 3 Scott, 338) the question arose upon the same charter-party as that in *Saville v. Campion*. It is submitted that under this charter-party the plaintiffs had a right to the possession of the ship until her cargo was finally discharged, and the plea discloses no answer to the declaration as to the charge of excluding the plaintiffs from the vessel, and refusing to permit them to remove or unload the cargo.

[527] With respect to the seventh plea, the validity of that plea depends on the same question as that of the sixth; for the defendants cannot justify the detention of the cargo if they had no lien. The freight for the homeward cargo was payable to the charterer; the captain who was appointed by the charterer as his agent, having signed bills of lading making the goods deliverable to Belcher. As regards the rejoinder to the replication to the seventh plea, it is clearly bad; for all that it traverses is, an inference of law.

The eighth plea sets up an agreement by which Stockdale, before his bankruptcy, agreed with the defendants to deliver to Colchester the bills of lading for the homeward cargo, and to empower Colchester to receive the proceeds, to be applied as in the plea mentioned, and justifies the taking possession of the cargo under such agreement. To this plea the plaintiffs have replied, that at the time of the agreement no part of the cargo was on board the vessel, nor any of the bills of lading in existence, and that before the shipping of the cargo or the existence of the bills of lading, and before Colchester had any control over the cargo, and while Stockdale was the apparent and reputed owner thereof, Stockdale became bankrupt, and the plaintiffs were appointed assignees, whereby the authority given to Colchester and the agree-

(b) 8 B. & C. 166, 2 Man. & R. 47. The judgment of the court of error was confirmed by the House of Lords, 6 Bligh, 189, 2 Dow, 415.

ment with the defendants became revoked, &c. The rejoinder states that before the bankruptcy, and before any revocation of the agreement or authority, certain goods were shipped at Sierra Leone by Stockdale's agents, as part of the homeward cargo, which goods were carried to the river Gambia, where, for the more convenient loading of the whole cargo they were landed; and that other goods provided by Stockdale's agents at the river Gambia were, before his bankruptcy, ready for shipment, as a further portion of the homeward cargo; and that afterwards both sets of goods [528] were shipped on board the vessel as the homeward cargo thereof. It is clear that the rejoinder affords no answer to the replication; for it appears on the face of the pleadings that Colchester never was in the possession of the cargo under the agreement, or of the bills of lading, previously to the bankruptcy, and consequently that there is no assignment of the goods, at law or in equity, so as to prevent them, on Stockdale's bankruptcy, vesting in the plaintiffs as his assignees.

Bompas Serjt. (with whom was Greenwood), contra. The tendency of the later decisions has been to increase the power of the ship-owner to hold the cargo until the freight has been paid. *Hutton v. Bragg* has been repeatedly overruled, and can no longer be considered as law. *The Master, &c. of the Trinity House v. Clark* was decided on the specific ground that the government had a complete control over the vessel, rather than on the terms of the charter-party. No case has been cited at all analogous to the present, where the point determined was the broad question of lien. There are many cases where, although the charter party contained words of demise, the ship-owner has been held to have a lien. In *Paul v. Birch* (2 Atkyns, 621), it is said by Lord Hardwicke, "As to the general law, the cargo is no doubt liable to pay the freight, or the expense of carrying the goods." In *Mitchell v. Scaife* (4 Campb. 298) the vessel was let for a voyage from Liverpool to Jamaica and back, and the balance of the freight was to be paid on the delivery of the homeward cargo at Liverpool, by bills, in like manner as here the balance of the freight is to be paid in cash on the vessel's final discharge. In that case the captain had signed bills of lading for the cargo, (which was the property of, and consigned to, a third [529] party), specifying a rate of freight amounting to a less sum than that mentioned in the charter-party. It was held that the owner had a lien on the cargo for the freight specified in the bills of lading, but not beyond. In *Birley v. Gladstone* (a), where the vessel was let to freight, the owner's claim to freight on the goods actually brought home, was not disputed. In *Tate v. Meek*, the owner of the vessel covenanted to deliver the cargo at the place of destination, agreeably to bills of lading that should be signed for the same, and the freighters covenanted to pay for the freight and hire of the vessel for the voyage at certain rates per ton, &c.; the said freight to be paid part in cash on the day the vessel should be reported inwards, and the remainder, by bills at two months after date from the day on which the delivery should be complete. The master having signed bills of lading for the delivery of the freighters' goods to order or assigns, they paying freight as per charter-party; it was held that the owner was justified in detaining the goods until payment of the freight stipulated by the charter-party. Gibbs C. J. in delivering judgment says, "The question is, whether the delivery of the goods and the payment by a bill be not concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act. We think they are such." In *Tate v. Meek* undoubtedly there were no words of demise; but such words did occur in *Yates v. Railston* (8 Taunt. 293, 2 B. Moore, 294), and *Yates v. Meynell* (8 Taunt. 392, 2 B. Moore, 297); notwithstanding which the shipowners were held not to be bound to part with the goods until they received [530] the freight. *Saville v. Champion* is in many respects analogous to the present case, and is a strong authority for the defendants. *Faith v. The East India Company* (4 B. & Ald. 630) is also an important case to shew the lien of the ship-owner on the cargo for freight, although such freight is expressed to be payable for the use or hire of the ship. In *Christie v. Lewis*, Parke J. says, "The question in all these cases generally has been a question of construction, or rather a question of fact arising out of the construction, whether there has been an entire letting or parting with the possession of the ship for given purposes, so that during that time the owner has no efficient control, but the charterer has the full disposition of the ship, or, in other words, to use the language of Gibbs C. J. in *Tate v. Meek*, whether the delivery of the cargo and the payment of freight are to be

(a) 3 M. & S. 205. See also *Gladstone v. Bailey*, 2 Meriv. 401

considered as concomitant acts. When the fact is ascertained, the legal result is clear." [Maule J. Here, the bills of lading make the freight on the homeward cargo payable to the charterer.] It is usual where the freight to be paid under the bills of lading is more or less than that stipulated in the charter-party, to make it payable to the charterer. The payment of the freight and the delivery of the cargo clearly are concurrent acts, and the shipowner is not bound to deliver the goods without receiving the freight. In *Small v. Moates* (9 Bingh. 574, 2 Moo. & Sc. 674) there was an express contract for a lien, and Tindal C. J. in delivering the judgment of the court says, "An express contract is the strongest and surest ground upon which the right of lien can in any case be placed; and in this charter-party the charterer has, in effect, covenanted with the shipowner, that whatever may be the legal operation of the charter-party as between themselves, the charterer's possession [531] of the ship shall be the possession of the owner so far as the right of the latter to a lien on the cargo is in any way concerned." That case shews, that although by the terms of the charter-party, the possession of the ship be given to the charterer, the owner's right of lien shall still be preserved if such appear to be the intention. Whenever freight is to be paid on the delivery of goods, a lien is created; for, as observed by Parke J. in *Christie v. Lewis*, when it is ascertained that the delivery of the cargo and the payment of freight are to be considered as concomitant acts, the legal result is clear. [Maule J. Supposing in this case the voyage had terminated within the six months?] *Campion v. Colvin* (3 New Cases, 17, 3 Scott, 338), in which, as already stated, the question arose on the same charter-party as that which was before the court in *Saville v. Campion*, is also confirmatory of the lien of the defendants. By this charter-party, the defendants do not part with the possession of the ship; for the cabin, deck, and other portions of the vessel still remain under their control; and if the owners are in possession of any part of the ship they are in possession of the whole; as where the owner of a house sublets a part, the whole is in law considered to be in his possession. The defendants also undertake to keep the vessel in repair, and in case of accident the monthly payments are to be suspended. Although the charterer was to have the privilege of putting in a master of his own; that is a usual stipulation, particularly in East India voyages. The charterer also agrees to be responsible to the owners for the master's conduct "whilst he should have the navigation of their vessel." Looking at the whole of the charter-party, it is clear, that the defendants never intended to part with the possession of the ship.

Supposing, however, that, in strictness, the defendants had not a lien on the homeward cargo, yet [532] where there are concurrent acts to be performed by the parties, the party seeking to enforce performance by the other side, should in his declaration aver performance of the concurrent acts to be done on his part. In *Spiller v. Wedlake* (2 B. & Ad. 155), it is said by Lord Tenterden, "Where by one and the same instrument a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts; and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute, a conveyance." So, in *Morton v. Lamb* (7 T. R. 125), Lord Kenyon says, "Where two concurrent acts are to be done, the party who sues the other for non-performance, must aver that he had performed, or was ready to perform, his part of the contract." *Jones v. Barkley* (2 Dougl. 684), *Phillips v. Fielding* (2 H. Bla. 123), and *Rawson v. Johnson* (1 East, 203) are to the like effect. [Maule J. The declaration here contains a general averment of performance. Channell Serjt. referred to *Farley v. Manton* (9 Bingh. 363, 2 Moo. & Sc. 484), and *Kemble v. Mills* (ante, vol. i. 757, 2 Scott, N. R. 121), to shew that such an averment is sufficient on general demurrer.] Even if the defendants had not, strictly speaking, a lien, the sixth plea is good. [Tindal C. J. You may set out in your plea a good substantial answer—a right to keep the goods—without in terms alleging that they are kept for a lien.] If the defendants shew upon the declaration and the plea, that the delivery of the goods and the payment of freight are to be concurrent acts, that is sufficient. The real object of the declaration is, to [533] recover damages for not delivering the cargo, and it treats the refusal to deliver the cargo as an exclusion of the plaintiffs from the vessel. There is, however, no foundation for the charge, if the owners never parted with the possession of the vessel.

The lien claimed in the seventh plea, is upon the homeward cargo under the bills of lading. With respect to the rejoinder to the replication to that plea, the only

point in which the defendants could take issue was, whether the freight was payable to them. If that issue had been taken simply, all the necessary facts would not have been on the record. The defendants therefore set out a number of facts to shew that the freight was payable to them, and then take issue on the allegation that it was not so payable; consequently, the rejoinder amounts to an argumentative denial with a special traverse of such allegation. It is said that the traverse is a mere legal inference, but if so the replication is bad as not being in confession and avoidance.

The eighth plea involves a question of considerable importance. The effect of the contract thereby disclosed is, to modify the charter-party, and, at all events, to make the homeward cargo liable for the freight. The contract set up is one which is by no means unusual, namely, to bind the cargo to pay the freight. As Stockdale could not pay the freight then due, he agreed to make the cargo liable. The answer attempted, is that Stockdale became bankrupt before the goods were put on board. But it is clear that the agreement amounted, in effect, to an equitable assignment of the goods (see *Bruce v. Wait*, 3 M. & W. 15). The plaintiffs contend that the goods were not bound by the agreement, as they were not specifically set out. The rejoinder, however, shews that although not on board, they were specifically appropriated for the cargo. In *Brown v. Heathcote* (1 Atkyns, 160), one R. W. and his partner gave [534] a bond to H. for 1200l. and the same day assigned by deed to H., or order, the goods in two ships then at sea; and also thirteen bills of lading and policies of insurance containing the said goods as a collateral security. The latter were indorsed to H., the former, not. Upon a bill brought by the assignee of R. W., who had become bankrupt, for these goods, insisting that R. W. acted as the visible owner, the ship and cargo not being put into the possession of H.; the court was of opinion that every thing which could shew a right to the ship and cargo being delivered over to H., R. W. could no longer be said to have the order and disposition of them within the meaning of the 21 Jac. 1, c. 19, s. 11, and consequently that H. had a right to retain the ship and cargo till the principal sum and interest were paid. So in *Lempriere v. Pasley* (3 T. R. 485), an assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading were held good, as against the assignees of the assignor, who had committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. The principle of these cases was recognised in *Burn v. Carvalho* (1 A. & E. 883, 4 N. & M. 889). *Hutchinson v. Heyworth* (9 A. & E. 375, 1 P. & D. 266) is also a strong authority upon this point.

Channell Serjt., in reply. It is contended that the court should treat the delivery of the cargo and the payment of the freight as concurrent acts; but the balance of the freight is to be paid on the discharge of the vessel, and not on the discharge of the cargo. If, as put by Mr. Justice Maule, the voyage had terminated within the six months, it is clear that the charterer could not have discharged the vessel, but must have paid a monthly com-[535]-pensation for the remainder of the time; and, although the vessel had earned no freight, he must still have paid. This case, therefore, differs from *Crozier v. Smith* (ante, vol. i. 407). The circumstance relied on—that the owners were to repair the vessel, amounts to nothing; such a clause is to be found in every charter-party. The owner of a house does not the less demise a house, because he covenants to repair it.

Supposing the defendants had no lien on the cargo, it is clear that it never came into their possession until they improperly seized the vessel after her return to England, and that they never had possession of the bills of lading. Moreover, it no where appears that the goods were appropriated so that the bills of lading could operate upon them. In *Brown v. Heathcote* and *Lempriere v. Pasley*, the goods were actually assigned; but here every thing rested in contract, the defendants never having possession of any document as a symbol of title; and there is nothing to shew that the bankrupt ever lost his control over the goods.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This case came on upon demurrers by the plaintiffs to the sixth plea, and to the rejoinders to the replications to the seventh and eighth pleas.

The action was brought by the plaintiffs, as assignees of the estate and effects of Robert Stockdale, a bankrupt, for the breach of a charter party of affreightment, made, before the bankruptcy of Robert Stockdale, between the defendants as owners, and

Robert Stockdale as charterer, of the ship "Maas." By the charter party, as set out in the declaration, the defendants agreed to let, and Robert Stockdale agreed to hire, the ship "Maas" for and during [536] the term of six calendar months, such term to commence fourteen days after the vessel should be ready to enter at the Customhouse, upon the terms and conditions, that during the term of that agreement, or as therein-after provided, the affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; that the master should, from time to time, and as often as the interest of the affreighter should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed there-with upon such lawful voyage or voyages as he the said affreighter or his agents should direct him to do; and that he should deliver the said goods and merchandise agree-ably to the bills of lading; that the freight and primage for such goods should be payable to the affreighter or his order; that in the event of the completion of the six months, whilst the vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain, at which place the final completion of that agreement was to take place, unless otherwise mutually agreed between the owners and the affreighter; the owners or master to keep the vessel tight and manned, provisioned and fitted with necessary stores; in consideration of which the affreighter agreed to pay to the owners at the rate of 22s. per ton per calendar month, for so long as she should be employed by him as aforesaid under that agreement; such consideration to be paid by one month's pay in advance in cash, one month after the [537] vessel should be entered outwards, one month's pay that day two months, and one month's pay at the expiration of each succeeding month till the end of the term she might be employed,—thus leaving one month's pay in abeyance,—and the balance, in cash, on her final discharge, together with all port-charges and pilotage, except in Great Britain; the master to be supplied with such cash as he might require for ship's disbursements at any of his loading or discharging ports, by the charterer's agent, free of commission, taking the master's draft upon his owners for the same; which amount was to be paid by the owners or deducted from the balance of freight due to the vessel. The declaration then states certain clauses for the suspension of the monthly payments, during interruptions of the voyage, for repairs, and for the ceasing of all payments in case the vessel should be lost, and other terms not material to the present inquiry; and then proceeds to set out a provision that the charterer was to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, the owners allowing whatever rate of wages they paid their own masters; and that, as the master was to be appointed by the charterer to superintend his interests, the owners were not to be responsible for such master's acts and conduct should he deviate from the charter-party; but the charterer held himself responsible to the owners for the said master's honest and correct conduct, and strict integrity whilst he should have the navigation of their vessel. The declaration then proceeds to allege mutual promises in the usual general form, and a promise by the defendants to suffer and permit the master to perform all things by him to be performed as master in pursuance of the charter-party, and to suffer and permit the delivery of the cargo according to the terms of the charter-party, and to suffer and permit the [538] charterer to use the ship according to the terms of the charter-party during its continuance, and during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions. The declaration then proceeds to aver that Stockdale had, before his bankruptcy, put in the ship a master of his own appointment; and that the ship proceeded on her voyage under his command; and that the master had, at certain places named, taken on board goods and merchandize according to the terms of the charter-party, and after the bankruptcy of the charterer proceeded therewith on the homeward voyage of the vessel, according to the orders and directions of the plaintiffs, assignees of the charterer; and that the vessel so loaded arrived at London at the West India

Docks, the six months' term mentioned in the charter-party having expired after the commencement of the loading of the vessel, and the terms of the agreement having been thereby prolonged until after the discharge of her cargo at a port in Great Britain. The declaration then proceeds to allege performance by the bankrupt, and by the plaintiffs as assignees, and alleges as a breach of the defendants' promise, that they did not suffer or permit the delivery of the goods and merchandize shipped on board the vessel in pursuance of the charter-party; but, on the contrary thereof, although the goods were by the bills of lading thereof, made deliverable to the plaintiff Alexander Brymer Belcher, who, on the arrival of the vessel, was, and thence hitherto hath been, ready to receive the same; and, although the plaintiffs, as such assignees, were then ready and willing to unload the same at the West India Docks, and to take the same from alongside at their expense, and to deliver the [539] same to the said A. B. Belcher, according to the bills of lading; yet the defendants refused to deliver, or to suffer or permit the master or any other person to deliver the cargo to the said A. B. Belcher, agreeably to the bills of lading, or to the plaintiffs, and have prevented their delivery, and detained them on board the vessel contrary to the meaning of the charter-party. The declaration then assigns as a second breach that the defendants would not suffer and permit the plaintiffs, as assignees, to use or enjoy the vessel according to the terms of the charter-party during its continuance, or during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception stated in the charter-party, but that, after the bankruptcy of Stockdale, and after the ship's arrival in London, and before the discharge of the cargo, and during the continuance of the charter-party, they deprived the plaintiffs of the use and enjoyment of the ship and every part thereof, and the defendants themselves seized and took possession of the whole of the said ship, and excluded the plaintiffs therefrom, alleging, as special damage, the deterioration of the goods, and the loss of profits by the sale.

The defendants, by their sixth plea, allege that after the making the charter-party, and during the subsistence of its provisions, and after the bankruptcy of Stockdale, and after the arrival of the ship at London, and before her final discharge, a large sum of money was due to the defendants as owners of the ship, for the use of the ship, according to the terms of the charter-party, and for the freight and carriage and conveyance of the cargo and goods in the declaration mentioned, according to the terms and provisions of the charter-party; and a certain other sum of money was payable to the defendants on the final discharge of the ship, for the use of the said ship, and for freight and carriage of the [540] cargo; yet that the plaintiffs and R. Stockdale would not pay the amount, or any part thereof, and the same remains unpaid; and the plea then proceeds to justify the refusal to deliver the cargo, and the detention of the same on board the ship, and their refusal to permit the plaintiffs to remove the same, and the keeping possession of the whole ship so having such cargo on board as and for a lien for the moneys so respectively due and payable according to the terms and provisions of the charter-party.

To this plea the plaintiffs have demurred, and have assigned several causes of special demurrer, to which, as will afterwards appear, it is unnecessary to advert.

Upon this demurrer two questions were argued before us—first, whether, by the terms of the charter-party, the defendants had any lien upon the cargo in respect of the freight or debt due under the charter-party for the hire of the ship—secondly, whether the existence of any such lien would justify the defendants excluding the plaintiffs from the ship before her final discharge.

It must be admitted that there is some contradiction in the authorities bearing upon the first point, viz. the right of lien in the owners of the ship, and that, in the later cases, the terms of actual demise have not been considered as affording so decisive a criterion of the intention of the contracting parties as was supposed to belong to them in the case of *Hutton v. Bragg* (7 Taunt. 14, 2 Marsh. 339). But when the several cases are closely examined, it will be found that the apparent conflict of authorities in this instance, as in all other questions arising upon the construction of written instruments, arises more from the variety of terms employed by the parties themselves in framing their contracts than from difference of opinion in the judges who interpret them; for in each of the cases in [541] which the owner's lien has been supported notwithstanding the terms of express demise, other stipulations will be found, sufficient to rebut the inference that the owners meant to part with the

possession of the ship. Thus, in *Mitchell v. Scaife* (4 Campb. 298), *Birley v. Gladstone* (3 M. & Sel. 205), *Yates v. Railston* (8 Taunt. 293, 2 B. Moore, 294), and *Christie v. Lewis* (2 Brod. & B. 410, 5 B. Moore, 211) there were terms that shewed that the payment of the hire was to be either precedent to, or concomitant with, the delivery of the goods; whereas, in *Small v. Moates* (9 Bingh. 574, 2 M. & Scott, 674), the lien of the owner was expressly reserved by the charter-party. In each case the whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other; and thus it often happens that the same expression will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found. In construing this charter-party, therefore, we have not relied implicitly upon the interpretation put by judges in other cases on any particular expression also found in this contract; but we have collected the intention of the contracting parties from the whole scope of the instrument, having reference nevertheless to the several authorities cited at the bar, as guides to our decision; and we are satisfied that, in this particular case, according to the terms of this particular charter-party, the possession of the vessel was given up by the owners to the charterer during the continuance of the contract; that the master was in possession of the cargo as agent for the charterer, and not as the servant of the owners; that personal credit was given to the charterer for the payment of the hire of the vessel; and that no lien, or right of stoppage of the goods, was intended to [542] be reserved to the owners as a security for the payment of the contract price. And we come to this conclusion because we find words of demise large enough to transfer the possession, if such words were necessary. We find also the owners giving to the charterer the power of appointing his own master, and requiring him to be responsible for the conduct of the master so appointed, as he would be for the conduct of his own servant; and we find that, in fact, the master was so appointed by the charterer. We find, further, that the freight for the goods was to be paid according to the bills of lading to the master thus appointed by the charterer, for the charterer's use, without any stipulation for its application towards the payment of the agreed price for the hire of the vessel. And we further find that, according to the terms of the contract, the parties contemplated that every part of the cargo would be delivered before the balance reserved would become payable; and on the other hand, we find nothing in the contract that indicates any intention to make the delivery of the cargo to depend upon the precedent or concomitant payment of any portion of the stipulated price.

We are therefore of opinion that neither the declaration alone, nor the declaration and sixth plea taken together, disclose any facts that would give the defendants the lien which they claim; and the plaintiffs therefore will have judgment on the demurrer to the sixth plea. On this ground it becomes unnecessary for us to say any thing upon the minor point—of the exclusion of the plaintiffs from the whole of the vessel,—or upon any of the special grounds of demurrer.

The seventh plea is pleaded in effect to so much of the declaration as relates to the alleged breach in not suffering and permitting the delivery of the cargo, and in detaining the same on board the ship, and taking and detaining possession of the whole of the ship with the [543] cargo on board, and excluding the plaintiffs therefrom, and in justification in substance alleges, that although the cargo and goods were, by the bills of lading, made deliverable to A. B. Belcher or his assigns, he or they paying customary freight for the same, and although the freight amounted to a large sum, and although there was then due to the defendants, as owners of the ship, for the use of the said ship for freight and carriage, a large sum according to the terms of the charter-party, and although a further sum of money was payable to the defendants, as owners of the said ship, on her final discharge for the use of the said ship, and for freight and carriage and conveyance of the said cargo and goods, yet the said A. B. Belcher refused to pay the said sums of money, or any other sum, for freight for the said goods; whereupon the defendants refused to suffer the delivery of the said goods to A. B. Belcher or to the plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, and kept and detained the possession of their said ship, so having on board the said cargo; as they lawfully might, for the cause aforesaid.

To this plea the plaintiffs replied, that the freight so payable, according to the terms of the bill of lading by the said A. B. Belcher or his assigns, was payable to James M'Cormick as the master and agent of the plaintiffs as assignees of Stockdale,

the freight being by the terms of the charter-party payable to the affreighter of the said vessel, and the said freight not being payable to the defendants or to James M'Cormick as their agent in that behalf; that on the arrival of the ship the plaintiffs as assignees discharged the said A. B. Belcher from paying to M'Cormick, and M'Cormick from receiving the freight, and required M'Cormick to deliver the cargo without payment of such freight; and that the said James [544] M'Cormick was then ready and willing to deliver, and but for the hindrance of the defendants, and their so seizing and taking and keeping possession of the ship and cargo, would have delivered, the cargo to the said A. B. Belcher, without the payment of the freight.

To this replication the defendants rejoin, that James M'Cormick was put in by Robert Stockdale the charterer of the vessel of his own appointment, under and in pursuance of the privilege reserved by the charter-party, as the defendants' master of the said ship, and as their agent and servant in respect of the said ship; and that the said James M'Cormick became and was the agent of the plaintiffs as such assignees, in such manner, and to such extent as by the charter-party is alleged and not otherwise, and that the said James M'Cormick had no other possession, or control, or disposal of the said cargo than in the character of master of the defendants' vessel, so appointed as aforesaid; and the defendants further say, that although the freight was eventually payable to the affreighter, yet James M'Cormick as the defendants' master of the ship, and as their agent with the knowledge and consent of the plaintiffs signed the bills of lading mentioned in the seventh plea, and thereby, on behalf of the defendants, undertook and promised that the goods and merchandise in that plea mentioned should be delivered to the said A. B. Belcher or his assigns, he or they paying freight for the same as customary, to the defendants, and that at the time of the signing of the bills of lading, and thence hitherto a large sum was due and owing from Robert Stockdale to the defendants according to the terms of the charter-party; and that after the signing of the bills of lading according to the provisions of the charter-party, other large sums of money became due to the defendants in respect of the freight, before and on the arrival of the ship; and that the plaintiffs had notice that the two sums men-[545]-tioned in the seventh plea, were, according to the terms of the charter-party, due and payable to the defendants, and were then unpaid, and were requested to pay the same; and that the plaintiffs and also A. B. Belcher were requested by the defendants to pay to them the freight as customary, according to the terms of the bills of lading, and that the defendants did not consent that the assignees should discharge A. B. Belcher from paying the freight; without this, that the said last-mentioned freight was not payable to the defendants.

To this rejoinder the plaintiffs have demurred, assigning several special grounds of demurrer. But as it is obvious from the pleadings, that the main question raised upon this demurrer has already been disposed of by our judgment on the demurrer to the sixth plea, and as we have already held that the master must be considered as having signed the bills of lading as agent for the charterer, and to be entitled as such agent, and not as the servant to the owners, to demand the freight upon those bills from consignees, and that the defendants had no lien upon the goods for the stipulated price for the hire of the ship, it will be unnecessary to say any thing more upon this part of the case, than that the judgment upon this demurrer must also be entered for the plaintiffs.

The eighth and last plea is pleaded to so much of the declaration as relates to the alleged breach in refusing to deliver, or to suffer and permit the master to deliver, the cargo to A. B. Belcher or to the plaintiffs, and in retaining the cargo on board the ship and refusing to suffer the plaintiffs to remove or unload the said cargo. The defendants by this plea allege that before the bankruptcy of R. Stockdale, a large sum of money became due from him to the defendants according to the terms of the charter-party, to recover which the defendants commenced an action against R. Stockdale, and that before his bankruptcy it was agreed between R. Stock-[546]-dale and the defendants, that the defendants should withdraw their action, and all proceedings at law against R. Stockdale, and that he should deliver to W. G. Colchester the bills of lading for the then homeward cargo, and should empower W. G. Colchester to receive the amount of the proceeds thereof, for the purpose of paying in the first place to the defendants any freight that might be due to them on the charter-party, and the balance to the account of R. Stockdale with W. G. Colchester; that in pursuance of the agreement the defendants withdrew their action and all proceedings at law

against R. Stockdale, and that he empowered to W. G. Colchester accordingly; that after the arrival of the vessel a large sum of money was due to the defendants on the charterparty for the freight: whereupon the defendants, owners of the ship as well in their own right, and also as agents of W. G. Colchester, and with his consent, went on board of the ship and took possession of the homeward cargo for the purposes last aforesaid, and in such right and as such agents, and in pursuance of such agreement and authority, refused to deliver, or to suffer or permit the master to deliver, the cargo to A. B. Belcher or to the plaintiffs, and detained the same on board the ship, and refused to suffer the plaintiffs to remove or unload the same; as they lawfully might, &c.

To this plea the plaintiffs replied, that at the time of the making of the agreement therein mentioned, no part of the cargo was on board the vessel, nor any of the bills of lading in existence, nor had they at any time come into the possession of W. G. Colchester or of the defendants, or of R. Stockdale; and that the authority to receive the amount of the proceeds of the cargo was given by R. Stockdale to W. G. Colchester before the shipping of the cargo, or the existence of the bills of lading; and that also before the shipping of the cargo, or the existence of the bills of lading, and before W. G. Colchester [547] had any control over the cargo, and while R. Stockdale was the apparent and reputed owner thereof, and whilst the defendants' action against him was still pending, R. Stockdale became bankrupt, and the plaintiffs were appointed his assignees, whereby the authority given to W. G. Colchester by R. Stockdale, and the agreement made with the defendants became revoked of which the defendants had notice before any exercise of the authority given to W. G. Colchester. The plaintiffs in their replication further allege that the cargo was from the time of the shipping thereof till the seizure thereof by the defendants in the possession and control of the plaintiffs as assignees, and of James McCormick as their agent, and that the plaintiffs had not in any way confirmed or assented to the agreement in the last plea mentioned, or to the power or authority given by R. Stockdale to W. G. Colchester, but had altogether rejected the same.

To this replication the defendants have rejoined, that before R. Stockdale's bankruptcy, and before any revocation by him of the agreement, or of the authority given by him, certain goods had been provided and shipped at Sierra Leone by R. Stockdale's agents, as part of the ship's homeward cargo, and on his account; and that these goods were afterwards carried in the ship to the river Gambia, where for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before R. Stockdale's bankruptcy, and there remained ready for shipment. The defendants further allege, that other goods provided by R. Stockdale's agents at the river Gambia were also before his bankruptcy ready for shipment on his account as a further portion of the homeward cargo; and that afterwards both sets of goods were shipped on board the vessel as the homeward cargo thereof; and thereupon the defendants, for the purposes, and by the authority in the last plea mentioned, went on board and took possession of the homeward cargo of the ship, and refused to deliver or to permit and suffer the master to deliver the cargo to A. B. Belcher, or to the plaintiffs, and detained the same on board the ship, and refused to suffer the plaintiffs to remove or unload the same, as they lawfully might, &c.

To this rejoinder the plaintiffs have demurred specially; but, in the view we take of the case, it becomes unnecessary to consider the special causes of demurrer assigned.

In considering the questions raised upon these pleadings, it must be remembered that the plaintiffs, as assignees, take the property of Stockdale, subject to all the incumbrances, equitable as well as legal, to which it would have been subject in the hands of Stockdale himself if he had continued solvent, except in those cases specially provided for by the bankrupt act. Two questions, therefore, will arise upon this demurrer: first, whether any lien, legal or equitable, vested in Colchester before the bankruptcy of Stockdale; and, secondly, whether such lien, if it existed, has been affected by the bankruptcy of Stockdale. It was not contended at the bar that there had been any legal assignment of the goods to Colchester, but it was argued that the agreement stated in the eighth plea amounted to an equitable assignment to him, and that he had an equitable lien on the goods, to the extent of the freight due to the defendant on the charterparty; and the cases of *Brown v. Heathcote* (1 Atk. 160), *Lempriere v. Pasley* (2 T. R. 485), *Burn v. Carvalho* (1 Ad. & E. 883, 4 N. & M. 889), and *Hutchinson v. Heyworth* (9 Ad. & E. 375, 1 P. & D. 266), were cited as authorities

for this point. According to these authorities, there can be no doubt that, if the goods had been on board the vessel, and the bills of lading [549] had been handed over to Colchester before the bankruptcy, though not indorsed to him till afterwards, he would have acquired a good equitable lien, not only as against Stockdale, but as against the assignees. And, according to the opinion of Lord Hardwicke in *Brown v. Heathcote*, he would have acquired such lien as against Stockdale by virtue of the agreement alone, without the delivery of any bill of lading. The cases of *Lempriere v. Pasley*, and *Falkener v. Case*, as cited by Mr. Justice Ashhurst in the former case, were decided against the assignees, on the ground that the bankrupt had done all that was in his power to complete the equitable assignment, and to deprive himself of the power of disposing of the property assigned. The case of *Burn v. Carvalho* was decided in favour of the assignees, because the equitable assignment was not complete before the bankruptcy. In the case of *Hutchinson v. Heyworth*, the bankrupt had sent out directions to his agent abroad before his bankruptcy, to pay a portion of the proceeds of certain shipments to certain creditors there; and the money having been paid after the bankruptcy, and after notice from the assignees, the question was, whether the bankrupt's directions had been revoked by his bankruptcy; and the court held, that as the agent had, before the bankruptcy of his principal, pledged himself to the creditor upon his guaranteeing him against the claims of other creditors, to pay over the money according to the principal's orders, there was either an appropriation of the funds to that extent, or an equitable assignment, before the bankruptcy, and that in neither case was there any revocation by the bankruptcy of the owner.

On the part of the plaintiffs it was contended, that neither of these cases was in point; that there was in this case no actual assignment of the goods, but only a contract to assign at some future time; that Colchester [550] never had possession either of the goods, or of any symbol representing the goods; and that the contract had been revoked by the bankruptcy of Stockdale before any cargo had been finally shipped on board the vessel; and, therefore, before the contract had attached to any definite goods, and while it was uncertain of what goods the cargo would be eventually composed.

As to the first portion of the cargo, which had been brought on board the vessel from Sierra Leone to the river Gambia, and there unloaded for the temporary purpose of more conveniently loading the whole of the homeward cargo, we think that those goods are sufficiently alleged to have been in the possession of the charterers, at the date of the agreement, as part of the intended homeward cargo mentioned in the agreement, to bring them within the terms of that agreement, as equitably assigned to Colchester for the purposes mentioned in that agreement; and if the other part of the cargo had been with equal clearness described to have been in the possession of the charterers' agents, and to have been set apart, as well as destined, as part of the homeward cargo before and at the time of the agreement, we should have been inclined to hold that the agreement operated as an assignment in equity of those specific goods, and that those goods were sufficiently identified with the goods that form the subject of the present action. But there is so much obscurity in the language of the rejoinder as to that portion of the cargo that was provided at the river Gambia, that we find it impossible to say, with any degree of certainty, that the goods which were afterwards put on board on the vessel and brought to England, were at any time before the bankruptcy set apart and definitely appropriated as part of the homeward cargo, so as to form the subject of any complete assignment before the bankruptcy of Stockdale.

But this becomes of less importance, because we are [551] of opinion, that if enough had been shewn to make out a valid equitable assignment as against Stockdale himself if he had remained solvent, still the property in all the goods passed to the plaintiffs, as goods in the order and disposition of the bankrupt at the time of his bankruptcy, under the seventy-second section of the statute 6 G. 4, c. 16; and that, therefore, as against the assignees, Colchester could not set up any lien under the agreement stated in the plea. Before this agreement the bankrupt was the real owner of the goods, and according to the most favourable view of the statement in the rejoinder, was, through his agents, in actual possession of them. By the replication it is alleged, and not denied by the rejoinder, that neither Colchester nor the defendants ever had possession of the goods forming the intended cargo, but that Stockdale continued the apparent and reputed owner. By the assignment to Colchester, he became in equity

the owner of the goods ; and, according to the case of *Ryall v. Rolle* (1 Atk. 165), and many subsequent cases, an equitable assignee is to be considered as the true owner of the goods assigned, within the meaning of the provisions in the bankrupt laws respecting reputed ownership. If, therefore, the goods forming the intended cargo were in the possession, order, and disposition of Stockdale at the time of his bankruptcy, with the consent of Colchester the true owner, the property in those goods would pass to the assignees. And as by the pleadings it is admitted, that the bankrupt was left in the sole possession and management of the cargo, with full power to dispose of, or gain credit upon, any part of it, having parted with no document that was essential to his power of disposal, we see no ground upon which we can hold these goods to be exempted from the operation of the seventy-second section of the bankrupt act (6 G. 4. c. 16).

[552] The judgment must therefore be entered for the plaintiffs upon this demurrer, as well as upon the former demurrers before considered.

Judgment for the plaintiffs.

THAMES HAVEN DOCK AND RAILWAY COMPANY v. ROSE. May 31, 1842.

[S. C. 5 Scott, N. R. 524. 3 Railw. Cas. 177 ; 2 D. N. S. 104 ; 12 L. J. C. P. 90. Referred to, *New Sombrero Phosphate Company v. Erlanger*, 1877-78, 5 Ch. D. 100 ; 3 App. Cas. 1218. Considered, *In re Alma Spinning Company*, 1880, 16 Ch. D. 681 ; *York Tramways Company v. Willows*, 1882, 8 Q. B. D. 697.]

By a private act, the business of a company thereby incorporated was to be carried on by twelve directors ; five of whom were to be a quorum. There were provisions in the act as to the election of new directors in case of death, &c. The directors were authorised to make calls, and in case of non-payment, the company had power to sue.—An action having been brought for calls, the defendant in March suffered judgment by default. In Trinity term following he applied to set aside the judgment, upon the ground that at the time the calls were made, there were only seven directors ; and that he had only lately learnt that fact.—The court refused the application, holding that the enactment as to the number of directors was only directory.—Also, semble, that the application was made too late.

Bompas Serjt., on behalf of the defendant, moved for a rule calling upon the plaintiffs to shew cause why the judgment, which had been signed in this cause, and all subsequent proceedings, should not be set aside for irregularity.

The company was incorporated by a private act, 6 & 7 W. 4, c. cviii., by the name and style of The Thames-Haven Dock and Railway Company (a). The [553]

(a) The following sections of this act were referred to in the argument :—

Section 108 enacts, that the business and concerns of the company shall be carried on under the management of twelve directors, to be chosen from time to time from amongst the proprietors for the time being of the company, qualified by holding ten shares or upwards each ; and that such directors shall have the general management, direction, superintendence, and control of the business and concerns of the company, and the custody of the common seal of the company, with power to use the same on their behalf, and also the custody of the books of account, and other books, deeds, and papers, and shall have power to direct the investment, calling in and laying out, sale and disposal of the stock, effects, funds, moneys, and securities of the company, and all other the dealings of the company, and to call and appoint the times and places of holding general and other meetings of the proprietors, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and the ascertainment of dividends, and the profits on shares, and to do all other things necessary, or to be deemed by them proper or expedient, for carrying on the business and concerns of the company, and to enforce, perform, and execute, all the powers, authorities, privileges, acts, and things in relation to the company, and to bind the company, as if the same were done by the whole corporation, except such as are hereby required to be done at some general or special meeting of the company ; and the directors for the time being shall have power to frame rules and regulations, and prescribe the orders and directions for carrying on the business and concerns of the

defendant was a proprietor in the company, and the action was brought against him in respect of calls. He [554] had suffered judgment by default on the 10th of March last; but the affidavit on which the motion was made, [555] stated that it had only lately come to his knowledge, that there were only seven directors of the company at the time the calls in question were made.

company, and alter and vary the same from time to time as they in their discretion shall think fit; and all such rules and regulations shall have the force of bye laws, provided the same be not repugnant to any of the provisions of the act, nor to any bye law which may have been duly passed at any general or special meeting of the proprietors of the company; and no individual proprietor, not being a director (except as hereinafter provided), shall have a right to any interference, management, direction, or control in or over the business and concerns of the company, or the capital, stock, or effects thereof.

Sect. 109 enacts that nine individuals, therein named, shall be the first directors of the company, and that they shall, unless they or any of them shall sooner die, resign, or become disqualified, as thereafter mentioned, continue in office until the first general meeting of the company to be held after the passing of the act; that at such meeting, all the directors shall go out of office, and twelve directors shall be elected in their place and stead, who shall continue in office until the first half-yearly meeting of the company in the year 1838; that at such half-yearly meeting in 1838, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office; that at each first half-yearly general meeting in the three following years, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office, and at each half-yearly general meeting in every subsequent year the three directors who shall have been longest in office since their last election, shall go out of office; and at every general half-yearly meeting at which three directors are to go out of office as aforesaid, three new directors shall be elected.

Sect. 110 provides and enacts, that any director who shall, by ballot or rotation, go out of office, may be immediately or at any future time re-elected by the company as a director, and that after such re-election he shall, with reference to the going out in rotation, be considered as a new director.

Sect. 111 provides and enacts, that no person holding any office, &c., or being concerned or interested in any contract, under the company, shall be capable of being chosen, or of continuing, a director, nor shall any director be capable of accepting any office, place, or employment, or of taking, or being concerned, or interested in any contract under the company; and that in either of the said cases, the party so offending shall forfeit the sum of 50l. during the time he shall be a director; and that if any director shall, at any time subsequent to his election, accept or continue to hold any other office or place of trust or profit under the company, or shall either directly or indirectly be concerned in any contract with the company, or shall participate in any manner in any work to be done for the company, or shall at any time cease to be a proprietor of ten shares at least in the undertaking, the office of such director shall thereupon become vacant, and he shall thenceforth be disqualified from voting or acting at any succeeding meeting of directors: provided nevertheless, that until the disqualification of any director shall have been communicated to, and recorded by, a court of directors, every act and proceeding to which such disqualified director shall have been a party, shall be as binding and effectual as if no such disqualification had taken place: provided also, that it shall be lawful for any general meeting to exempt any particular person from the operation of this present clause, in case they shall deem it advantageous so to do.

Sect. 112 enacts, that when any director elected by virtue of the act, shall die or resign or become disqualified or incompetent to act as a director, or shall cease to be a director by any other means than by going out of office, it shall be lawful for the remaining directors to elect some other proprietor duly qualified to be a director; and that every such proprietor so elected to fill up any such vacancy, shall continue in office so long only as the person in whose place or stead he may be elected would have been entitled to continue in office had he lived and remained in office.

Sect. 116 enacts, that the directors for the time being shall meet together at the office of the company once at least in every two calendar months, and at such other

[556] The learned serjeant contended that, as by the 108th section (supra, 552), all the business and concerns of the company were to be carried on by twelve directors, and that as there were only seven at the time the calls were made, in respect of which the action was brought, there were no proper parties to maintain the action. [Maule J. The 112th section (supra, 554) says, that when any of the twelve directors shall die, &c., "it shall be lawful for the remaining directors to elect some other proprietor, &c., to be a director." It does not say it shall be necessary to do [557] so. Cresswell J.

times as they shall think proper, and at such other times as they shall be convened as hereinafter mentioned ; and each of such meetings shall be styled a court of directors ; but that no meeting shall be deemed a court competent to enter and determine upon business unless at least five directors shall be present at the commencement of the business, and when a decision takes place upon the whole or any part of the business ; and if, on the day appointed for such meeting, a sufficient number of directors to constitute a court shall not attend, then and in every such case the meeting shall be adjourned to the next or some subsequent day by the directors then present, but if none be present, then by the secretary of the said company, or such other person as shall attend in his place ; and that any director shall be at liberty to call an extraordinary meeting of directors, upon such notice and in such manner, and to consist of at least such number (not being less than five), as shall from time to time be provided by the bye-laws of the company, or the orders of the court of directors, &c.

Sect. 118 enacts, that the directors shall have full power from time to time to make such calls of money from the several subscribers to, and proprietors for the time being of, the undertaking, not exceeding in the whole, including the sums already paid in respect of such share, the sum of 150*l.* for each share, as they shall from time to time find necessary for the purposes of the undertaking ; so that no call shall exceed the sum of 5*l.* upon each share in the undertaking, and so that the total amount of such calls in any one year shall not exceed 20*l.* upon each share, and that there shall be an interval of three calendar months at least between every two successive calls ; and that such several sums of money so to be called for shall be paid into such bank or banks, or to such person or persons and at such time and place and in such a manner, as the directors shall from time to time order and appoint, and that of such time and place twenty-one days notice at the least shall be previously given by advertisement, under the hand of the secretary for the time being, inserted in two or more London newspapers, and in one or more newspaper or newspapers usually circulating in the county of Essex.

Sect. 119 enacts, that the court of directors for the time being shall have full power and authority to use the common seal on behalf of the company ; and that all contracts in writing relating to the affairs of the company, which shall be signed by any three of the directors in pursuance of a resolution of a court of directors, shall be binding on the company and all other parties thereto, their respective successors, heirs, &c. and actions and suits may be maintained thereon, and damages and costs recovered by or against the company or any other parties thereto, failing in the execution thereof.

Sect. 123 enacts, that the several parties who have subscribed, or who shall hereafter subscribe, for or towards the undertaking, and every proprietor of any share in the undertaking, shall pay the respective sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors, by virtue of and pursuant to the powers and authorities of the act, to such persons and at such times and places as the directors shall from time to time, in manner thereinbefore mentioned, direct and appoint ; and that if any proprietor of any such shares shall refuse or neglect to pay his ratable proportion of the money, so to be called for at such time and in such manner as aforesaid, then and in such case, and so often as the same shall happen, such proprietor shall pay interest for the same after the rate of five pounds per centum per annum, from the day appointed for payment thereof up to the time when the same shall be actually paid ; and that if any proprietor of any such share shall neglect or refuse to pay such his ratable proportion, together with interest (if any) accruing for the same, for the space of one calendar month next after the day appointed for the payment thereof, then it shall be lawful for the company to sue for and recover the same, with full costs of suit, in any of His Majesty's courts of record, by action of debt or on the case, or by bill, &c.

Is there any thing in the act that requires the action to be brought by twelve directors? Not in express terms; but it is submitted, that as twelve directors are required to transact the business of the company, when there are not so many, there is in fact no company. The expression, that "it shall be lawful" for them to proceed to an election in cases of a vacancy, must be construed in an imperative sense (vide 1 Wms. Saund. 58, n. (1)). The 116th section (supra, 554) provides that five directors may act as a quorum, but the five must be part of the twelve. [Maule J. The other directors may have died or become disqualified.] Then the remaining directors are bound to proceed to a new election. [Tindal C. J. There must be some interval between the death of a director and a re-election. Maule J. Or there may not remain twelve shareholders with ten shares each, which is the qualification requisite to become a director.] In that case the corporation would be at an end. [Maule J. There might be ground for applying for a mandamus in the present state of the company, to order them to proceed to a new election; but it would be going a great way to set aside the proceedings in an action.] Suppose there were only one director left, it could not be said that the company was then properly constituted so as to sue other parties. And the same principle will apply to the present state of facts. [Coltman J. There does not appear to be any irregularity on the face of the proceedings?] There does not; but they would appear equally regular if the action were brought by a stranger in the name of the company. In such a case the court would set aside the proceedings, on the ground that the action had been brought without authority. [Maule J. There might be some ground for that argument if the application were made on the [558] part of the company; but here, they appear to approve of the action. They might, if they had thought proper, have called a meeting and instructed counsel to state that the action was brought without their authority.] It is submitted that it is equally open to the defendant to rely upon that point, as there are no parties in existence legally competent to authorise the action. The present application has been made at the earliest possible period, as it appears from the affidavit that it was only during the present week that the defendant discovered there were only seven directors when the calls were made upon which the action is brought. [Maule J. It may be, that only seven attended at the meeting. Tindal C. J. Or the number may have been filled up before the action was brought; and the twelve directors may have adopted the acts of the seven. Cresswell J. The 123d section (supra, 556) says, that "it shall be lawful for the company to sue." But the company have no power to act unless there are the proper number of directors. [Coltman J. If the defendant had paid these calls, could he have been required to pay them again?] It is submitted, that if fresh calls had been made by a meeting of twelve directors, he would have been liable to pay those calls. In order to constitute a proper meeting, it is necessary to summon twelve directors; five of whom may act. But, in the present case, there can have been a summons of seven only; and five of that number have no power either to make calls, or to authorise the action being brought.

TINDAL C. J. This is confessedly a case of the first impression, no precedent having been shewn for a similar application.

The first observation that occurs is, that this is a [559] very late period for making the application. The judgment was signed in March, and the defendant at that time had all the means of knowledge which he now possesses, so far as they are derived from the act of parliament, and an inspection of the books of the company; but he does not make this application till nearly the middle of Trinity term, when the consequence of acceding to it would be, that the proceedings would stand over till after the long vacation.

But, independently of this, I think there is no ground for the present application. The action is brought by the company for a debt, admitted by the defendant to be due, as he has allowed judgment to go by default. The act says that the company may sue; and they have sued in this instance. It is however contended, that upon this power to sue must be ingrafted, what is said in another part of the act—that the business and concerns of the company shall be carried on under the management of twelve directors; but that I think is matter of direction only. If any party is dissatisfied with the proceedings of the company because there is not the full number of directors, he may apply for a mandamus to have the number completed. If the fact of the number not being completed is an answer to an action for calls, it is pleadable as such, and ought to have been pleaded in this instance; but a defendant can-

not apply to the equitable jurisdiction or the discretion of the court, to set aside a judgment upon grounds which might have been pleaded as an answer to the action.

It appears to me, that the proper parties to the record being before us, and the debt being admitted, the court ought not—especially at this period of time—to interfere in the matter.

COLTMAN J. This is an application to the summary jurisdiction of the court, which ought not to be acceded [560] to, unless for the purpose of furthering justice. It has not been shewn that, if the money were paid in this action, it could be recovered again from the defendant: and it appears to me that it could not. I agree, therefore, that there ought to be no rule.

MAULE J. I am of the same opinion. I do not think that, according to the act of parliament, it is necessary that there should be always twelve directors of the company. The question depends upon sects. 109, 110, 111 and 112 (*supra*, 553, 554). [The learned judge read those sections.]

By sect. 112, in the case of death or disqualification of any of the directors, a power is given to the remaining directors to elect others, but it is not compulsory on them to do so. If they are of opinion that the number of directors is not sufficient to enable them to carry on the affairs of the company, they may elect others. At present there are only seven directors; but it may be, that seven are a sufficient number for the purposes of the company. It appears to me that the provision referred to is a mere arrangement as to the internal affairs of the company, and that it does not apply to their external affairs, or prevent them from enforcing calls that have been duly made.

CRESSWELL J. concurred.

Rule refused.

[561] CROTTY v. HODGES. May 30, 1842.

[S. C. 5 Scott, N. R. 221; 11 L. J. C. P. 289.]

B, by the authority of A., wrote the name of A. as acceptor upon a blank paper, bearing a bill stamp, and added his own name as drawer. C. afterwards filled up the bill, and added the words, "payable at the Bank of E.," under the name of A. This was done without the knowledge of either A. or B.—To a declaration by an indorsee against A., as acceptor (not stating the bill to be payable at any particular place), the defendant pleaded non acceptavit. The bill being produced, Held, that it did not support the issue.

Assumpsit by the indorsee of a bill of exchange for 100l. drawn by one Watling upon the defendant, and by him accepted (generally).

Plea: non acceptavit; and issue thereon.

At the trial before Tindal C. J. at the Middlesex sittings after last Hilary term, it appeared that the name of the defendant, as acceptor, was written by Watling in the presence of the defendant, and by his direction, across the blank stamped paper, to which Watling then set his own name as drawer (no place at which the bill was to be payable being then specified thereon). This paper was then taken away by one Bowie (the plaintiff's indorser); who, in the course of the same afternoon, directed another person to fill up the body of the bill for 100l., and to add, to the signature of the defendant, the words "payable at the Bank of England." This addition was made without the authority or knowledge, either of the defendant, or of Watling.

It was contended, for the defence, that the addition was a material alteration, which avoided the contract, and that this defence was admissible under the plea of non-acceptance. By his lordship's direction a verdict was returned for the plaintiff; leave being reserved to the defendant to move to enter a nonsuit upon this point.

Sir T. Wilde Serjt. obtained a rule nisi accordingly, in Easter term last, upon the authority of *Calvert v. Baker* (4 M. & W. 417). He also cited *Rowe v. Young* (b); *Tidmarsh* [562] v. *Grover* (1 M. & S. 735), *Fenton v. Goundry* (13 East, 459), *Cowie v. Halsall* (4 B. & Ald. 197, 3 Stark. N. P. C. 36), *Mackintosh v. Haydon* (Ryan & Moo. 362), and stat. 1 & 2 G. 4, c. 78.

(b) 2 Bro. & B. 165, 2 Bligh, 391. Vide Story's Commentaries on Bills of Exchange, s. 239.

Talfourd Serjt. now shewed cause. The alteration is immaterial. The authority to accept was general; and the addition does not alter the legal effect of the acceptance, so as to render it a qualified one. But assuming it to be otherwise; the defence is in confession and avoidance, and should have been so pleaded, according to the rule of Hilary term, 4 W. 4, I. 3. Thus in *Hemming v. Trenery* (9 A. & E. 926, 1 P. & D. 661), where the instrument declared upon appeared at the trial to have been materially altered by interlineations, it was held that the defence arising from the fact of these alterations could not be taken advantage of under the plea of non assumpsit. This was subsequent to the decision in *Calvert v. Baker*; where it was held that in an action by the indorsee against the acceptor of a bill (not stated to be payable at any particular place), it was a good defence, under a plea that the defendant did not accept the bill declared on, that after he had accepted it generally, it was altered, without his knowledge, by the addition of a memorandum making it payable at a banker's. That case must be taken to be overruled by *Hemming v. Trenery*. In *Cock v. Coxwell* (2 C. M. & R. 291, 4 Dowl. P. C. 187, 1 Gale, Exch. Rep. 177), the bill having been altered was declared upon in its altered state; and there the plea of non acceptavit was held a sufficient answer.

The want of a second stamp would have been a good objection under this plea, because the instrument having been altered, was not admissible in evidence to support the affirmative of the issue raised upon the plea.

[563] Bompas Serjt., in support of the rule. The defendant has put upon the record a plea, which a solemn judgment of the court of Exchequer, has decided to be sufficient. *Calvert v. Baker* has not been overruled, and it cannot be distinguished from the present case. If the defendant had pleaded the facts specially his plea would have been bad, as amounting to a denial of the acceptance. [Tindal C. J. Might not the defendant have pleaded that the bill was altered after acceptance without his knowledge? *Hemming v. Trenery* seems to be a strong case.] There, a valid contract in writing had once existed; and it was held that a defence on the ground of the subsequent avoidance of that contract, by reason of the alteration, could not be raised under the general issue; but here, the authority given by the defendant was exceeded, and in fact he never did accept the bill produced. It would be a great hardship upon the defendant, if, after having pleaded in the precise form pointed out by the court of Exchequer, he should not be permitted to go into his defence under that plea. [Maule J. We are bound to consider whether the plea is an answer to the action.] In a question of mere form, the court will not decide contrary to what has already been determined. The variance from the authority given by the defendant is material, with reference as well to the defendant as to its legal effect upon the rights of third parties. In *Tidmarsh v. Grover* (1 M. & S. 735), the drawer and payee of a bill, accepted payable at B. and Co's., substituted E. and Co. for B. and Co. without the knowledge of the acceptor, and then indorsed the bill to the plaintiff. The acceptor was held to be discharged. [Talfourd Serjt. That was before 1 & 2 G. 4, c. 78.] That statute does not affect the present question. In *Mackintosh v. Haydon* (Ryan & Moo. 362) it was held by Abbott C. J., that [564] when the drawer of a bill, drawn since that statute, and accepted generally, adds to the acceptance a special place of payment without the knowledge of the acceptor, the latter is discharged. There, the acceptor was considered not to be liable upon the bill in any shape.

It was justly observed in that case, that "the right of the last indorsee to sue his immediate indorser would, as the bill appears, be complete upon default made at the banker's, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such nonpayment" (a). [Maule J. Your argument would be well founded, if there were a proferat, with non est factum pleaded. Suppose the alteration to be made after some indorsements were made, but before others. Cresswell J. The difficulty with respect to the stamp, appears to be this, that the stamp is insufficient unless the bill be read as it was originally drawn by Watling.]

TINDAL C. J. It appears to me that the question here turns, not so much upon

(a) It might also have been observed, that the last indorsee, by omitting to do that which, as the bill stood, appeared to be wholly unnecessary, namely, to present it to the acceptor for payment, would have discharged the prior indorsers.

the avoidance of the bill by its subsequent alteration after acceptance, as upon the point—whether it has ever been accepted at all.

It is in evidence that the defendant authorised only the affixing of his signature to a general acceptance; and that, afterwards, an acceptance was affixed in a different form, which he had not sanctioned. It cannot, therefore, be said that he accepted the bill which was produced at the trial. This appears to me to get rid of the difficulty of reconciling the two cases that have been principally relied upon.

The rule must be made absolute.

[565] COLTMAN J. There seems to be some conflict between the cases of *Calvert v. Baker* and *Hemming v. Trener*; which has created a doubt with respect to the present case. But upon further consideration it appears that, without deciding between them, we may hold that here the defendant did not accept at all, the authority being to draw a bill in a particular form.

MAULE J. No fact was left, or was desired to be left, to the jury. The judge decided; but he reserved the point. The proper result of the evidence was, that the defendant authorised Bowie to draw and accept generally. That being so, the question is, whether this bill was ever drawn in any other way than as payable at the Bank of England. It seems to me that it was not. The drawing and the accepting of the bill must be considered as taking place at the same time; and, in such a case, until all is written which the party is about writing, the whole is in fieri. I therefore agree that a nonsuit should be entered.

CRESSWELL J. I am of the same opinion. It appears to me that this bill never existed as an accepted bill, otherwise than as a bill payable at the Bank of England; and I think that the defendant never did accept such a bill.

Rule absolute.

[566] WETHERED v. CALCUTT. June 3, 1842.

[S. C. 5 Scott, N. R. 409; 11 L. J. M. C. 123; 6 Jur. 487.]

In an action against B, an overseer, for a penalty alleged to have been incurred under the 17 G. 2, c. 3, for not delivering a copy of the poor-rate to A., an inhabitant, it appeared that A. was a churchwarden of the parish. Held, that A. was not entitled to such copy.

Debt, on the 17 G. 2, c. 3. The first count of the declaration alleged that the plaintiff was an inhabitant of the parish of Little Marlow, and the defendant one of the overseers of the poor of the said parish; that on the 17th of May 1841, the churchwardens and overseers of the said parish made a certain rate for the relief of the poor, which said rate was duly allowed; that afterwards, to wit, on the Sunday next after the allowance of the said rate, to wit on the 23d of May in the year aforesaid, the said churchwardens and overseers of Little Marlow aforesaid, did reduce a certain notice of the said rate having been allowed as aforesaid, into writing, and did, previously to the commencement of divine service in the parish church of Little Marlow aforesaid, on the day and year last aforesaid (the said last-mentioned day being the Sunday next, after the allowance of the said rate as aforesaid), affix copies in writing of the said notice on the doors of all the churches and chapels within the parish of Little Marlow aforesaid; and that public notice of the said rate having been so allowed as aforesaid, was then duly given, according to the form of the statute in that case made and provided. The count then alleged a demand to inspect the rate, and a refusal by the defendant, &c.

Second count, that the plaintiff being such inhabitant, and the defendant being such overseer of the poor of the said parish, and the said rate being so made, assessed, allowed, published, and notified as in that behalf aforesaid, he the plaintiff afterwards, at a reasonable and seasonable time in that behalf, to wit on the 11th of October in the year aforesaid, demanded of the defendant [567] so then being such overseer of the poor of the parish as aforesaid, a copy of the said rate so made, allowed, assessed, published, and notified as aforesaid, and was then to wit, upon and at the time of the making of the said demand, ready to pay and offered to pay to the defendant for the same at and after the rate of 6d., for every twenty-four names thereof, and in the said rate, according to the form of the statute in that case made and provided; yet the

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defendant did not, nor would then, nor had he at any time since delivered or given to the plaintiff a copy of the said rate, or any part thereof, &c.

The defendant pleaded—"by statute."

At the trial before Atcherley Serjt. at the last spring assizes at Aylesbury, it appeared that the plaintiff, who was one of the churchwardens of the parish of Little Marlow, had, on the 11th of October 1841, called upon the defendant, one of the overseers of the same parish, and had demanded to inspect the rate in question, and also a copy thereof, at the same time tendering 10s. for such copy. The defendant informed him that the rate-book was in the possession of one Phillips, an assistant overseer, but said that he would send for it, and would let the plaintiff have a copy on the Thursday following. On the same day Phillips, by the direction of the defendant, carried the rate-book to a person of the name of Ward, in order to have a copy made of the rate. On the 25th of November the plaintiff's attorney wrote to the defendant, threatening to proceed against him under the statute of the 17 G. 2, c. 3. On the 27th of November the attorney for the defendant replied, stating, among other things, that "the copy of the rate required by Mr. Wethered was made upwards of a month ago; which he has been informed of. It has been, and now is, ready for delivery by me, on payment of 20s., my charge, and, now, the further charge of 5s."

It was admitted that the rate had been duly made [568] and allowed, but the only evidence of publication was, that a paper which purported to be a notice of the making and allowance of the rate, was produced by Phillips the assistant-overseer, and after being read in the church, was taken away by the defendant. The rate had been collected, and had been paid, among others, by the defendant.

For the defendant, it was contended; first, that there was no evidence of the publication of the rate; secondly, that the plaintiff being himself a churchwarden, was not within the 17 G. 2, c. 3; thirdly, that the defendant was not liable to the penalties imposed by the act, there having been no wilful refusal or neglect on his part to produce the rate, &c.; and, fourthly, that the demand to inspect the rate, &c., should have been made on Phillips the assistant-overseer, and not upon the defendant; *Bennett v. Edwards* (a)¹; where it was held that an assistant overseer, appointed under the 59 G. 3, c. 12, having, by virtue of his office, the poor-rate in his custody, is liable to a penalty under the 17 G. 2, c. 3, for refusing to produce it to an inhabitant when lawfully demanded.

The learned judge having directed a verdict for the plaintiff, for the amount of the penalties, with leave for the defendant to move to enter a nonsuit, if the court should be of opinion that any of the objections taken were valid,

Storks Serjt., in Easter term last, obtained a rule nisi accordingly.

Channell Serjt., (with whom was Gunning), now shewed cause (b). It is submitted that there is nothing [569] in the statute of 17 G. 2, c. 3, to limit the right thereby given, of enforcing the production, or the delivery of a copy, of the rate, in the manner that has been suggested. By section 2, churchwardens and overseers are to permit "all and every the inhabitants" of the parish, to inspect the rate at seasonable times, and, on demand, to furnish copies to "any inhabitant." By the third section, in case any churchwarden or overseer shall not permit "any inhabitant or parishioner" to inspect the said rates, &c., he shall forfeit the penalties therein mentioned; which are to be paid to the party aggrieved. The plaintiff is not the less an inhabitant parishioner, because he is a churchwarden. Supposing one of the overseers to take possession of the rate, and to refuse to produce it to the other parish officers, there seems no reason why they should not have the protection of the statute. It would be hard, if because a party is either a churchwarden or an overseer, he should be deprived of the benefit of the act, and be compelled to bring an action (a)² to recover possession of the rate. It may be much more important to a churchwarden than to another inhabitant of the parish, to see the rate. A churchwarden or an overseer who does not sign a rate, may clearly appeal against it; and being within the words of

(a)¹ 8 B. & C. 702, affirmed in the Exchequer Chamber, *Edwards v. Bennett*, 1 Bingh. 230, 3 Y. & J. 458, 3 M. & P. 749.

(b) As the judgment of the court proceeded solely upon the second point, the argument on the other objections is omitted.

(a)² *Quære*, et vide post, 573 (a).

the statute, the court will not exclude him from its provisions, if a case can be conceived in which he may be a party aggrieved by a non-compliance therewith.

Storks Serjt., *contrà*. As no authority is to be found on this point, the court will look at the act, to see if the plaintiff comes within it. The preamble shews that the inconveniences meant to be remedied were caused by the parties who made the rate withholding it from the rest of the parish. The churchwardens and [570] overseers are by the statute clearly put in contradistinction to the other inhabitants; for the second section evidently contemplates the case of the former being called to produce or furnish a copy of the rate to third parties. It cannot be supposed that the remedy given by the act was meant to apply to churchwardens or overseers, who must be presumed to have the possession of those rates, the production of which the statute was passed to enforce.

TINDAL C. J. This is an action under the 17 G. 2, c. 3, for penalties alleged to have been incurred by the defendant as one of the overseers of the parish of Little Marlow, in the county of Buckingham, for refusing to allow the plaintiff, a rated inhabitant of the parish, to inspect a rate made for the relief of the poor, and also for refusing him a copy of such rate. So far as the first count is concerned, it was not made out by the evidence, there having been no refusal to allow the plaintiff to inspect the rate. There was, however, some evidence to support the second count; and the question is, whether, on the facts proved, the case is brought within the statute. It seems to me that the act was passed to give the inhabitants a remedy against the officers of the parish, and that the word "inhabitants" is used in contradistinction to "churchwardens and overseers." If the churchwardens and overseers of this parish had done their duty, the whole of them, including the plaintiff, would have been present when the rate was made; and the legislature could never suppose that officers, whose duty it is to be so present, assisting in making the rate, could require the aid of the act, in order to inspect it or to obtain a copy. It appears to me, therefore, that the plaintiff has not brought himself within the act. It has been argued, that what took place when the defendant desired the assistant-overseer to furnish the plaintiff with a copy of the rate, was an admission [571] on his part that he was liable to do so; but I do not think that his voluntary promise placed the defendant in a worse position than that in which he stood before.

COLTMAN J. I also am of opinion that this case is not within the statute. It seems to me that it would have been a good answer to give to the plaintiff's demand of a copy of the rate, "You are a churchwarden—make a copy for yourself." The act does not apply to a case like the present; for no inconvenience could ever be contemplated as likely to arise from the churchwardens and overseers themselves not possessing a power over their own rate (*a*). The object of the statute clearly was, to give a remedy to the inhabitants against "the unlimited power" of the parish officers to make rates, and by which they were liable to be oppressed. Therefore, when the acts speak of "inhabitants" and "parishioners," those words must be understood as being used in contradistinction to "churchwardens and overseers;" for a penal statute is not to be extended beyond its fair and necessary construction.

MAULE J. I also think that the rule must be made absolute. The statute, after reciting that "great inconveniencies do often arise in cities, &c. by reason of the unlimited power of the churchwardens and overseers of the poor, who frequently, on frivolous pretences, and for private ends, make unjust and illegal rates, in a secret and clandestine manner, contrary to the intent and meaning of the stat. 43 Eliz. c. 2," directs (*s. 1*) that public notice shall be given in the church of every rate for the relief of the poor, the next Sunday after it shall be allowed. By the second section it is provided, that the churchwardens and overseers of the poor, or other persons authorised as aforesaid, in every parish, township, [572] or place, shall permit all and every the inhabitants of the said parish, township, or place to inspect every such rate at all reasonable times, paying 1s. for the same, and shall upon demand forthwith give copies of the same or any part thereof, to any inhabitant of the said parish, township, or place, paying at the rate of 6d. for every twenty-four names. The third section enacts, "that if any churchwarden or overseer of the poor or other person authorised as aforesaid, shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer,

(a) Vide tamen, post, 573, n.

or other person authorised as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20l., to be sued for and recovered by action of debt," &c. It is contended on the part of the plaintiff that churchwardens are comprehended in the expression, "any inhabitant or parishioner;" but it appears to me, that the generality of those terms must be limited by the intention and object of the act. Previously to the statute an obvious wrong might be suffered by the inhabitants of a parish, in having secret rates imposed upon them; and the act meant to give a copy to those persons, who, without its aid, could not obtain such copy. It is not without precedent to construe a statute by what is presumed to have been its intention, notwithstanding you thereby limit its effect. By the seventeenth section of the statute of frauds, 29 Car. 2, c. 3, it is provided that, in order to charge a party upon a contract for the sale of goods, there shall be some note or memorandum in writing of the bargain, made and signed by the parties to be charged by it or their agents thereunto lawfully authorised. Construing that clause literally, it would include the case of one of the parties signing as the agent of the other; but it was held, in *Farebrother v. Simmons* (5 B. & Ald. 333), that the agent [573] contemplated by that section who is to bind a defendant by his signature, must be a third person, and not the other contracting party.

CRESSWELL J. The three sections of the statute were framed in order to provide a remedy for the inconveniences recited in the preamble. The first section directs that the churchwardens and overseers shall publish every rate when made, in the manner thereby prescribed; the second "that they shall permit all inhabitants to inspect the rates at seasonable times, and, on demand, give copies thereof at a certain price;" and the third section provides "that if any churchwarden or overseer shall not permit any inhabitant or parishioner to inspect the rates, or shall refuse or neglect to give copies thereof, he shall forfeit and pay to the party aggrieved" a certain sum, to be recovered as therein mentioned. It is quite clear that the relief provided in these clauses is for the same class of persons. The churchwardens and overseers are all presumed to be cognisant of the rate, and are entitled to the possession of it; consequently they have a higher right than the one given by the act—to a mere inspection, or a copy of the rate. It cannot therefore be supposed that the statute was meant to apply to them.

Rule absolute (a).

[574] DIRKS v. RICHARDS. June 4, 1842.

[S. C. 5 Scott, N. R. 534; 6 Jur. 562: at Nisi Prius, Car. & M. 626. Referred to, *In re Llewellyn*, [1891] 3 Ch. 149.]

A picture was placed by A. in the hands of B. for sale. B. deposited it with C. On its being demanded by A., C. claimed 5s. for warehouse-room; but on a second demand being made, with an offer to pay any claim which C. might have for warehouse-room, C. refused to give up the picture without being paid 8l. due to him from B.—Held, that the demand of the 8l. amounted to a waiver of the claim for warehouse-room, and that it rendered a specific tender in respect thereof unnecessary.

Detinue, for a picture. Pleas: non detinet, and not possessed; upon both of which issue was joined.

At the trial before Alderson B., at the last assizes for the county of Surrey, it

(a) An action lies by one joint-tenant, or one tenant in common of a chattel against another for destroying the joint or common chattel, but not for withholding or concealing it. The churchwardens and overseers cannot have actual joint possession of the rate except when all are together; and it would appear that one who was in malo lecti or in itinere when the rate was made, or who, though he may have once seen it, finds his memory too infirm to retain the particulars of every assessment, can get it from the unaccommodating holder, or even obtain a sight of it, only by force or by stratagem. "If the one take the whole to himself out of the possession of the other, the other has no remedy in order to occupy in common, but to take it from him who has done to him the wrong, when he can see his time, (quant il veit son temps)." Littleton, sect. 323, Of Tenants in Common. And see 2 Wms. Saund. 47 h.

appeared that the picture had been placed in the hands of a person named Bye for sale. Bye deposited it with the defendant, an auctioneer, at the same time telling him that his charge for warehouse rent must be moderate. The plaintiff subsequently demanded the picture, whereupon the defendant made a claim of 5s. for warehouse-room. The plaintiff having made a second demand in writing, accompanied with an offer to pay the defendant any lien he might have on the picture for warehouse-room, the latter stated that he would not deliver it up until he was paid a debt of 8l. due to him from Bye. No tender was made of any specific sum for warehouse-room. *Scarfe v. Morgan* (4 M. & W. 270) was cited on behalf of the defendant.

The learned judge directed the jury, if they were satisfied that the picture was the plaintiff's, and that it was detained by the defendant, to find for the plaintiff, telling them that by the demand of 8l., the defendant waived or dispensed with any tender for warehouse-room. The jury having found for the plaintiff,

Sir T. Wilde Serjt., in Easter term last, obtained a rule nisi for a new trial, on the ground of misdirection, [575] contending that a tender of a specific sum for warehouse-rent should have been made.

Shée Serjt. now shewed cause. The plaintiff having offered to pay what might be due for warehouse-room, the defendant's demand of 8l. for the debt due to him from Bye, was clearly a waiver of his claim for warehouse-rent. It rendered the detainer unjustifiable, and dispensed with the necessity of making any tender of such rent. *Knight v. Harrison*, cited in Saunders on Plead. & Ev. 641, is precisely in point. That was an action of trover for 100 pieces of calico. It appeared that the defendant, a commission-agent at Manchester, had bought, as agent of Moravia and Co. of London, from the plaintiffs at Manchester, 1500 pieces of calico, to be paid for by a bill to be drawn by the plaintiffs on Moravia and Co. The goods were delivered to the defendant on the 2d of October. On the 4th of October Moravia and Co. stopped payment. The plaintiffs applied to the defendant for the goods then in his hands, and the defendant at first promised to return them, they not having been drawn for, but he afterwards said he would not deliver them, as it was doubtful whether he could safely do so. The plaintiffs obtained an order from Moravia and Co., and shewed the order to the defendant; on which he said he would not give up the goods until Moravia and Co. had paid his general balance, the amount of which he did not state. The plaintiffs demanded the goods and tendered an indemnity, but the defendant refused to accept it. It was contended for the defendant; first, that he had a general lien for his whole balance; secondly, that he had a lien for 49l., the amount of expenses incurred by him in getting the goods glazed: but Abbott C. J. said, "He has no lien for his general balance, as against the plaintiffs. As at the time of the demand he insisted on having [576] his general balance, and did not name his particular lien, but made too large a claim, he is precluded from setting it up now; for, if he had relied upon that then, it is most probable the plaintiffs would have paid it." There is an obvious distinction between *Scarfe v. Morgan* and the present case; for here, the claim made by the defendant was in respect of a debt due to him from a third person, who was not the owner of the picture.

Channell Serjt. (with whom was Montague Chambers), in support of the rule. The question is, whether the claim of 8l., which it is conceded the defendant had no right to make, dispensed with the necessity of a tender of what was really due to him for warehouse-rent. [Erskine J. In *Boardman v. Sill* (1 Campb. 410), the plaintiff brought trover for some brandy which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying it was his own property. Certain warehouse-rent was due to the defendant on account of the brandy, of which no tender had been made. Lord Ellenborough held, that as the brandy had been detained on a different ground, and as no demand of warehouse-rent had been made, the defendant must be taken to have waived his lien, if he had one.] The present case is not to be distinguished from *Scarfe v. Morgan*. There, the plaintiff sent a mare to the defendant, who was a farmer, to be covered by a stallion belonging to him. The mare was taken to the defendant's stables, and covered accordingly, upon a Sunday. The charge for covering not being paid, the defendant detained the mare. A demand of her was afterwards made, but he refused to deliver her, claiming a lien, not only for the charge on that occasion, but for a general balance due [577] to him on another account. It was held that the defendant was entitled to a specific lien on the mare for the charge for covering her; and that the claim made by him to retain her for

the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum. Alderson B. there said, "It seems to me a monstrous proposition to say, that a party who claims in respect of two sums to detain a mare, is supposed to have waived his right to detain her as to one (a). The more natural conclusion is, that the defendant intended to act upon both; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other."

MAULE J. Did not the claim of the 8l. by the defendant amount to this? "I do not recognise your right to the picture; I claim a lien on it for 8l. due to me from Bye, who deposited it with me." If the defendant set up an inconsistent claim, it was clearly a waiver of his claim for warehouse-rent.

The rest of the court concurred.

Rule discharged.

[578] HOLLIS v. BRYANT. June 13, 1842.

A creditor who, upon petition to the insolvent debtors' court under 1 & 2 Vict. c. 110, s. 36, obtained a vesting order, is not bound to assent to the discharge of the debtor upon his tendering the amount of the debt and costs, where it appears that such debtor has other creditors.

Ludlow Serjt. on a former day in this term had obtained a rule nisi to set aside an order made by Maule J., which had been obtained by the defendant on the 7th of May,—that he should be discharged out of custody, as to the execution in this action, upon payment of the amount for which he was so charged in execution; that the plaintiff's attorney should deliver up the bill of exchange, upon which the action was brought, at the time of such payment; and that the plaintiff's attorney should thereupon enter satisfaction upon the judgment.

It appeared from the affidavits that at the time the order was made, the defendant was in custody in execution at the suit of the plaintiff for 77l. 4s. 6d. and costs; that upon the application of one Burt, the court for the relief of insolvent debtors had made an order, under the 1 & 2 Vict. c. 110, ss. 36, 37, vesting the estate and effects of the defendant in the provisional assignee; that the plaintiff had been appointed assignee; that upon the 24th of May, the defendant, upon a suggestion that Burt's demand had been satisfied, had obtained a rule in the insolvent debtors' court, calling upon the plaintiff, as assignee, to shew cause why the vesting order should not be annulled, and his appointment, as such assignee, vacated, upon payment of his debt and costs pursuant to the judge's order; that such rule was still pending, and that the plaintiff intended to shew cause against the same, upon the affidavits of several unsatisfied creditors of the defendants to a large amount.

The learned serjeant referred to *Drury v. Hounsfeld* (11 A. & E. 101, 4 P. & D. 386).

[579] Bompas Serjt. now shewed cause, and contended that it was not competent to the defendant to introduce new facts that were not before the judge when the order was made which it was now sought to set aside; and that it did not sufficiently appear, as in *Drury v. Hounsfeld*, that there were any other unsatisfied creditors, at the time when the vesting order was made.

Ludlow Serjt. was heard in support of the rule.

(a) Without supposing the party to waive his right to detain in respect of the specific lien, the assumption of the right to withhold the possession of the mare from the owner, until performance of a condition which the person detaining had no right to impose, would appear to be a tortious conversion on the part of such person, notwithstanding any other title to detain remaining in him.

In *Scarfe v. Morgan*, though there may have been a waiver, (i.e. a dispensation with the necessity,) of a tender, there could have been no intention to waive or abandon the right to detain for the particular charge, there having been an express demand of both sums. In the principal case no mention appears to have been made of the 5s. when the 8l. was demanded. It would, however, be, perhaps, too much to infer from that omission, that the defendant really meant to give up his claim for warehouse-rent.

TINDAL C. J. I think it sufficiently appears that there are other unsatisfied creditors of the defendant who may be entitled to participate in his estate; and I am therefore of opinion, upon the authority of the case cited, that the defendant is not entitled to be discharged out of custody. All the facts do not appear to have been brought before the learned judge at the time the order was made. I think that the rule for setting the order aside must be made absolute.

The other judges concurred.

Rule absolute.

[580] CRANE v. PRICE AND OTHERS. June 13, 1842.

[S. C. 5 Scott, N. R. 338; 1 Web. P. C. 393; 12 L. J. C. P. 81. Discussed, *Murray v. Clayton*, 1872, L. R. 7 Ch. 584; *Clark v. Adie*, 1877, 2 App. Cas. 335. Commented on, *Rushion v. Crawley*, 1870, L. R. 10 Eq. 529.]

It is no objection to the validity of a patent that the invention cannot be used except by means of a former patented invention; especially where the second patentee expressly disclaims any part of such former invention.—In 1829 A. obtained a patent for the use of hot-air blast in furnaces. In 1837 B. took out a patent for “an improvement in the manufacture of iron,” which consisted in “the application of anthracite or stone-coal, combined with a hot-air blast in the smelting of iron.” The hot-air blast was used by B. under a licence from A. The use of it with anthracite was new; and the iron produced in consequence was greater in yield, cheaper in cost, and better in quality than that produced by the ordinary method. Held, that such combination was a “new manufacture” within the 21 J. 1, c. 3.—In the specification of A.’s invention, it was alleged that the blast was to be passed through a vessel, (the form of which vessel was stated to be immaterial,) by means of a tube, into the furnace. B., in the application of the hot-air blast, used a succession of tubes. Held, that this was not a material variation from the subject of A.’s patent.

Case, for the infringement of a patent for an improvement in the manufacture of iron.

The declaration, after alleging that the plaintiff, before and at the time, &c., was the true and first inventor of an improvement in the manufacture of iron, set out certain letters patent, bearing date the 28th of September, 7 W. 4 (1836), granting, in the usual manner, to the plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention for fourteen years; with the customary proviso as to the enrolment of the specification. The declaration then stated that, on the 27th of March 1837, the requisite specification was made, and on the 28th of March was duly enrolled in the court of Chancery. The breaches assigned were: first, that the defendants smelted, manufactured, and made iron on the said improved plan or principle, and in imitation of the said invention of the plaintiff, and according to the said improvement in the said letters patent mentioned, and sold and vended iron so smelted, &c.; secondly, that the defendants used and put in practice the said invention, by smelting, manufacturing, and working iron in imitation [581] of the said invention; thirdly, that the defendants did counterfeited, imitate, and resemble the said invention, and did make colourable additions thereto and subtractions therefrom, whereby to pretend themselves the inventors thereof; fourthly, that the defendants smelted and manufactured and made iron with certain improvements in the process of such smelting, and which were intended to imitate and resemble, and did imitate and resemble, the said improvement so invented by the plaintiff, and thereby counterfeited the same.

Pleas; first, not guilty.

Secondly, that the plaintiff was not the true and first inventor of the said alleged improvement

The third plea set out the specification, as follows:

“To all to whom these presents shall come, I, George Crane, of, &c., iron-master, send greeting:” (the specification then briefly recited the letters patent and the proviso as to the specification). “Now, know ye, that in compliance with the said proviso, I, the said G. C., do hereby declare the nature of my invention, and the

manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, that is to say; according to the ordinary practice of obtaining iron from iron-stone, mine or ore in this country, the iron-stone, mine or ore, either calcined or in the raw state, according to the respective qualities, is put into suitable furnaces with coke produced from bituminous coal, formerly called pit-coal, in contradistinction to charcoal produced from wood, which was the fuel employed in this country previously to the introduction of pit-coal in the smelting and manufacture of iron. Now, as there are districts in which there are to be found large quantities of iron-stone, mine or ore, in the immediate neighbourhood of what is known as stone-coal or anthracite coal, it has been long considered as a desirable object, to employ such [582] coal for the smelting and manufacture of iron; and, although attempts have been made to apply such description of coal in the smelting and manufacture of iron, the same have failed and have been abandoned. In addition to such advantages to be obtained from the using of anthracite or stone-coal, in the districts where such coal is found together with iron-stone, mine or ore, from the practice I have had, I am induced to believe such coal, from its properties, will be found to produce a quality of iron more nearly resembling iron obtained by the aid of vegetable charcoal. Now, the object of my invention is the application of such anthracite or stone-coal, combined with a hot-air blast, in the smelting or manufacture of iron from iron-stone, mine, or ore. And, in order to give the best information in my power for enabling a workman to carry out my invention, I will describe the process or means pursued by me; and, in doing so, I will suppose the furnace of an ordinary construction to be in blast, and that the machinery and apparatus are adapted for the application of hot-air blast, as is well understood and extensively applied in many places where the ordinary fuel (coke of bituminous coal, or the coal in a raw state) is employed in the manufacture of iron from iron-stone, mine or ore; and I have found a furnace having suitable apparatus for making the blast to about 600° of Fahrenheit a good arrangement for carrying out my invention, though so high a degree of temperature is not indispensably necessary, but I believe preferable. In charging such a furnace, I throw in about 3 cwt. of anthracite or stone-coal or culm, to each 5 cwt. of calcined argillaceous iron-stone, with a proper quantity of flux, as if working with the coke of bituminous coal. Such charging of the furnace, and the general working, with the exception of the using of anthracite or stone-coal, is to be pursued as if working with coke of [583] bituminous coal: and I would remark that the quantities above given, are such as I have hitherto employed in making the best qualities of pig iron, viz. No. 1 or No. 2, at my works, from the anthracite, stone-coal, or culm found in the neighbourhood of the Yniscedwyn iron works; but these quantities may be varied, according to local circumstances, and the refractory nature of the iron-stone, mine or ore, or otherwise to be reduced, and the quality of iron desired to be obtained, as is the case in ordinary working, and at the judgment and discretion of the manager, as heretofore: and I would remark that the anthracite or stone-coal, or culm, may be coked in like manner as bituminous coal before charging the furnace; but from my experience, I have not (so far as my practice goes, in working with the coal obtained in my neighbourhood), found that such coking is necessary, or that a more advantageous result is obtained than in applying the anthracite or stone-coal directly from the mine. And it is desirable to observe, I have found it of advantage that the blast of hot air should be as free and unimpeded as possible, and that from that account I have hitherto used only anthracite or stone-coal, the smaller parts of which would not pass through a sieve of an inch mesh; but, where the pillar or volume of blast is considerable, say 2 lbs. and upwards on the square inch, this precaution is not necessary.

"Having thus described the nature of my invention, and the manner of carrying the same into effect, I would have it understood that I do not claim the using of hot-air blast separately in the smelting and manufacture of iron, as of my invention, when uncombined with the application of anthracite or stone-coal and culm; nor do I claim the application of anthracite or stone-coal in the manufacture or smelting of iron when uncombined with the using of hot-air blast; but what I do claim as [584] my invention, is the application of anthracite or stone-coal and culm combined with the using of hot-air blast in the smelting and manufacture of iron, from iron-stone, mine or ore, as above described. In witness," &c.

The plea then averred that the said alleged improvement, in the patent and specification mentioned, was not a new manufacture invented by the plaintiff within

the intent and meaning of the statute (21 Jac. 1, c. 3, s. 6) as to the public use and exercise thereof; by reason whereof the said letters patent were void.

Fourth plea—that the nature of the said invention, and the manner in which the said invention was to be performed, were not particularly described, according to the intent and meaning of the letters patent, in or by the specification.

The fifth plea (after referring to the specification, and setting out the proviso in the patent, that nothing therein contained should give privilege to the plaintiff, his executors, &c., to use or imitate any invention or work theretofore invented or found out by any other person and publicly used or exercised, unto whom letters patent had been granted) then proceeded to aver the grant of certain letters patent to one James Beaumont Neilson, dated the 11th of September, 9 G. 4, (1828); whereby was granted to Neilson, for fourteen years, the sole privilege to make, use, exercise, and vend a certain invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus were required; that the said improved application of air in the last mentioned patent, was the production and application of a hot-air blast for the purpose of heating fires in forges and furnaces where bellows, &c. were required; which said hot-air blast was [535] long before the plaintiff's patent, publicly used and exercised in the smelting and manufacture of iron, from iron-stone, &c., and was the hot-air blast in the plaintiff's specification mentioned; that Neilson's patent was still in force, and that, in consequence thereof, the plaintiff could not use the said hot-air blast, in the smelting or manufacture of iron, without Neilson's licence; that the plaintiff obtained such licence before the grant of his patent; and that the using by the plaintiff of the hot-air blast, in the manner in the said specification mentioned, in the smelting and manufacture of iron, from iron-stone, &c., as described in the said specification, combined with the said anthracite or stone-coal and culm, as therein mentioned, was a using and imitating of Neilson's invention; which rendered the plaintiff's patent void. Verification.

Replication. The plaintiff joined issue on the first, second, and fourth pleas.

To the third plea, the plaintiff replied that the improvement in the patent mentioned and described in the specification, was a new manufacture invented by the plaintiff, within the intent of the statute, as to the public use and exercise thereof; whereon issue was joined.

To the fifth plea, the replication, after referring to the proviso in Neilson's patent, as to the specification, averred the due enrolment of the specification, and set it out as follows;—(after reciting the grant of the patent, &c., with the proviso as to the specification)—

“Now, know ye, that in compliance with the said proviso, I, the said J. B. N., do hereby declare that the nature of my said invention for the improved application of air to produce heat in fires, forges and furnaces where bellows or other blowing apparatus are required, and the manner in which the same is to be performed, are particularly described and ascertained as follows; that is to say, a blast or current of air must be produced by bel-[536]-lows or other blowing apparatus in the ordinary way, to which mode of producing the blast or current of air this patent is not intended to extend. The blast or current of air, so produced, is to be passed from the bellows or blowing apparatus into an air-vessel or receptacle made sufficiently strong to endure the blast, and through and from that vessel or receptacle, by means of a tube, pipe or aperture, into the fire, forge or furnace. The air-vessel or receptacle must be air-tight or nearly so, except the apertures for admission and emission of the air; and at the commencement and during the continuance of the blast it must be kept artificially heated to a considerable temperature. It is better that the temperature be kept to a red heat, or nearly so; but so high a temperature is not absolutely necessary to produce a beneficial effect. The air-vessel or receptacle may be conveniently made of iron; but, as the effect does not depend upon the nature of the material, other metals or convenient materials may be used. The size of the air-vessel must depend upon the blast, and on the heat necessary to be produced. For an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions; and for a cupola of the usual size for cast-iron founders, an air-vessel capable of containing 10,000 cubic inches, will be of a proper size; for fires, forges, or furnaces upon a greater scale, such as blast-furnaces for smelting iron, and large cast-iron founders' cupolas, air-vessels of proportionally increased dimensions and numbers are to be employed. The form or shape of the vessel or receptacle is

immaterial to the effect, and may be adapted to the local circumstances or situation. The air-vessel may generally be conveniently heated by a fire distinct from the fire to be affected by the blast or current of air; and generally it will be better that the air-vessel, and the fire by which it is heated, should be enclosed in [587] brickwork or masonry, through which the pipes or tubes connected with the air-vessel should pass. The manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature. In witness whereof," &c.

The replication then averred that Neilson's invention for the improved application of air to produce heat in fires, &c., as the same was described in Neilson's specification, was not the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned and referred to in the plaintiff's specification as then being well understood and extensively applied in many places, where the ordinary fuel was employed in the manufacture of iron, from iron-stone, &c.; nor was the using by the plaintiff of his said invention, as described in his said specification, a using or imitating of Neilson's invention described in his specification. Verification.

Rejoinder, to the replication to the fifth plea; that Neilson's invention was the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned in the plaintiff's specification, and that the using by the plaintiff of his invention, as described in his specification, was a using and imitating of Neilson's invention described in his specification. Issue thereon.

The following notice of objections was delivered by the defendants, with the pleas, under the stat. 5 & 6 W. 4, c. 83, s. 5.

"First, that the alleged invention mentioned in the declaration,—which the plaintiff in his specification claims and alleges to consist in the application of anthracite or stone-coal and culm, combined with the using of hot-air blast, in the smelting and manufacture of iron from iron-stone mine or ore,—is not a new manufacture, within the meaning of the stat. 21 Jac. 1, c. 3, s. 6, for which [588] a patent can be granted, but only a using at the same time of a well-known article, namely, anthracite or stone-coal and culm, and of the hot-air blast (the latter admitted in the plaintiff's specification to be then well-known), each separately in use for smelting and manufacturing iron before the date of the said letters patent. Secondly, that anthracite or stone-coal and culm, had been publicly used as the only fuel in the smelting and manufacture of iron by Mr. Thomas Harper, at his furnace, at Abercrave, in the county of Brecon, and had been so used mixed with other fuel, by the British Iron Company, at their works at Abercrave aforesaid, and at the Ynisedwyn iron-works, the Landore iron-works, the Milbrook iron-works, and the Neath Abbey iron-works, in the county of Glamorgan, before the date of the said letters patent; and the alleged invention of the plaintiff is only the use of anthracite or stone-coal or culm with the hot-air blast. Thirdly, that the using of hot-air blast in the smelting or manufacture of iron, was not the invention of the plaintiff, but was well-known and in use before the granting of the letters patent to the plaintiff, as admitted in the specification thereof, and the alleged invention of the plaintiff is only the use of the said hot-air blast, with the well-known anthracite, or stone-coal and culm; and that the hot-air blast was used in the smelting and manufacture of iron prior to the said letters patent, at the works of the said plaintiff, the Ynisedwyn iron-works, &c.; [here followed a list of sixteen iron-works, where the hot-air blast had been in use]; and also at a great many iron-works in the kingdom, too numerous to be individually specified. Fourthly, that the alleged invention of the plaintiff necessarily involves the use of another invention, which was patented before the date of the plaintiff's letters patent, viz. the hot-air blast of J. B. Neilson; and that the application thereof to anthracite or stone-coal, which was a well-known fuel, was an application that all persons were at [589] liberty to make who had permission to use the said invention of the said J. B. Neilson. Fifthly, that the exclusive use of the hot-air blast having been previously granted to J. B. Neilson by letters patent, the subsequent patent, granted to the plaintiff for the same invention, is void. Sixthly, that anthracite or stone-coal and culm having been well-known and in use as a fuel, prior to the said plaintiff's letters patent, the application of such fuel to the smelting or manufacture of iron by well-known methods is not a new manufacture, within the meaning of the statute. Seventhly, that the use of the hot-air blast, described in the said specification, produces substantially only the same effect when the anthracite or stone-coal or culm is used as fuel in the smelting and manufacture of iron, as when any other kind of coal or coke is used for the same purposes. Eighthly,

that the specification is defective, inasmuch as it does not describe the kind of furnace to which the alleged invention is applicable, and it is not applicable to all kinds of furnaces. Ninthly, that the said specification does not clearly state, whether or not it is intended to apply to the use of anthracite or stone-coal and culm, as the only fuel, or whether it is intended to include the use of anthracite or stone-coal and culm, together with other fuel."

At the trial before Tindal C. J. at the sittings at Westminster, after Hilary term 1840, the plaintiff (besides Neilson's specification, as set out in the replication to the fifth plea) gave the following specifications in evidence :

First, that of an invention of Thomas Botfield—for "certain improvements in the manufacture of iron,"—inrolled on the 1st of April 1828, under a patent, dated the 2d of January 1828. The principle of this invention was stated by the patentee as follows :—"for causing or obtaining a blast of atmospheric air, sufficient to smelt, fuse, run or make pig, cast or crude iron, from iron [590] stone or ore. This blast is to be produced by means of rarefied air, gas, flame or heated air, from an oven or fire-place, and is to be applied in or to a blast-furnace, cupola, or air-furnace : this I propose to effect by the draught of a powerful chimney or chimneys, which may be built separate, at any distance that may be most convenient, or may join to or be made part of the blast-furnace or cupola, as may be found most desirable and best to answer the purpose required, and which is to be connected by a flue or flues with the cupola, blast, or air-furnace ; but, in case this draught should not prove sufficient for the purpose of smelting the iron stone or ore, I propose and intend to apply and use the common blast from machinery to assist the blast from the draught of the machinery : and I claim a right to use, and mean to use the atmospheric air, either separately or mixed with gas, flame, or heated air. I also claim as part of my patent the right to use and mix with other materials, rock salt, common refuse or other salt, in any state or degree of refining, or any other substance of which soda (the mineral alkali) forms a part. This is to be mixed in the blast-furnace, cupola, or air-furnace, with the iron-stone or ore, and with the other usual materials, of coke, or charcoal, and limestone, to which cinder (produced in the processes of converting pig, cast or crude-iron, into malleable iron) may be added. And I propose, as I shall find necessary, to cause the iron-stone or ore to smelt or fuse sooner or with less blast, fuel, or heat." And in another part of the specification, the patentee stated—"And I further declare that I propose to use coal, coke, stone-coal, culm, wood, charcoal, or any other kind of fuel or fuels, or combination of fuel, in any proportion or proportions, in the fire-place, oven, or air furnace, for producing the gas, flame, or heated air ; and also to use all the materials before recited, in any proportion or proportions that may be found sufficient and [591] best adapted to produce the main object required. I claim, as my patent, the use of the additional chimney or chimneys, and the application of rarefied air, gas, flame, or heated air, to, at, or near the twire or twires of the blast-furnace or cupola, to cause or assist the blast of atmospheric air. And I also claim, as part of my patent, the use of salt, or any other substance containing soda, to mix with the iron-stone or ore, and other materials in the blast, cupola or air-furnace, to cause those materials to melt or fuse sooner, more easily, or with less blast and fuel."

Secondly, that of an invention of Edward Martin,—inrolled the 23d of June 1804, under a patent of the same date,—“for making pig and cast iron of every description from iron-stone, iron-mine, and iron-ore, and of smelting, preparing and refining of pig and cast iron of every sort, and for the making of such pig and cast iron into wrought or bar iron by using raw stone-coal or culm to be worked and made by blast.” In this specification the nature of the invention and the manner in which the same was to be performed, and the method used to make stone coal and culm to stand the blast, were thus described : “To light the fire in the furnace, finery, or hearth, with free-burning wood, and, as soon as the wood is sufficiently ignited, then to put on small quantities of raw stone-coal or culm, free of dust (broken into the size of a common hen's egg), to continue to feed the furnace, finery or hearth with raw stone-coal or culm, till it is quite full of vivid fire, before any blast is introduced ; then (in making pig or cast iron) charge the furnace, in the common way with due proportions of raw stone-coal or culm clear of dust (instead of coke or charcoal), with iron-stone, iron-mine, or iron-ore, and lime-stone ; then to introduce the blast in a very gentle manner for the first twelve hours ; then to increase the blast gradually, day after day, for the first week of blowing, [592] till the furnace is sufficiently hot and burthened,

and then to blow to any extent, the machinery or the furnace is capable of bearing; and by keeping the furnace regularly and properly fed with materials, and keeping up a sufficient blast, the process will be completed. And in the remelting, preparing and refining of pig and cast iron of every sort, and for making such pig and cast iron into wrought or bar iron, the foregoing method of lighting and feeding the hearth or finery till it is full of vivid stone-coal or culm, must be pursued before the finery or hearth is charged with metal, or the blast introduced; then, by charging with metal, and feeding the finery or hearth with raw stone-coal or culm (instead of coke or charcoal), and by introducing the blast in the common way, the wished-for success will be produced."

Thirdly, that of an invention of Philip Taylor,—inrolled on the 17th of February 1826, under a patent dated the 5th of the same month,—for "certain improvements in making iron." The principle of this invention was, the introduction, into the furnace in which anthracite or stone-coal was to be used, of carburetted hydrogen gas.

And, fourthly, that of an invention of Charles Pierre Devaux,—inrolled on the 8th of April 1836, under a patent dated the 28th of October, 1835,—for "certain improvements in smelting iron-stone or iron-ore."

This specification stated the invention in these terms; "The improvements relate to the placing or arranging of apparatus between the ordinary blowing-machine and the furnace which contains the iron-stone or iron-ore to be smelted, whereby the blast of atmospheric air caused by the ordinary blowing machinery is forced through and amongst the fuel in a fire enclosed in such superadded apparatus, and whereby the atmospheric air so forced supports combustion in such fire, becomes heated, and in some degree decomposed, and is [593] thence constantly forced forward by the pressure of the condensed air in the apparatus (carrying with it the gas and vapours evolved by the fuel in the fire) into, and becomes a heated and gaseous blast to, the ordinary furnace containing the iron-stone or iron-ore to be smelted, great improvement will take place in the process of smelting iron-stone or iron-ore, and fuel saved."

Numerous witnesses were called on the part of the plaintiff, who were employed in the manufacture of iron, many of them in the neighbourhood of the plaintiff's works. Their evidence went to shew,—that repeated attempts had been made to use anthracite coal in the manufacture of iron; that it was an object greatly desired by the trade; that the British Iron Company had succeeded in using it, but that the iron produced was inferior in quality and not worth the cost of manufacture, and that the company had, in consequence, abandoned their works. Other instances were adduced, where similar attempts had failed. In February 1837 the plaintiff, after frequent and expensive experiments, began to use the hot-air blast and stone-coal; the apparatus for the hot-air blast having been erected under the direction of one of Neilson's men. The plaintiff however (finding that the air vessel used by Neilson did not give a sufficient degree of heat) soon afterwards substituted for it a coil or succession of tubes, so as to cause a larger surface of air to be exposed to the influence of the fire in the transit from the blowing apparatus to the furnace; whereby a hot-air blast sufficient to melt lead (about 600° Fahrenheit) was produced; that the iron thus produced was of a very superior quality; that the yield was greater, and the consumption of fuel less by one sixth; that since the plaintiff's discovery two manufactories had been commenced upon his system; that in April or May 1837 the defendants were using hot-air blast, and stone-coal [594] together with coke, in the proportion of one third of the former to two thirds of the latter. It was also proved that cold blast blows anthracite coal black; which had been the cause of the failure of Martin's invention; that Taylor's invention had altogether failed, and that Botfield's was not applicable to anthracite coal; and that the description in the plaintiff's specification was sufficient to enable persons of competent skill, successfully to apply the invention.

The counsel for the defendants, after stating that no witnesses were to be called for the defence, was proceeding to argue that the plaintiff's invention was not a new manufacture; when it was suggested by the Lord Chief Justice that there was no point to leave to the jury, and that the real question was one of law, namely, as to the meaning of the word "manufacture" under the statute; whether the application of a known mode of working the hot-air blast to a known material, so as to produce a new effect, is a manufacture; and also whether, if it be so, the plaintiff was the first inventor of it. It was therefore agreed that a verdict should be entered for the plaintiff, with nominal damages, upon all the issues, subject to a motion, on the part

of the defendants, to enter a nonsuit or verdict for them, with leave to turn the evidence into a special case.

Sir Thomas Wilde Serjt., in Hilary term, 1840, having accordingly obtained a rule nisi to enter a nonsuit or a verdict for the defendants, it was arranged that the evidence should be turned into a special case; the court being at liberty to draw the same inferences from the evidence that a jury might draw; if the court should be of opinion that the plaintiff was entitled to retain the verdict on all the issues, then the verdict was to stand as entered; but if the court should be of opinion that the defendants were entitled to have the verdict entered [595] for them on all or either of the issues, then the verdict was to be altered accordingly: if the court should be of opinion that the defendants were entitled to have the verdict entered for them on the third and fourth issues, or either of them, the court were to be at liberty, if they should be so advised, to give judgment non obstante veredicto. In case the verdict for the plaintiff should stand, the Lord Chief Justice was to be at liberty, if he should think fit, to certify on the record that the validity of the patent came in question before him, pursuant to the statute 5 & 6 W. 4, c. 83, s. 3.

The case was argued in Hilary term, 1842 (a).

Bompas Serjt. and Rotch for the defendants. As to the first issue: there was no infringement of the plaintiff's patent proved. The plaintiff's invention was the simple application of Neilson's patent to the use of anthracite coal in smelting iron. The plaintiff's specification does not state the proportions or method to be observed in the manufacture; but merely that stone-coal with the hot-air blast, is to be used in the ordinary way. The plaintiff cannot contend that his patent would be infringed by the application of hot air to stone-coal in combination with other fuel in any proportions whatsoever. There are extensive districts where the coal is more or less anthracitous; in such places the proportions of anthracite and of bituminous coal which manufacturers may use, could not be ascertained. According to the evidence, the defendants used only a small proportion of anthracite compared to the quantity of coke. But the mere using of some anthracite with the hot blast could not amount to an infringement of the plaintiff's patent, supposing that patent to be valid.

As to the second and third issues: the plaintiff is neither the first inventor of the alleged improvement, [596] nor is the invention a "new manufacture" within the meaning of the statute.

The patent is for "an improvement in the manufacture of iron." No improvement is suggested throughout the plaintiff's specification, whereby an improved quality of iron is to be obtained. All that is there stated is, that the alleged invention of the plaintiff will produce iron more like that obtained by the aid of vegetable charcoal. The process used by the plaintiff contains nothing new. The hot-air blast was not new—that was the subject of Neilson's patent. The use of anthracite coal was not new: it had been previously used by a number of persons. The plaintiff's specification, therefore, reveals no novelty of detail. It is true that an improved method in the application of a former discovery, or a new combination of machinery, the details of which were already known, may be the subject of a patent; but the mere use of a thing already known, in a known manner, and for a known purpose, has frequently been decided not to be the subject of a patent: *Brunton v. Hawkes* (4 B. & Ald. 541); *Saunders v. Aston* (3 B. & Ad. 881); *Cornish v. Keene* (3 New Cases, 570, 4 Scott, 337); *Kay v. Marshall* (5 New Cases, 492, 7 Scott, 548). In *Minter v. Mower* (6 Ad. & E. 735, 1 N. & P. 595) the patent was held to be bad, as including the subject of a former invention. In this case the plaintiff's patent includes the invention of Neilson.

As to the fourth issue: the specification is insufficient, inasmuch as it does not describe the sort of furnace requisite to be used. It appeared from the evidence that the invention failed when used with a large furnace.

As to the fifth issue—whether the hot-air blast described in the plaintiff's specification is to be obtained in the same manner as that for which Neilson had obtained a patent—there was no evidence to shew that there was any other hot-air blast in use in England, except under Neilson's patent, the validity of which had been fully established. *Neilson v. Thompson* (2 Webst. Pat. Ca. 275, 278); *Neilson v. Fothergill* (ib. 287); *Neilson v. Harford* (8 M. & W. 806, 2 Webst. P. C. 295, 328). Indeed the

(a) Before Tindal C. J., and Coltman, Erskine, and Maule JJ.

hot-air blast with which the plaintiff worked his apparatus was erected by one of Neilson's servant's, and was worked under a licence from Neilson. A patent which includes the subject of a former patent is bad, because the second patentee obtains a right which was exclusively granted to the first; and it is contrary to the proviso in the patent, which declares that it shall not extend to, or give privilege to use or imitate, any invention or work which had been, heretofore invented by any person to whom a patent had been granted.

Sir Frederick Pollock, A. G., R. V. Richards, Montague Smith, and Webster for the plaintiff. Under the arrangement entered into at nisi prius, it is submitted that it is not now open to the defendant to dispute the infringement of the plaintiff's patent. But even if it were so, there was abundant evidence to entitle the plaintiff to a verdict on that issue. In order to entitle the plaintiff to maintain this action, it is sufficient to shew that the defendants used anthracite coal in combination with hot-air blast, in considerable quantities; he was not called upon to prove that it was the only kind of coal used in their manufacture.

Upon the second issue—whether the plaintiff is the first inventor—it is not pretended that any other person had successfully used anthracite coal combined with the hot-air blast, in the manufacture of iron; others had made the attempt indeed, but had failed.

[598] The third issue is the most important in the case,—viz., whether the combination of which the plaintiff claims the invention, and for which he has obtained his patent, is a "new manufacture" within the statute of James I. From the decided cases upon this subject it is not very easy to discover any general rule or principle by which the courts have been guided. There can be no doubt, however, that a party may have a patent for any new *modus operandi* or combination, which shall produce an entirely new result. Now it is clear that, up to the period of the granting of the present patent, anthracite coal had been found thoroughly untractable and useless, for the purposes of smelting iron, and that to make it so serviceable was a great object in the trade. By the combination in the plaintiff's invention, the object has been obtained; and the iron produced by this method is both cheaper and better. The most beneficial discoveries are often but new combinations of well-known substances or principles, producing new results. Such have been the subject of patents in various cases. *Hall v. Boot* (Gods. Pat. 242, 1 Webst. Pat. Ca. 100), *Forsyth's Patent* (1 Webst. Patent Cases, 95), *Derome's Patent* (ib. 152), *Hartley's Patent* (ib. 54), *Lewis v. Davies* (3 C. & P. 502), *Lewis v. Marling* (4 C. & P. 52, 10 B. & C. 22, 5 M. & R. 66), are authorities to this effect. Even the omission of any process in a manufacture, hitherto deemed essential, may be the subject of a patent: *Russell v. Cowley* (1 C. M. & R. 864). In *Strong v. De la Rue* (5 Russ. 322), it was held that an invention for preparing paper, so as to render it more available for copper-plate printing, was valid. In *Hill v. Thompson* (3 Mer. 626, S. C. 3 B. Moore, 424, 8 Taunt. 375, Holt, N. P. C. 636), [599] Lord Eldon laid down the rule "that there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials." In *Brunton v. Hawkes* (4 B. & Ald. 541), the invention, as stated in the specification, was not new. In *Saunders v. Aston* (3 B. & Ad. 881), and *Rex v. Metcalf* (2 Stark. Nisi Prius C. 249), the patents would have been held valid if the inventions had been properly described in the specification. *Cornish v. Keene* (3 N. C. 586, 4 Scott, 337) is also an authority that a new combination of old materials, may be the subject of a valid patent.

As to the fourth issue—that the invention was not sufficiently described in the specification—it appeared from the plaintiff's evidence that the specification was sufficient for all practical purposes. No evidence was called by the defendants to shew that the description was inaccurate or insufficient; and the affirmative of the issue lay upon them.

The fifth issue raises two questions; 1st, whether the hot-air blast described in the plaintiff's specification, is the subject matter of Neilson's patent; and 2dly, whether a patent can be maintained for an invention which involves the subject of a former patent.

As to the first point, the evidence was almost sufficient to prove that Neilson's hot-air blast was inapplicable to the plaintiff's invention.

As to the second of these points, there are many cases which establish the principle,—in which valid patents have been granted for improvements upon the subject of existing

patents, or for the application of a former patent in a new manner, or to a new material; *Hornblower v. Boulton* (8 T. R. 95), *Fox, Ex parte* (1 Ves. & B. 67), *Lewis v. Da-*[600]*-ris* (3 C. & P. 502), *Harmar v. Playne* (14 Ves. 130, 11 East, 101), *Huddart v. Grimshaw* (Dav. Pat. Ca. 265, 1 Webst. Pat. Ca. 85), *Boulton v. Bull* (2 H. Bla. 495), *Rex v. Wheeler* (2 B. & Ald. 345).

Bompas Serjt. was heard in reply.

TINDAL C. J. now delivered the judgment of the court.

This was an action on the case for the infringement of a patent granted to the plaintiff on the 28th of September 1836, for "an improvement in the manufacture of iron." The declaration was in the usual form; and the defendants pleaded thereto, first, that they were not guilty; secondly, that the plaintiff was not the true and first inventor of the said improvements; upon each of which pleas issue was joined; thirdly, after setting out at length the plaintiff's specification, the defendants pleaded that the alleged improvement therein described was not a new manufacture invented by the plaintiff, within the intent and meaning of the statute, as to the public use and exercise thereof within England; which allegation was traversed by the plaintiff in his replication; fourthly, the defendants pleaded, that the nature of the plaintiff's invention, and the manner in which it was to be performed, were not particularly described or ascertained by the plaintiff in his specification; upon which plea issue was joined: and in their last plea, the defendants, after referring to the plaintiff's specification before set out in the third plea, stated the grant of letters patent dated the 11th of September 1828, to one James Beaumont Neilson for "the improved application of air to produce heat in fires, forges and furnaces [601] where bellows or other blowing apparatus are required;" that Neilson's invention was the production and application of a hot-air blast, and was in public use, with Neilson's licence, in the smelting and manufacturing of iron from iron-stone, and was the hot-air blast in the plaintiff's specification mentioned; that the plaintiff could not use the hot-air blast in his specification mentioned, without Neilson's licence, and that he obtained such licence before the grant of his letters patent; and that the using by the plaintiff of the hot-air blast, in the smelting of iron from iron-stone, combined with the anthracite or stone-coal as mentioned in the specification, was a using and imitating of Neilson's invention; whereby the plaintiff's patent was void. The plaintiff replied to this last plea, that Neilson's invention was not the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned and referred to in the plaintiff's specification, nor was the using by the plaintiff of the invention as described in his specification a using or imitating of Neilson's invention as described in Neilson's specification; which allegations were traversed by the defendants in their rejoinder.

At the trial before me, the verdict was entered for the plaintiff on all the issues, subject to the opinion of the court upon the evidence given at the trial, as contained in a report agreed upon between the parties, the court being at liberty to draw the same inferences from it as a jury might draw.

Upon the argument, it was contended by the defendants that the verdict ought to be entered for them on each of the issues joined on the record: but as the main question between the parties turns on the third issue, which involves the question whether the invention of the plaintiff is a manufacture within the intent and meaning of the statute of James, that is, whether it is or is not the subject-matter of a patent, and, as the [602] determination of this issue in favour of the one party or the other will render the decision as to the other issues simple and free from difficulty, we will apply ourselves, in the first instance, to that question.

Now, in order to determine whether the improvement described in the patent is or is not a manufacture within the statute, we must, in the first place, ascertain precisely what is the invention claimed by the plaintiff; and then, by the application of some principles admitted and acknowledged to govern the law relating to patents, and by the authority of decided cases, determine the question in dispute between the parties.

The plaintiff describes the subject of his invention to be, the application of anthracite or stone-coal, combined with hot-air blast in the smelting or manufacture of iron from iron-stone, mine or ore, and states distinctly and unequivocally, at the end of his specification, that he does not claim the using of a hot-air blast separately as his invention, when uncombined with the application of anthracite or stone-coal; nor does he claim the application of anthracite or stone-coal when uncombined with the use of

hot-air blast; but that what he claims for his invention is, the application of anthracite or stone-coal, and culm, combined with the using of hot-air blast in the smelting and manufacture of iron from iron-stone, mine or ore. And the question therefore becomes this, whether—admitting the use of the hot-air blast to have been known before, in the manufacture of iron with bituminous coal, and the use of anthracite or stone-coal to have been known before in the manufacture of iron with the cold blast, but that the combination of the two together (the hot-air blast and the anthracite) was not known before in the manufacture of iron,—such combination can be the subject of a patent. We are of opinion, that if the result produced by such a combination is either a new article, or a better article, or a [603] cheaper article, to the public, than that produced before by the old method, such combination is an invention or a manufacture intended by the statute, and may well become the subject of a patent.

Such an assumed state of facts falls clearly within the principle exemplified by Abbott C. J., in *The King v. Wheeler* (2 B. & Ald. 350), where he is determining what is and what is not the subject of a patent, viz. :—"It may perhaps extend to a new process, to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or a more useful kind." And it falls also within the doctrine laid down by Lord Eldon, in *Hill v. Thompson* (3 Meriv. 629), viz. :—"There may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials; but, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application."

There are numerous instances of patents which have been granted where the invention consisted in no more than the use of things already known, the acting with them in a manner already known, the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public. It will be sufficient to refer to a few instances, in some of which the patents have failed on other grounds, but in none on the objection that the invention itself was not the subject of a patent. We would instance *Hall's Patent* (1 Webst. Pat. Ca. 97), for applying the flame of gas to singe off the superfluous fibres of lace, where the flame of oil had been used before for that same purpose: Derosne's [604] patent (*De Rome v. Fairie*, 1 Webst. Pat. Ca. 152), in which the invention consisted in filtering the syrup of sugar through a filter, to act with animal charcoal and charcoal from bituminous substances, where charcoal had been used before for the filtering of almost every liquid except the syrup of sugar: *Hill's Patent* (3 Meriv. 629), above referred to, for improvements in the smelting and working of iron; there the invention consisted only in the use and application of the slags or cinders thrown off by the operation of smelting,—which had been previously considered useless for the production of good and serviceable metal,—by the admixture of mine rubbish. Again, Daniell's patent (*Rex v. Daniell*, Gods. Pat. 274), was taken out for improvements in dressing woollen cloth, where the invention consisted in immersing a roll of cloth, manufactured in the usual manner, in hot water.

The only questions, therefore, to be considered with respect to the evidence are, was the iron produced by the combination of the hot-air blast and the anthracite, a better or a cheaper article than was before produced from the combination of the hot-air blast and the bituminous coal? and was the combination described in the specification new, as to the public use thereof in England? And upon the first point, upon looking at the evidence in the cause, we think there is no doubt that in the result of the combination of the hot-air blast with the anthracite or stone-coal, the yield of the furnace was more, the nature, properties and quality of the iron were better, and the expense of making the iron was less, than under the former process, by means of the combination of the hot-air blast with the bituminous coal. It is to be observed, that no evidence was produced on the part of the defendants to meet that, given by the plaintiff on these points, and that it was a neces-[605]-sary consequence, from the proof in the cause, that from the substitution of the anthracite, in whole or in part, in the stead and place of bituminous coal, the manufacture of iron should be conducted at a less expense.

It was objected, in the course of the argument, that the quantity or degree of invention was so small that it could not become the subject of a patent—that the person who had procured a licence to use the hot-air blast under Neilson's patent, had

a full right to subject to that blast coal of any nature whatever, whether bituminous or stone coal. But we think, if it were necessary to consider the labour, pains and expense encountered by the plaintiff in bringing his discovery to perfection, that there is evidence in this cause that the expense was considerable and the experiments numerous; but, in point of law, the labour of thought or experiment, and the expenditure of money, are not the essential grounds of consideration upon which the question, whether the invention is or is not the subject matter of a patent, ought to depend; for if the invention be new and useful to the public, it is not material whether it is the result of long experiments and profound research, or whether of some sudden and lucky thought, or of mere accidental discovery. The case of *Monopolies (Darcy v. Allen*, 11 Co. Rep. 84; Noy, 178), states the law to be "that where a man, by his own charge or industry, or by his own wit or invention, brings a new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, the king may grant him a monopoly-patent for a reasonable time." And if the combination now under consideration be, as we think it is, a manufacture, within the [606] statute of James the First, there was abundant evidence in the cause, that it had, before the granting of the patent, been a great object or desideratum to smelt iron-stone by the means of anthracite, and that it had not been done before; indeed no evidence was called on the part of the defendants to meet that which the plaintiff brought forward. These considerations, therefore, enable us to direct that the verdict shall be entered for the plaintiff upon the third issue,—that this was a manufacture, and a manufacture new as to the public use and exercise thereof within England and Wales.

On the same ground also the second issue is disposed of, in favour of the plaintiff. For no evidence was produced on the part of the defendants to shew any inventor earlier than the plaintiff; nor did the fact that there was an earlier inventor appear from the cross-examination of the plaintiff's witnesses.

As to the first issue, namely, whether the defendants had infringed the patent, we think it clearly appears on the evidence that the defendants had used, either in part or in whole, the combination described in the specification of the plaintiff's patent.

The plaintiff's evidence goes fully to shew such infringements, and is not met by any explanation on the part of the defendants. Indeed, the defendants' case did not appear to rest on this point, at the trial, so much as on the important question raised by them, whether the improvement described in the specification was a manufacture, within the statute of James.

Upon the fourth issue, which raised no more than the usual inquiry, whether the nature of the invention was sufficiently described in the specification, the usual evidence was given,—that persons of competent skill and experience could follow the directions, and produce the manufacture described, with success; and this evidence [607] was entirely unopposed. Upon this issue, also, the verdict ought to be entered for the plaintiff.

With respect, however, to the issue raised in the rejoinder to the plaintiff's replication to the fifth plea, we are of opinion, that, taking the whole of the evidence brought forward by the plaintiff, it is impossible to find any substantial or real distinction between the hot-air blast and the machinery and apparatus described in Neilson's specification, and that, described and referred to in the plaintiff's, or to say that the using by the plaintiff of the invention described in his specification was any other than the using or imitating of the invention described in Neilson's specification. The plaintiff, indeed, worked by licence under Neilson's patent at the time of his discovery. Upon this fifth issue, therefore, we think the verdict should be entered for the defendants.

Then arises the question, whether the plaintiff is or is not entitled to a judgment notwithstanding the verdict, upon this fifth issue; on which point the argument on the part of the defendant is, that the taking out a patent for an invention, which invention cannot be used or enjoyed by the public, except by means of a former invention of another person, which former invention is itself the subject-matter of a patent still in force, is void by law. Undoubtedly, if the second patent claims, as part of the invention described in it, that which was the subject-matter of a patent then in force, it would be void, on the double ground, that it claimed that which was not new (which, indeed, would equally be the case if the former patent had expired),

and also, that it would be an infringement of, and inconsistent with, a former grant of the king still in force, which latter consideration alone would make a new patent void. But, in this case, there is an express disclaimer as to any part of the invention of the use of the hot-air blast, [608] which was covered by Neilson's patent; the specification describes the application of hot-air blast to be well understood and extensively applied in many places where ordinary fuel is employed. The validity, therefore, of the plaintiff's patent cannot be impeached on either of the grounds above adverted to. Unless, therefore, the grantee of the new letters patent is bound by law to specify whether such former invention, which is excepted, was so excepted on the ground of its being generally known, and used by the public, or because it was the subject of a patent which secured the use of it to a former patentee, the new patent will be good. But that distinction is as much in the knowledge of the public as in that of the grantee of the patent. If, indeed, the new patent had been taken out for an improvement or alteration of an invention secured by a former patent, then, for obvious reasons, a greater particularity would be necessary to distinguish the new from the old. But the present specification expressly says, "I take the whole of an invention already well known to the public, and I combine it with something else." But, it is further argued, that in point of law no patent can be taken out, which includes the subject-matter of a patent still running and in force. No authority was cited to support this position; and the case in which Lord Tenterden held, that where an action was brought for an infringement of improvements in a former patent, granted to another person, and still in force, the plaintiff must produce the former patent and specification at the trial (*a*), affords a strong inference that the second patent was good. The case also of *Harmar v. Playne* (11 East, 101) is a clear authority to the same point; and upon reason and principle there appears no objection. The new patent, after the expiration of the old one, would be free [609] from every objection; and whilst the former exists, the new patent can be legally used by the public, by procuring a licence from Neilson, or by purchasing the apparatus from him or some of his agents; and the probability of the refusal of a licence to any one applying for it, is so extremely remote that it cannot enter into consideration as a ground of any legal objection.

Upon the whole, therefore, we hold that the verdict is to be entered for the plaintiff upon all the issues except the fifth; that the verdict is to be entered for the defendants on the fifth issue; but that, notwithstanding such verdict, the judgment must be given for the plaintiff.

Judgment for the plaintiff.

STUBBS AND WIFE TO OAKLEY. June 8, 1842.

Where the acknowledgment of a married woman had been taken in a remote part of India, under peculiar circumstances, in the absence of all the commissioners, before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein.

Talfourd Serjt. applied for an order, directing the officer of the court to receive and file the acknowledgment of a married woman taken in India, or that the commission might be amended by inserting therein the names of John Hall and Andrew Paton.

It appeared from the affidavits upon which the application was made, that two commissions, dated in September 1841, were sent to India for the purpose of taking and certifying the acknowledgment by Anne Belinda Stubbs, wife of John Stubbs, lieutenant of the forty-ninth regiment of Bengal native infantry, of the execution by her of two indentures of release and conveyance and assignment, in order to pass the interest of Mrs. Stubbs in certain estates in the county of Salop. Lieutenant Stubbs being upon detached ser-[610]-vice accompanied by his wife, and it being consequently uncertain where they might be found, the commissions were directed to all the officers of his regiment, by name, and also to Orlando Stubbs, colonel, late of the forty-fourth Bengal native regiment, commanding Scindia's contingent, or any two of them. The commissions were returned, together with the deeds, which had been

(a) *Lewis v. Davis*, 3 C. & P. 502.

executed and acknowledged before John Hall, a lieutenant in the East India Company's twenty-second regiment of native infantry, and Andrew Paton, an assistant-surgeon in the Company's Bengal service. The certificates of acknowledgment were signed by Hall and Paton, who were described as "two of the commissioners specially appointed pursuant to the statute." The affidavits verifying the certificates were respectively sworn, at Erinpoorah, in the territory of Sirohi, in the East Indies, before David Downing, "major in the third regiment of Bengal native infantry, political superintendent, Sirohi, and commanding at Erinpoorah." The following document was also sent, signed by Major Downing, and dated at Erinpoorah :—

"This is to certify, that the aforesaid officers (to whom the commissions were directed) of the forty-ninth regiment of Bengal native infantry are, one and all, to the best of my knowledge and belief, beyond 1000 miles from this place, and could not therefore possibly perform the said commission. I further certify, that the two officers who have acted as commissioners in taking the acknowledgment of the said Anne Belinda Stubbs, viz. Andrew Paton, assistant-surgeon, Jhodpore legion, and John Hall, lieutenant, twenty-second regiment, Bengal native infantry, now adjutant of the Jhodpore legion, are such as they represent themselves to be, and in every respect adequate to act as such commissioners: and I further declare, that if a new commission should be [611] sent from England to this country, naming any special commissioners, the exigencies and casualties of the service are such just now, that the probability is that the said special commissioners would be removed before the commission could arrive at Erinpoorah."

There was also a letter from Lieutenant Stubbs, dated to Erinpoorah, to the same effect, and also stating, that he was attached to the Jhodpore legion, an irregular regiment, and that he was liable at any moment to be ordered to a distance, either with that regiment or with his own; that, under the circumstances, it was thought advisable to execute the commissions in the manner they had been, which was as nearly in conformity with the instructions sent as was practicable, as, in the event of their being sent back to England to be amended, it was deemed highly improbable in the then state of India, that, on their being again sent out, the parties would be in a more convenient position for their execution; that there was no notary public, nor any magistrate before whom an oath could be taken, within several hundred miles from Erinpoorah; and that Major Downing was, as the writer believed, duly qualified to administer oaths.

TINDAL C. J. said that, under the very peculiar circumstances brought before the court, they would direct the commissions to be amended by inserting the names of the two gentlemen before whom the acknowledgment had been taken as commissioners; there being no doubt that their names would have been inserted at first if the necessity for so doing had been known and mentioned.

Per curiam. Rule accordingly.

[612] BARTHOLOMEW v. CARTER. June 8, 1842.

[S. C. 5 Scott, N. R. 498.]

By sect. 41 of the 10 G. 4, c. 44 (the metropolitan police act) certain privileges are given to persons against whom actions are brought "for any thing done in pursuance of the act;" and it is enacted that "though a verdict shall be given for the plaintiff he shall not have costs against the defendant, unless the judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon."—In an action for false imprisonment, it appeared that the plaintiff had been a constable in the metropolitan police, in which the defendant was a superintendent. By the regulations of the commissioners, every constable who is unmarried, is bound, if required, to reside in one of the station-houses; and every constable, upon leaving the force, is to deliver up his uniform. The plaintiff, who was unmarried, upon being required by the defendant to reside in a station house, refused to do so and resigned. The defendant sent another constable to demand his uniform, which he refused to give up (a). Having in the course of the same

(a) See now 2 & 3 Vict. c. 47, s. 16. Ante, vol. iii. 125, n. (a).

day gone to the station-house, the serjeant on duty detained him in custody until the following day, when he was taken before a magistrate and discharged. The plaintiff recovered a verdict for 5l.: but the judge refused to certify. Held, that the plaintiff was nevertheless entitled to his costs, inasmuch as the action was not brought "for any thing done in pursuance of the act."—In a case within the statute, *quære*, whether advantage should be taken of it by suggestion or by motion.—The costs of an unsuccessful motion to review the master's taxation do not necessarily follow the general costs of the cause. And where the question as to such taxation involved the construction of a difficult statute, the court discharged the rule to review, without costs.

Trespass and false imprisonment by a constable of the Metropolitan police force against a superintendent of that force (b)¹. The plaintiff recovered a verdict, with 5l. damages; but the learned judge who tried the cause did not certify his approbation of the action under sect. 41 of the stat. 10 G. 4, c. 44 (c) so as to [613] give the plaintiff his costs. The master having, notwithstanding, taxed the plaintiff his costs,

Humfrey in last Michaelmas term obtained a rule nisi for a review of such taxation.

Bompas Serjt. and Martin, in last Hilary term, shewed cause. They contended that, inasmuch as the record was made up in the ordinary way, the master was bound to tax the plaintiff his costs, as he was entitled to have judgment for costs as well as for damages; otherwise there would be error upon the record, of which advantage might be taken by the defendant himself; 1 Wms. Saund. 46 b. n. (8). If the judgment was not warranted by the previous proceedings on the record, the proper course would have been for the defendant to enter a suggestion on the roll, which the plaintiff might have demurred to, or traversed; *Barton v. Hunter* (1 Hudson & Brooke's Rep. K. B. Ireland, 569) recognised in *Bartlett v. Pentland* (b)². But the application for a suggestion would now be too late; *Barney v. Tubb* (2 H. Bla. 353); *Watchorn v. Cook* (2 M. & S. 348); *Calvert v. Everard* (5 M. & S. 510); *Hippesley v. Layng* (4 B. & C. 863, 7 D. & R. 265); *Baddley v. Oliver* (3 Tyrwh. 145, 1 C. & M. 219). Even assuming, however, that the application is correct in form, and proper in point of time, still there is nothing to shew that the act of which the plaintiff complained [614] was done by the defendant in pursuance of the 10 G. 4, c. 44; or even that the defendant had reasonable ground for supposing that it was, so as to bring the case with the decisions as to notices of action to privileged persons; *Cook v. Leonard* (6 B. & C. 351, 9 D. & R. 399); *Wedge v. Berkeley* (6 A. & E. 663, 1 N. & P. 665). And further, the facts not being presented to the court upon affidavit, they have no materials to act upon. (They were then stopped by the court.)

Humfrey, in support of the rule. There was no dispute at the trial, as to the act complained of having been done under the supposed authority of the statute. It is not necessary to produce an affidavit when a certificate is applied for to give or deprive a party of costs; as the facts appear on the judge's notes. So, upon a motion to enter a suggestion; *Oakes v. Albin* (13 Price, 783, M'Clel. 582). [Tindal C. J. An application to enter a suggestion upon the record under a court of conscience act, is always made upon affidavit.] The court would there have no other means of knowing the facts; but even in such cases a suggestion is not the only course. In Tidd's Practice (pa. 961, 9th ed.) it is said, "where the intent is, to call upon the other party to pay costs, it is necessary to enter a suggestion; but where the intent is, to exonerate the party applying, and the other party is not entitled to costs, a motion is sufficient to take them from him." In *Baildon v. Pitter* (3 B. & A. 210, 1 Chitt. R. 635), *Robinson*

(b)¹ For the pleadings and facts in this case, see vol. iii. of these Reports, p. 125.

(c) See the former part of this section set out, ante, vol. iii. 126, n. (a), which relates to actions, &c., "commenced against any person for any thing done in pursuance of the act." By the latter part it is enacted, that "though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon."

(b)² 1 B. & Ad. 704. See *Bosanquet v. Ransford*, 11 A. & E. 520, 3 P. & D. 298; *Cross v. Law*, 6 M. & W. 217; *Harwood v. Law*, 7 M. & W. 203; *Whittenburg v. Law*, 6 N. C. 345, 8 Scott, 661.

v. Vickers (1 Chitt. R. 636, n.), and *Fleming v. Davis* (5 D. & R. 371), the parties were exempted from payment of costs, upon motion. [Tindal C. J. The rule in this case might be assimilated to those in the cases mentioned, if it should appear that the act in question was clearly done [615] in pursuance of the statute. Upon that point we will look into the act and the judge's notes; if it shall appear that the act was not of that nature, it is not a case in which the judge could certify, and then cadit questio; but if it appears that the act was done under the authority of the statute, we will then consider the form of the rule. I do not think, looking at the dates, that the application can be considered as out of time. Martin. In *Basidon v. Pitter* and *Fleming v. Davis*, it appears that the application was made before judgment.]

Cur. adv. vult.

TINDAL C. J. now said that the court had looked at the learned judge's notes, and that they thought the act complained of was not within the meaning of the police act, but was quite wide of it, and could not be said to be done "in pursuance of" that statute, or of any power given thereby; and that the rule to review the master's taxation must be discharged.

Rule discharged.

Bompas Serjt., in the following Michaelmas term, obtained a rule nisi to amend the above rule (discharging the rule to amend the master's taxation) by adding the words "with costs."

Humfrey shewed cause (a) upon the ground that the question being one of great doubt and difficulty, the court would not have given costs, even if they had been asked for, at the time.

Bompas Serjt. admitted that he had not asked for costs at the time the judgment had been pronounced, which was not done till some time after the case had been argued, [616] when he was not present. He submitted that the motion to review taxation related as much to a matter in the cause as a motion to enter a suggestion; which, if discharged, would certainly have been so with costs. This was an appeal from the judgment of the master, which, having been supported by the court, the party who succeeded was entitled to the costs of the application.

TINDAL C. J. The costs of a motion to review the master's taxation do not necessarily follow the general costs of the cause. The court will see whether there was any ground for the application. The question in this case turned upon a difficult and embroiled act of parliament, and the master might have been either right or wrong in his view of the matter. I think it was a proper case in which to apply to the court. The general rule is certainly as contended for by my brother Bompas: but I think that where a case turns upon the construction of an act of parliament it is competent to a party to come to the court and ask whether the construction is this way or that. Upon the whole—especially considering the lapse of time in this case—I think this rule must be discharged; but we will say nothing about costs.

Per curiam. Rule to amend the former rule discharged.

[617] TANNER v. LEA AND OTHERS. June 9, 1842.

[S. C. 5 Scott, N. R. 237.]

The court, upon the application of the defendants, ordered the plaintiff's attorney to deliver his bill of costs, though upon the settlement of the action it had been expressly agreed between the attorneys of the respective parties, that, on certain accommodation being given to the defendants, the plaintiff's attorney should receive 60l. as an ascertained amount of costs between attorney and client.—The costs were directed to be taxed as between attorney and client.

Bompas Serjt. on a former day in this term, on behalf of the defendants, obtained a rule, calling upon the attorney for the plaintiff to shew cause why he should not deliver his bill of costs in the above cause.

It appeared from the affidavits on which the rule was obtained, that when the cause was at issue the proceedings were stayed under a judge's order, by consent, upon the defendants' undertaking to pay the debt and costs, to be taxed, within three weeks,

(a) Thursday, 24th November 1842.

or judgment. The debt and costs were paid, part of the payment being by a banker's draft at three months, which the plaintiff's attorney consented to receive in consideration of an agreed sum of 60*l.* being paid to him for costs, without any bill being delivered. The attorneys for the defendants afterwards demanded a bill of costs, which demand had not been complied with.

Channell Serjt. now shewed cause, on affidavits, which stated that the sum of 60*l.* had been expressly agreed upon between the attorneys on both sides, as the ascertained amount of costs between attorney and client. He submitted that this being a bargain between the parties, the court would not interfere.

Bompas Serjt. was heard in support of the rule.

TINDAL C. J. This appears to have been a bargain made for the benefit, not of the client, but of the attorney. And I do not see how we can refuse to interfere, when applied to for that purpose.

[618] MAULE and CRESSWELL JJ. expressed their concurrence; and the latter observed that as the defendants did not come to the court under any favourable circumstances, they ought not to have costs.

Per curiam; Rule absolute without costs; the costs in the cause to be taxed as between attorney and client.

GEIKIE AND ANOTHER v. HEWSON. SAME v. MARTIN. June 11, 1842.

[S. C. 5 Scott, 484.]

Pending an action of debt by A. against B., as acceptor of a bill for 468*l.* 1*s.* 9*d.*, and for 1500*l.* for goods sold and delivered, &c. A. filed an affidavit in the court of Bankruptcy under the 1 & 2 Vict. c. 110, s. 8, stating B. to be indebted to A. in 468*l.* 1*s.* 9*d.* for goods sold and delivered, &c., and also upon a bill for 468*l.* 1*s.* 9*d.*—Afterwards, on the 11th of February, B., with C. and D. as his sureties, gave a bond to A. conditioned for the payment of such sum as should be recovered in the action for the alleged debt, or for the render of B. On the 15th of March a fiat in bankruptcy was awarded against B. On the 21st of March A. signed judgment against B. for 1332*l.* 19*s.* 6*d.* On the 5th of April A. proved under the fiat, for 864*l.* 12*s.* 9*d.*, being the amount of the judgment debt excluding the 468*l.* 1*s.* 9*d.* On the 12th of April a ca. sa. against B. was lodged with the sheriff. On the 30th of May A. brought an action against C. and D. on the bond.—Held, that the proof under the fiat was an election to relinquish the action against B., and that B., being entitled to be discharged if rendered, C. and D. were entitled to have the proceedings stayed.

Sir Thomas Wilde Serjt. had obtained a rule nisi to stay the proceedings in these actions upon affidavits stating the following facts:—

On the 1st February 1842 the plaintiffs, as drawers and payees of a bill of exchange for 468*l.* 1*s.* 9*d.*, commenced an action of debt against James Gale and James Gale the younger, as the acceptors; the declaration contained also counts for goods sold and delivered, for [619] money paid, and on an account stated; the sum of 1500*l.* being claimed in each of such counts. The plaintiffs subsequently filed an affidavit in the court of Bankruptcy, under the 1 & 2 Vict. c. 110, s. 8 (vide ante, vol. iii. 159, n.), stating that the Gales were indebted to them in 468*l.* 1*s.* 9*d.*, for goods sold and delivered and money paid, and also upon a certain bill of exchange for 468*l.* 1*s.* 9*d.*, drawn by the plaintiffs upon and accepted by the Gales, at four months' date. A copy of this affidavit, and a notice demanding immediate payment of the debt, were duly served upon the Gales. On the 11th of February the Gales (together with the defendants Hewson and Martin as their sureties), executed the bond required by the same section of the act, conditioned for the payment by the Gales to the plaintiffs, of the sum to be recovered in the action, with costs, or for their render after judgment recovered. On the 12th of February, a judge's order was made, by consent, in the action against the Gales,—that, upon payment of 1332*l.* 19*s.* 6*d.*, the amount of debt due, and the costs, to be paid by instalments, all further proceedings in that cause should be stayed; and that in case default should be made in any payment, the whole should become due, and the plaintiffs be at liberty to sign final judgment, and issue execution for the whole amount unpaid, with costs, &c. &c. A fiat in bankruptcy

having been awarded against the Gales, the plaintiffs, on the 21st of March, entered up judgment in the action against them, for 1332l. 19s. 6d.; and, on the 5th of April, they proved under the fiat a debt of 864l. 12s. 9d., alleging that they had received no security or satisfaction for the same, except certain bills of exchange accepted by the bankrupts, "and a certain judgment in an action against the said bankrupts, signed on the 21st of March last for the said [620] debt of 864l. 12s. 9d., and a certain bill of exchange not included in the above debt" (namely, the bill for 468l. 1s. 9d.). On the 12th of April, the plaintiffs lodged a ca. sa. with the sheriff in the action against the Gales; and, on the 30th of May, they commenced the present actions upon the bond against two of the sureties, to recover the amount of the last mentioned bill.

The rule nisi was obtained upon the ground that, as the plaintiffs had proved for part of the debt, they had elected to relinquish the action, and had thereby released the sureties; and that, these sureties being in the nature of bail, they might render their principals, and were therefore entitled to summary relief on motion.

The learned serjeant referred to the stat. 6 G. 4, c. 16, s. 59; *Ex parte Glover* (1 Glyn & Jam. 270) and *Owston v. Coates* (10 Ad. & E. 193, 2 P. & D. 485).

Storks Serjt. now shewed cause. The bond in question having been given in the court of Bankruptcy established by the 1 & 2 W. 4, c. 56, that court has an equitable jurisdiction as to the sureties, and has power to afford them relief; but it is submitted that this court has no jurisdiction in the matter. [Tindal C. J. No objection appears to have been made to the jurisdiction in *Owston v. Coates*.] The application in that case was merely to render the principal; not, as here, to stay the proceedings in an action against the sureties. Where a bankrupt is clearly entitled to his discharge, the court undoubtedly will relieve the bail on motion; *Ray v. Hussey* (Barnes, 104); *Lining v. Comyn* (2 Taunt. 246); *Todd v. Maxfield* (3 B. & C. 222; 5 D. & R. 258). But the present case is very different. Here, there is no render, no certificate, no discharge. The bail are fixed. [Tindal C. J. Have not the plaintiffs, [621] by proving under the fiat, elected to relinquish their action against the bankrupts, under 6 G. 4, c. 16, s. 59?] Only, it is submitted, as to the debt proved. The proof under the fiat excluded the debt for which the bond was given. In *Harley v. Greenwood* (5 B. & Ald. 95) it was held that the election of the creditor to take the benefit of the commission was confined to the debt actually proved, and did not extend to distinct debts ejusdem generis due at the same time. *Watson v. Medex* (1 B. & Ald. 121) is to the same effect. [Sir T. Wilde Serjt. The result of the cases is, that where the action is brought first, there proof under the fiat discharges the action; where the proof is first, the debt proved is alone discharged. Tindal C. J. The question is, whether the judgment did not alter the nature of the debt. In this case the whole demand has become one entire judgment-debt. Is it then competent to the plaintiffs to separate that debt into two parts, and to prove under the fiat as to the one part and to proceed against the sureties for the other?] The debts are distinct in their nature, though they were included in the same action. There is nothing compulsory in the act. [Maule J. When a writ of *capias ad satisfaciendum* has lain four days in the office to fix the bail, can that be said to be a proceeding to which the term "action" properly applies? Tindal C. J. The plaintiff should not mix up the two questions together.] But at any rate, the present application is not the form in which the sureties are entitled to relief, even assuming that they stand in the situation of bail; *Sanders v. Spincks* (Barnes, 105). In *Clarke v. Hoppe* (3 Taunt. 46), where an action had been commenced, and the defendant afterwards became bankrupt, and then permitted judgment to be signed for want of a plea, the court would not relieve the bail on motion. There, the defendant had obtained his certificate.

[622] Sir T. Wilde Serjt., in support of the rule. In the present state of facts, it is clear that the sureties in this bond, being in the nature of bail, are not fixed; Tidd's Practice, p. 283 (9th ed.). The 1 & 2 Vict. c. 110, s. 8, requires the giving of a bond which is to have the effect of a recognisance of bail. The defendants were discharged as to the action, by the proof under the fiat after the action had been brought; *Ex parte Dickson* (1 Rose, 98); *Ex parte Hardenbergh* (ibid. 204); *Ex parte Woolley* (ibid. 394); *Ex parte Glover* (1 Glyn. & Jam. 270). In *Watson v. Medex* the proof was prior to the action. In *Harley v. Greenwood* the rule is laid down very clearly in the judgment of Holroyd J. The fifty-ninth section of the bankrupt act operates as a suspension of the proceedings in an action, defeasible in the event of the

fiat being afterwards superseded. If this had been the ordinary case of bail, the principal, when rendered, being entitled to his discharge, the court would give relief to the bail on motion. Now, by the eighth section of the 1 & 2 Vict. c. 110, the bond to be given to the creditor is in the terms of the old recognisance of bail, and is to become void upon the render of the principal, according to the practice of the court; and the court will not put the parties to the unnecessary trouble and expense of a render. [Maule J. Might not the bankrupt say, discharge me or expunge the debt?] Two cases only appear to have been decided upon the statute. *Owston v. Coates* is a distinct authority that the sureties in such a bond may discharge themselves by a render of the principal. But in this case, as the right of action against the principal is at least suspended by the proof under the fiat, the principal cannot be called upon to render; and the sureties have therefore a right to be relieved. In [623] *Saunderson v. Parker* (9 Dowl. P. C. 495) a ca. sa. was sued out to fix the bail; but, the principal being in custody, the ca. sa. was held to be unnecessary and irregular, and the ca. sa. was set aside and the proceedings on the bond were stayed. If the plaintiff is bound to relinquish his action, it is clear that the defendants, if rendered, would be discharged.

TINDAL C. J. I am of opinion that this application ought to be granted. It appears to me, that the sureties in this case stand in the same situation as parties who have entered into a recognisance of bail, where the plaintiff has proved under the bankruptcy of the principal. In such a case the first question would be, whether the bail would not continue liable to be fixed until something had been done to discharge their liability, after a ca. sa. had issued. Here, however, the ca. sa. itself appears to be irregular; for if the case falls within the 6 G. 4, c. 16, s. 59, the proof of the debt would operate as a suspension of the action (b). The point therefore comes to this—have the proceedings adopted by the plaintiffs that operation? And I am of opinion that they have.

The words of the act are very strong,—that no creditor who has brought any action against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved under the commission, shall prove a debt under such commission, or have any claim entered upon the proceedings, without relinquishing such action; and the proving or claiming a debt under a commission shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt proved or claimed. Now, in [624] this case, the creditors have not only brought an action to recover a large sum, but have gone so far as to sign judgment for the whole amount. After doing this they have proved under the fiat for that which forms a component part of the entire sum. In *Harley v. Greenwood* the main question was, whether the action was brought before or after the proof of the debt. In the present case no such question arises. The sum for which judgment has been signed includes both causes of action, and the plaintiffs have proved under the fiat upon one of those causes of action only. But in *Ex parte Glover* it was held, that proof by a creditor for one debt operated as a relinquishment of an action previously brought in respect of a distinct demand. Here, the party has done more, because the debt proved formed a part of the debt for which the action was brought. The plaintiffs, therefore, could not have enforced the claim against the bankrupt; with regard to that portion of the debt for which judgment had been obtained, which related to the bill for 468l. 1s. 9d. Nor am I aware of any authority they had, to sever that judgment, and to prove for one part and proceed to execution for the remainder. The two sums being united in the form of a judgment, cannot again be severed. To hold that the plaintiffs could recover against the sureties, would be directly contrary to the decision in *Ex parte Glover*. If bail would be entitled to relief in such a case, I cannot see why it should be refused to the sureties in this bond. As, therefore, in respect of these actions, the sureties would be entitled to relief if the bankrupts were rendered, they ought not to be driven to the expense of that circuitous course. For these reasons, therefore, I think that the proceedings against them should be stayed.

COLTMAN J. I am of the same opinion. The case falls precisely within the first portion of the fifty-ninth [625] section of the 6 G. 4, c. 16. The plaintiffs having

(b) A right of action, if suspended by operation of law, is not extinguished; if suspended by the act of the party, it is gone for ever. See 1 Roll. Abr. tit. Extinguishment, (L), (M); ante, 476 (c).

proved a debt under the fiat, have elected to relinquish their actions against the bankrupt. And their sureties under the eighth section of the 1 & 2 Vict. c. 110, being in the nature of bail, are clearly entitled to relief on summary application to the court, in which the action was brought. It was evidently the intention of the legislature, that the sureties in the bond described in that act should be entitled to discharge themselves upon rendering their principal. And the object of the present application is, to obtain relief under the equitable jurisdiction of the court. If we were to refuse to grant the application, the effect would be that the principals must be rendered, whereby the sureties would be discharged. But that would be a great hardship upon the bankrupts, as they would have a right to be immediately discharged out of custody. I think therefore that, as in the case of recognizance of bail, we ought at once to grant the relief; and that the rule must be made absolute to stay the proceedings against the sureties.

MAULE J. I also am of opinion, that the obligors in this case, who are in the nature of bail, should have this summary relief. The meaning of "relinquishing such action or suit," in the first branch of the fifty-ninth section of the 6 G. 4, c. 16, is explained by the subsequent part of the clause to be "proceeding no further in the action." I had some doubt at first, whether this application should not have been made to the court of Review instead of being made to this court. But, upon consideration, I think that the authority is properly exercised by the court in which the action is brought, since the act of parliament is silent as to the court which is to have jurisdiction over the subject. The court in which this action is brought, has therefore no right to withdraw from the duty im-[626]-plicitly imposed upon it, and I think we are bound to administer the relief which the statute has provided. The action is not determined. The effect of the application is, that the sureties are not to be called upon to render their principals, until after the fiat is superseded, if that event shall ever happen.

Cresswell J. concurred.

Rule absolute (a).

DAVIDSON, one of the Public Officers of the Commercial Bank of England
v. BOWER. June 4, 1842.

The declaration described the plaintiff as one of the public officers of certain persons united in co-partnership for the purpose of carrying on the trade or business of bankers in England, according to the 7 G. 4, c. 46. The declaration contained a count for work and labour done by the co-partnership as the bankers of the defendant, and for commission due in respect thereof:—Held, on motion in arrest of judgment, that, looking at the whole record, it sufficiently appeared that the co-partnership were carrying on business as bankers under the statute.

Assumpsit. The declaration commenced as follows: "Alexander Davidson, one of the present public officers of certain persons united in co-partnership for the purpose of carrying on the trade or business of bankers in England, according to the statute made and passed in the seventh year of the reign of His late Majesty George the Fourth, intituled 'An act for the better regulating co-partnerships of certain bankers in England, and for amending so much of an act of the thirty-ninth and fortieth years of the reign of His late Majesty King George the Third, intituled An act for establishing an agreement with the Governor and Company of the Bank of England, for advancing the sum of 3,000,000*l.* towards the supply for the service of the [627] year 1800, as relates to the same,' and called the Commercial Bank of England, which Alexander Davidson hath been duly nominated and appointed, and now is, one of the public officers of the said co-partnership, according to the force, form, and effect of the said act of parliament, complains" &c. The declaration then proceeded in the usual form of an indebitatus assumpsit for money lent,—for money paid,—for the price and value of divers shares in divers public companies bargained and sold by the co-partnership to the defendant,—for work and labour, care, diligence, and attendance of the co-partnership, done, performed, and bestowed as the bankers of and for the defendant at his request, and for commission and reward due and of right payable

(a) See *Kymer v. Sydserf*, post, 636.

from the defendant to the co-partnership in respect thereof,—for interest,—and upon an account stated.

Pleas: as to 10l. parcel, &c. payment into court; as to all but 10l.—non assumpsit—payment—and set-off.

The plaintiff took the 10l. out of court, joined issue on the second plea, and took issue on the third and fourth.

At the trial before Rolfe B. at the last Liverpool assizes, it appeared that the plaintiff was registered as one of the public officers of a banking co-partnership, called "The Commercial Bank of England," of which the defendant was a shareholder, and had been a director. The action was brought to recover a balance of principal and interest in respect of 1500 shares of 5l. each, which, by an agreement among the directors for a division among them of the shares in the undertaking not disposed of, had been allotted to the defendant, credit having been given to him, from time to time, for the dividends declared on such shares. The jury having returned a verdict for the plaintiff, for 5182l.,

Channell Serjt. in last Easter term, moved in arrest of judgment, on the ground that it did not appear by [628] the declaration, that the company were carrying on the trade and business of bankers, so as to bring them within the provisions of the 7 G. 4, c. 46, s. 9 (a), and the 1 & 2 Vict. c. 96 (b). It is consistent with what is [629] stated in the declaration, that the company may never have carried on business at all. The learned serjeant cited *Fletcher v. Crosbie* (9 M. & W. 252, 1 Dowl. N. S. 149). A rule nisi having been granted,

(a) Which enacts, "that all actions and suits, and also all petitions to found any commission of bankruptcy, against any person or persons who may be at any time indebted to any such co-partnership carrying on business under the provisions of this act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such co-partnership, against any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such co-partnership, or for any other matter relating to the concerns of such co-partnership, shall, and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid, for the time being, of such co-partnership as the nominal plaintiff or petitioner for and on behalf of such co-partnership," &c. &c.

(b) Which, after reciting the foregoing provision, enacts, "that any person now being, or having been, or who may hereafter be or have been, a member of any co-partnership now carrying on, or which may hereafter carry on, the business of banking under the provisions of the said recited act, may at any time during the continuance of this act, in respect of any demand which such person may have, either solely, or jointly with any other person, against the said co-partnership, or the funds or property thereof, commence and prosecute, either solely, or jointly with any other person, (as the case may require), any action, suit, or other proceeding at law or in equity, against any public officer appointed or to be appointed under the provisions of the said acts, to sue and be sued on behalf of the said co-partnership, and that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding, at law or in equity, against any person being or having been a member of the said co-partnership, either alone, or jointly with any other person, against whom any such co-partnership has or may have any demand whatsoever, and that every person being or having been a member of any such co-partnership shall, either solely, or jointly with any other person, (as the case may require,) be capable of proceeding against any such co-partnership, by their public officer, and be liable to be proceeded against by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said co-partnership, and that no action or suit shall in any wise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in any wise interested or concerned in such action, being or having been a member of the said co-partnership, and that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers."

Shee Serjt. (with whom were Knowles, Crompton, and Martin) now shewed cause. It is submitted that the declaration is sufficient, being in the form used in *Spiller v. Johnson* (6 M. & W. 570, 8 Dowl. P. C. 368), and *Christie v. Peart* (7 M. & W. 491, 9 Dowl. P. C. 291), where the present point was not taken. Although the declaration might have been held bad on special demurrer, according to the case of *Fletcher v. Crosbie*, the objection cannot prevail when taken in arrest of judgment. It is clear, looking at the whole of the record, that the company were carrying on business as bankers. [Maule J. The declaration states, that the parties are united in partnership for the purpose of carrying on the trade or business of bankers, and their claim against the defendant is for a banking account. Surely that is sufficient.] In *Fletcher v. Crosbie* it did not appear on the record that the action was brought for banking business. Moreover, here the declaration is aided by the verdict, and the jury must be assumed to have found, that there was a balance due from the defendant to the co-partnership upon a banking account. [630] Besides, there has been a payment of money into court, which is an admission of a contract.

Channell Serjt. (with whom were Dundas and W. H. Watson), in support of the rule. This is an objection that may be taken as well in arrest of judgment as by special demurrer; for the defect is one of substance and not of mere form. To entitle the plaintiff to sue as one of the public officers of the bank, the co-partnership must have been actually carrying on business as bankers under the statute. [Cresswell J. Suppose the company to comply with all the requisites of the act, and to open their bank and transact such business as they might have carried on without the intervention of the act.] It would not be sufficient for them to act as private bankers, they must carry on business as bankers under the statute. *Fletcher v. Crosbie* ought to govern this case. There, the declaration, which described the plaintiff "as one of the present public officers of certain persons united in co-partnership for the purpose of carrying on the trade and business of banking in England," according to the statute 7 G. 4, c. 46, was held bad on special demurrer, for not stating that the co-partnership was carrying on the trade and business of bankers or had carried on such trade. It is true, that here there is a count for commission; but that only shews that the company carried on business as private bankers, not that they carried it on under the act. The payment of money into court only operates as an admission to the extent of the sum paid in.

TINDAL C. J. When the plaintiff is described as a public officer of the co-partnership, the inference is that the co-partnership was carrying on business under the act. The ninth section of the 7 G. 4, c. 46, confers a great benefit on the public, not only authorising the [631] bank to sue, but also allowing it to be sued. Looking at the whole record, it is fairly to be intended that the company were conducting the business of bankers under the provisions of the statute.

Per curiam. Rule discharged.

CHAPMAN v. ELEY. June 9, 1842.

Semble, that where a trial has taken place during term, the four days within which the parties may move for a new trial must be reckoned inclusively of the day of the return of the distringas.

This action was tried before Erskine J. at the sittings for Westminster during this term (Thursday, May the 26th), when the plaintiff recovered a verdict for 40s. The distringas was returnable the following day (Friday the 27th.)

Shee Serjt., on Wednesday, June the 1st, obtained a rule nisi for a new trial on the ground of surprise. On the same day the plaintiff signed judgment.

Glover Serjt., on Friday the 3d, obtained a rule nisi to set aside this judgment for irregularity; upon the ground that the defendant had four clear days from the return of the distringas, to move for a new trial. He referred to *Mason v. Clarke* (1 Dowl. C. P. 288, 1 Tyrwh. 534, 1 C. & J. 411), Reg. Gen. Hil. 2 W. 4, r. 67 (b),

(b) 8 Bingh. 297. "After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return; and, after a verdict or nonsuit, on the day after the appearance day of the return of the distringas or habeas corpora, without any rule for judgment."

and to Archb. Prac. p. 1099, 7th ed. [Tindal C. J. referred to *Kirkham v. Marter* (2 B. & A. 613, 1 Chitt. Rep. 382), and observed that in cases of trials on the circuit, the *distringas* was [632] returnable on the first day of term, but the motion for the new trial must be made within the first four days of the term.]

Channell Serjt. now shewed cause. The *distringas* having been returnable on the 27th of May, the motion for a new trial, made on the 1st of June, was too late; for the plaintiff was entitled to sign judgment on that day, as the four days within which a party must move for a new trial are reckoned inclusive of the day of the return of the *distringas*. In the passage from Archbold's Practice, which was cited when the rule was obtained, it is said "the motion for the rule nisi must be made within four days after the *distringas* is returnable." For this, *Kirkham v. Marter* is cited as an authority. But it is afterwards added, "the four days are reckoned inclusive of the first and last day." But whether both days are included, or only one, the plaintiff was entitled to sign judgment in this case. The rule of Hilary term 2 W. 4, r. 67, leaves the time when judgment may be signed in some doubt, as it only fixes "the day after the appearance day of the return of the *distringas*;" but such appearance day is clearly ascertained by the 1 W. 4, c. 3, s. 2 (a)¹, as being the third day after the return of the *distringas* exclusive of the day of the return; Tidd's New Practice, p. 45.

[633] There is another objection in this case. Where a rule nisi for a new trial has not been obtained in time,—as from pressure of business in the court,—the party who seeks to obtain it must give notice to the other party of his intention to move; *Doe dem. Duncan v. Edwards* (7 Dowl. P. C. 547). In this case the rule nisi was not served till twelve o'clock on the 2d of June, and no previous notice had been given. The learned serjeant stated these facts from affidavits.

Shee and Glover Serjts., in support of the rule. In the note to *Kirkham v. Marter*, in the report in Chitty, it is said, "In C. P., if a cause be tried in term time, the notice for a new trial must be made before or on the appearance day of the return of the *habeas corpora juratorum*, if returnable, as in actions by original, on a general return day; or if returnable on a day certain, then within four days exclusive of the return day." [Maule J. The word "exclusive" in that passage must be a misprint for "inclusive." Chitty refers to Imp. C. P. 434, and Tidd, 6th ed. 934. The latter writer also refers to Impey; and they both say that the four days are to be reckoned inclusively of the return day.] In *Young v. Higgon* (6 M. & W. 49, 8 Dowl. P. C. 212), it was held that in the computation of the calendar month's notice of action to a justice, required by the 24 G. 2, c. 44, s. 1, the day of giving the notice and the day of suing out the writ, are both to be excluded (c). [Cresswell J. That case has no reference to the rule as to motions for new trials. The question would rather seem to turn on the words of the general rule, H. 2 W. 4, r. viii. by which it is ordered "that, in all cases in which any particular number of days, not expressed to be clear [634] days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas day, Good Friday or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also."] Before the stat. 1 W. 4, c. 3—when it was necessary to have a rule for judgment,—it was held that the rule should have four clear days, exclusively of the first and last, and of Sunday, before judgment could be signed; *Roberts v. Stacey* (a)². [Maule J. There is no question but that the motion for a new trial might have been made at the sitting of the court on Friday, the 27th; and, therefore, if the

(a)¹ Which enacts "that all writs now usually returnable before any of His Majesty's courts of King's Bench, Common Pleas, or Exchequer respectively, on general return days, that shall be made returnable after the 1st day of January 1831, may be made returnable on the third day exclusive before the commencement of each term, or on any day, not being Sunday, between that day and the third day exclusive before the last day of the term; and the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return, or in case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return."

(c) See also *Mitchell v. Foster*, 12 A. E. 472; and see ante, vol. iii. p. 166; *Gibson v. Muskett*, ante, p. 160.

(a)² 13 East, 21. See also *Bromley v. Foster*, 1 Chitt. R. 562.

defendant was right in moving on the following Wednesday, he would have five whole days for the purpose, not reckoning the intervening Sunday ; and that is more than is allowed by the rules of the court.]

TINDAL C. J. I think that under all the circumstances of the case, as the defendant has obtained a rule nisi for a new trial, the judgment may be set aside on payment of costs.

Per curiam. Rule accordingly.

[635] H. MIRFIN, Wife of ——— Mirfin, to ———. June 9, 1842.

[S. C. 5 Scott, N. R. 166 ; 2 D. N. S. 110 ; 12 L. J. C. P. 92.]

Where a married woman, heir of a surviving trustee, lived apart from her husband, who was in a very nervous and excitable state, so as to render it difficult, if not impossible, to procure the execution by him of any legal instrument, the court refused to dispense with his concurrence in the conveyance of the property (under 3 & 4 W. 4, c. 74, s. 91), until an application had been made to him to concur ; although neither husband nor wife had any interest in the property to be conveyed.

Channell Serjt. moved for an order to enable a married woman to convey certain property without the concurrence of her husband, under the stat. 3 & 4 W. 4, c. 74, s. 91 (a). It appeared from the affidavits that Mrs. Mirfin was the heir of the survivor of three trustees, in whom the property in question was vested ; that neither she nor her husband had any interest in the property ; that for the last four years they had been living apart by mutual consent ; that Mr. Mirfin was in a very nervous and excitable state, and it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed or other legal instrument.

TINDAL C. J. I think that some application should be made to the husband for his concurrence ; and that none being shewn, the rule ought not to go.

Channell Serjt., on a subsequent day, renewed his application, upon an affidavit stating that an application [636] had been made to the husband for his concurrence, and that he had refused to execute the conveyance : whereupon,

Per curiam. Rule granted.

KYMER v. SYDSERF. June 9, 1842.

A ca. sa. issued against the principal, for the purpose of fixing the sureties in a bond given under 1 & 2 Vict. c. 110, s. 8, had only fifteen days between the teste and return.—Held, not irregular.

Channell Serjt. moved to set aside a *capias ad satisfaciendum* for irregularity. The writ of summons issued on the 8th of February last ; on which day the defendant was served with a copy of an affidavit, filed under the 1 & 2 Vict. c. 110, s. 8 (*vide ante*, vol. iii. p. 159, n.), stating that the defendant was indebted to the plaintiff in 160l., and that the defendant was a trader within the meaning of the bankrupt laws. At the same time a notice was delivered to the defendant (pursuant to the same statute) requiring payment of the debt. On the 23d of March, the defendant entered into the bond required by the statutes) with two sureties. On the 30th, final judgment was signed, and on the 31st, the costs were taxed. On the 6th of June, the plaintiff

(a) Which enacts "that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court-roll ; or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court of Common Pleas at Westminster, by an order, to be made in a summary way, upon the application of the wife, and upon such evidences as to the said court shall seem meet, to dispense with the concurrence of the husband, in any case in which his concurrence is required by this act or otherwise : " &c.

(with the view of fixing the sureties), sued out the ca. sa. in question, which bore teste of the 31st of May, and was returnable on the 13th of June.

The learned serjeant contended, that the ca. sa. was irregular, by reason of there not being fifteen days between the teste and the return of the writ. Assuming that the sureties in the bond given in pursuance of the stat. 1 & 2 Vict. c. 110 are in the nature of bail, in order to charge them, there ought, by the old practice in this court, to have been fifteen days between the teste and the return of the ca. sa., which must have been sealed in or after the term in which the judgment was signed [637] against the principal; and the writ must have lain in the sheriff's office four days exclusive, before it was returnable. For the stat. 13 Car. 2, stat. 2, c. 2, s. 7—whereby eight days between the teste and the return of the writ were made sufficient, where the proceedings were by bill—was not applicable to this court, where the proceedings were not by bill; Tidd's Prac. 1099 (9th ed.). The stat. of Charles II. has not been in terms repealed, though it possibly may be so in effect, by the uniformity of process act (a)¹. The difficulty however is, that the original writ is taken away by that statute. [Maule J. Suppose the rule to be, that where a writ is returnable on a day certain, eight days would be sufficient between the teste and the return. And as now all writs are made returnable on a day certain (see 3 & 4 W. 4, c. 67, s. 2), would not the rule be applicable?] Probably it must be so taken (a)¹. And undoubtedly in this case the writ was made returnable more than eight days, though less than fifteen. [Maule J. In *Owston v. Coates* (10 A. & E. 193, 2 P. & D. 485), the sureties given in pursuance of the stat. 1 & 2 Vict. c. 110 were considered so far on the footing of bail, that it was held they might discharge themselves by a render of their principal. But that statute has put an end to bail in the old sense of the term. Tindal C. J. The writ being altered, the law no longer remains the same.]

Per curiam. Rule refused (d).

[638] BENNETT v. DEAN. June 13, 1842.

An order for the delivery of an attorney's bill may be made by a judge of a different court from that in which the action is brought, although a judge of the latter court is attending at chambers at the time such order is made.

Channell Serjt. moved to set aside an order made by Wightman J. at chambers, for the delivery of an attorney's bill in a cause in this court, upon the ground of want of jurisdiction, inasmuch as the order was made by that learned judge whilst a judge of this court was attending at chambers. [Maule J. The application is wholly groundless. The stat. 1 & 2 Vict. c. 45, s. 1 (a)², gives a general and concurrent jurisdiction to the

(a)¹ By 2 W. 4, c. 39, s. 1, the process by which all personal actions are to be commenced, (subject to an exception since taken away,) is the writ of summons. This process, not being founded upon any antecedent matter, real or supposed, is, in truth, an original writ.

The delay of fifteen days between the teste (when the writ is supposed to issue,) and the return, was not, however, an indulgence granted to defendants sued by original, but a general privilege, subject to a special derogation by statute in the case of proceedings by bill.

(d) See *Giekie v. Hewson*, ante, 618.

(a)² Which enacts "that every judge of the courts of Queen's Bench, Common Pleas or Exchequer, shall have equal jurisdiction, power and authority to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding in either of the said courts of Queen's Bench or Common Pleas, or on the common law or revenue side of the said court of Exchequer, or relating to the granting writs of certiorari or habeas corpus, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to Her Majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no common jurisdiction therein, in like manner as if the judge so transacting business had been a judge of the court to which the same by law belongs."

judges of all the courts in any business which may be transacted out of court by a single judge.]

The rest of the court concurring, the learned serjeant
Took nothing.

[639] ELLIS v. STEBBING. June 9, 1842.

Where issue is joined in a country cause in, or in the vacation before, an issuable term, the motion for judgment as in case of a nonsuit, cannot be made until after the lapse of two assizes.

Talfourd Serjt., on a former day in this term obtained a rule nisi for judgment as in case of nonsuit, upon an affidavit stating that issue had been joined on the 8th of December 1841.

Channell Serjt. afterwards shewed cause upon affidavits, by which it appeared that this was a country cause. He contended that the application for judgment as in case of a nonsuit, was made too soon. The issue being joined in Michaelmas vacation, must be taken to refer to the following term; until which time the parties were not bound to join issue. He referred to *Duggan v. Wilbraham (a)*¹, and to the note to that case in 1 Scott, N. R. 213.

Talfourd Serjt. admitted, that in *Heeles v. Kidd* (10 M. & W. 76, 1 Dowl. N. S. 663), the court of Exchequer had overruled the case of *Higgins v. Stanley* (ante, vol. ii. 336. Vide ibid. 956).

The court ordered the case to stand over in order that they might inquire into the case of *Higgins v. Stanley* (which had not then been reported), and stated on a subsequent day that the rule was now considered to be well settled according to the note supplied by Alderson B. (ante, vol. ii. 956); and that the motion for judgment as in case of a nonsuit in this case had been made too soon.

Rule discharged.

[640] EX PARTE FLEETWOOD. June 13, 1842.

The 2 & 3 Vict. c. 11, s. 8, provides that a register or index of debtors to the Crown shall be made by the senior master of this court. By sect. 9, whenever a quietus shall be obtained by a Crown debtor, and a copy thereof left with the master, he is required to enter in the index the name of the person whose estate is intended to be discharged.—Where it appeared that certain bonds, given to the Crown to secure an advance of exchequer bills, which had been duly indorsed, had been paid off, but no quietus had been obtained, by reason of the abolition of the pipe-office, the court, upon the production of a warrant by the attorney-general on behalf of the Crown, ordered the master to make a minute in the index of the Crown debtors that the bonds had been satisfied; valeat quantum.

Sir T. Wilde Serjt., applied for an order, that the senior master of this court might make a memorandum in the index to debtors and accountants to the Crown, that certain bonds given to the Queen by Sir Peter Hesketh Fleetwood had been satisfied. The application was made under the stat. 2 & 3 Vict. c. 11 (a)², s. 9.

(a)¹ Ante, vol. i. 240, 1 Scott, N. R. 212. See also *Doe dem. Balls v. Margrave*, ante, vol. i. 334; 1 Scott, N. R. 213, n.

(a)² "An act for the better protection of purchasers against judgments, Crown debts, lis pendens, and fiats in bankruptcy."

Sect. 8 enacts, "that no judgment, statute, or recognizance which shall hereafter be obtained or entered into in the name or upon the proper account of Her Majesty, her heirs, or successors, or inquisition, by which any debt shall be found due to Her Majesty, &c., or obligation or specialty which shall hereafter be made to Her Majesty, &c., in the manner directed by the act 33 Hen. 8, c. 39, or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages, under the provisions of the act 13 Eliz. c. 4, shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last

[641] The following facts appeared from the affidavits. In August 1840, the commissioners for public works, appointed under the stat. 1 & 2 W. 4, c. 24, advanced the sum of 66,000*l.* in Exchequer bills to the Preston and Wyre Railway Harbour and Dock Company, for the completion or in aid of the improvement of the harbour of Fleetwood, in the county palatine of Lancaster, upon the security of a mortgage by the company to the secretary of the commissioners of the railway, harbour, &c., and also all the works, freehold and leasehold messuages or tenements, lands, &c. belonging to the company; and upon the further security of two bonds dated the 10th August 1840, from Sir Peter H. Fleetwood of Rossall Hall, in the said county, to Her Majesty, her heirs and successors, each in the penal sum of 132,000*l.* On the 14th of the same month memoranda containing the name, place of abode and title of Sir Peter H. Fleetwood, and the sums for which [642] the bonds were given, and the dates of the same were, in pursuance of 2 & 3 Vict. c. 11, s. 8 (*supra*, 640, *n.*), left with the senior master of this court, to be entered by him in the "Index" therein mentioned. On the 12th of February in this year, the principal sum of 66,000*l.*, with 4936*l.* 8*s.* 8*d.* interest thereon, was, upon the certificates of the commissioners, paid to one of the cashiers of the Bank of England, who, in pursuance of the 1 & 2 W. 4, c. 24, s. 13 (*b*),

place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and also in the case of any judgment, the court and the title of the cause in which such judgment shall have been obtained, and the date of such judgments, and the amount of the debt, damages and costs thereby recovered, and also in the case of a statute or recognizance, the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also, in the case of an obligation or specialty, the sum in which the obligor shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office, and the time of the officer accepting the same, shall be left with the senior master of the said court of Common Pleas, who shall forthwith enter the same particulars in a book to be intituled, 'The Index to Debtors and Accountants to the Crown,' in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute or recognizance, inquisition, obligation or specialty, or the acceptance of any office," &c.

Sect. 9 enacts, "that whenever a quietus shall be obtained by a debtor or accountant to the Crown, and an office copy thereof shall be left with the senior master of the said court of Common Pleas, together with a certificate, signed by the Accountant-General, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the Crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date," &c.

(*b*) Which enacts, "that the Governors and Directors of the Bank of England are hereby required to continue the account now open in their books with the commissioners for the execution of the said recited acts, under the title of 'Commissioners for the issue of certain Exchequer Bills,' and shall carry to the credit of such account the several moneys by the said recited act or this act directed to be paid to the cashiers of the said Bank of England; and whenever the said commissioners for the execution of the said recited act, and this act shall have advanced or lent any of the exchequer bills to be made out in pursuance of this act to any person or persons, body politic or corporate, the said commissioners shall, at some time before the sums contained therein shall be to be repaid, deliver to such person, &c., at his or their request, one or more certificate or certificates, under the hands of any three or more of them, specifying the amount of the exchequer bills lent and advanced to such person, &c., and the amount of the money to be received on account thereof; and the said cashiers of the bank, or one of them, shall, upon the production of such certificate or certificates, accept and receive from the person or persons producing the same, the amount of the money therein mentioned to be receivable, and at the foot of such certificate or certificates shall acknowledge the receipt of the said money, without fee or reward; and every receipt so given as aforesaid shall be afterwards brought to the office of the said commissioners, and by them entered in proper books to be provided and kept for that purpose, and the said commissioners, or any three or more of them, shall attest

at the foot of such certificates had ac-[643]-knowledgeed the receipt of the said sums respectively. The receipts of the cashier were afterwards taken to the office of the commissioners, and entered in the proper book provided and kept for that purpose, and were afterwards attested by three of the commissioners under their hands, and returned to the persons producing the same, in the manner prescribed by the said statute. On the 24th of February the commissioners resolved that the said two bonds be delivered up to Sir Peter H. Fleetwood, and that he be acquitted and discharged from all claims and demands upon the said bonds or either of them; and in pursuance of such resolution the bonds were delivered up to his solicitor. It further appeared that a quietus could not now be obtained, so as to comply with the requisition of the 2 & 3 Vict. c. 11, s. 9 (supra, 641).

The following consent of the attorney-general on behalf of the Crown was also produced;

"The two bonds, bearing date respectively on the 10th day of August 1840, made to Her Majesty by Sir [644] Peter Hesketh Fleetwood, of Rossall Hall, in the county palatine of Lancaster, Bart., each in the penal sum of 132,000l. having been satisfied, I consent to a rule or order of the court of Common Pleas being drawn up, directing the senior master of that court to enter a minute or memorandum in the index to debtors and accountants to the Crown accordingly."

The learned serjeant stated in answer to a question from the court, that the application was made on behalf of the Exchequer Bill Loan Commissioners. The eighth section of 2 & 3 Vict. c. 11 (supra, 640) established a new mode of registering the Crown judgments. The ninth section (supra, 641) requires the master to enter a memorandum of the discharge of the debtor upon the production by him of an office-copy of a quietus (c), which was formerly given in the Pipe office (d); but since the passing of that act, the Pipe office has been abolished (5 & 6 Vict. c. 86, s. 1), and there are no means of complying with the requisitions of the statute in that respect. All the other formal proceedings are correct. The entry of the master is the only means of effectually discharging the estates in question. [Maule J. Is not a great part of the business formerly done at the Pipe office now done at the Treasury?] The duties of the clerk of the Pipe are now principally performed by the Queen's Remembrancer (5 & 6 Vict. c. 86, s. 2). [Tindal C. J. Can we make the law? The act says, that the entry is to be made upon the party's producing an office copy of the quietus. How can that be dispensed [645] with? Cresswell J. It does not appear

the same under their hands, and return the same to the person or persons producing the same at the said office; and every such receipt so attested, and every such entry in any of the said books, shall respectively from thenceforth be a valid and effectual acquittance and discharge for the sum or sums expressed therein to have been received, as well against the said commissioners and every of them, their and every of their executors and administrators, as also to the person or persons to whom such receipt or receipts shall be given, and to all and every the person and persons who shall have entered into any security in respect of the exchequer bills mentioned in such certificate to which such receipt shall be subscribed, their and every of their heirs, &c., respectively, to all intents and purposes whatsoever; and all money which may be recovered by any legal or other proceedings directed by the said commissioners under the authority of the said recited acts, or any of them, or this act, shall be paid by the secretary of the said commissioners, or such other persons as may be appointed by them for that purpose, into the same account, upon a certificate to be signed by three or more of the said commissioners, specifying on what or on whose account the said money may have been recovered; and the said cashiers of the bank, or any one of them, shall, upon the production of such last-mentioned certificate, accept and receive from such secretary or other persons the moneys mentioned in such last-mentioned certificate, and at the foot of such certificate shall acknowledge the receipt of the said moneys, without fee or reward."

(c) A quietus obtained by a party who is an accountant to the Crown, is pleadable to all prior debts, although he continue to be an accountant, and become indebted afterwards to the Crown; *Rex v. Wilkinson*, Bunbury, 315.

(d) As to the entry of a quietus in the court of Exchequer by the clerk of the Pipe, or by the auditors of the receipt, see Blount's Law Dict. sub voce.

that the court have any power given them by the statute to pronounce the discharge of the Crown debtor. The master, however, may make the entry, valeat quantum.]

TINDAL C. J. There can be no objection to his making a minute of the facts ; and we will order him to make that minute.

Per Curiam. Rule accordingly (a).

[646] MILLER v. NEWMAN. May 25, 1842.

[S. C. 11 L. J. C. P. 265.]

The mere delivery of goods by A. to B., will not support an action at the suit of A. for goods sold and delivered, where it appears that A. was to pay B. a commission upon the sale of the goods to B.

Debt, for goods sold and delivered, and on an account stated. Plea, nunquam indebitatus.

The action was brought to recover the sum of 16l. 5s. for bread sold by the plaintiff, a baker, to the defendant. The cause was tried before the under-sheriff of Worcestershire. Two witnesses were called for the plaintiff. The first proved the delivery of the bread ; but on cross-examination stated that the defendant was in the habit of selling bread for the plaintiff at a commission of 20d. in the pound. The second proved a demand of payment, when the defendant said he would pay as soon as he had money enough. The amount of the claim was not stated at the time. The under-sheriff, upon the authority of *Holland v. Hopkins* (2 B. & P. 243), directed a nonsuit, but reserved leave to the plaintiff to move to set it aside.

Channell Serjt. now moved accordingly. He submitted, that although, where it was clear, as in *Holland v. Hopkins*, that the defendant had sold goods on commission for the plaintiff, the latter could not recover against him, as for goods sold and delivered, yet in the present case, though there might have been evidence that the bread was sent to the defendant on commission, yet the question should have been left to the jury ; and at any rate there was evidence of an account stated. [Maule J. The matter might have been equivocal perhaps, upon the evidence of the second witness ; but it is explained [647] by the cross-examination of the first. Tindal C. J. It does not appear from the second witness's statement that any amount was mentioned to the defendant : so that the count on an account stated cannot help the plaintiff. And then the first witness puts him out of court as to the first count.]

Per curiam. Rule refused.

MALONEY v. STOCKLEY. June 9, 1842.

[S. C. 2 D. N. S. 122 ; 12 L. J. C. P. 92.]

Debt for money had and received, and upon an account stated ; pleas, nunquam indebitatus, payment and set-off.—An award that a verdict be entered for the defendant on all the issues, is insufficient, as not deciding the set-off.

Debt, for money had and received, and upon an account stated.

Pleas : first, never indebted ; secondly, payment ; thirdly, a set-off.

By an order of nisi prius, the verdict was entered for the plaintiff for the damages in the declaration, subject to the award of an arbitrator, to whom the cause and all

(a) The rule was drawn up in the following form :—

“Upon reading the affidavits, &c., and on reading the consent of the attorney-general on behalf of the Crown, it is ordered, that the senior master of this court do make a memorandum or minute in the index to debtors and accountants to the Crown, that the two bonds bearing date respectively on the 10th day of August 1840, made to Her Majesty by the said Sir P. H. Fleetwood of Rossall Hall, in the county palatine of Lancaster, Bart., each in the penal sum of 132,000l. (particulars of which, from the memorandum or minutes left with him on the 14th day of August 1840, were entered by the said senior master in the said index, pursuant to the statute of 2 & 3 Vict. c. 11), have been satisfied.”

matters in difference were referred, the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator directed that the verdict should be set aside; that a verdict (generally) should be entered for the defendant; and that the plaintiff should pay the costs of the reference. It did not appear that there were any other matters in difference between the parties, except those in the cause.

Bompas Serjt., on a former day in this term, obtained a rule nisi to set aside the award, upon the ground that it had not decided all the matters referred, and [648] that it was not consistent, final, or certain. He cited *England v. Davison* (9 Dowl. P. C. 1052).

Channell Serjt. now shewed cause. Whatever may be the effect of the new rule of H. 2 W. 4, r. 74 (b), it is clear that, formerly, a general verdict for the defendant would have been good. In *England v. Davison* it was decided that where a cause in which several issues are raised is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. And, therefore, where in such a case the arbitrator had awarded merely that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, the award was held to be bad. It is difficult to reconcile that case with other decisions; but even there the award was not set aside, but on the defendant allowing the costs on certain issues to be taxed for the plaintiff, and paying the costs of the rule, the award was permitted to stand. It may be, that the defendant in this case was never legally indebted to the plaintiff, but only morally so; and he may have thought fit to pay that debt or to set off against it a legal debt due to himself. Here the arbitrator was not bound to direct that the verdict should be entered upon all the issues, unless distinctly requested so to do; *Dibben v. The Marquess of Anglesey* (2 C. & M. 722, 4 Tyrwh. 926, 10 Bingh. 568). In *Duckworth v. Harrison* (4 M. & W. 432, 7 Dowl. P. C. 71) an action of assumpsit, to which the defendant had pleaded the general issue, and a set-off, having been referred, and the arbitrator having found that the plaintiff was [649] not entitled to recover, and had no cause of action against the defendant, but having said nothing as to the set-off, it was held that the award was final. *Williams v. Mouldsdale* (7 M. & W. 134) is to the same effect. These are express authorities that an award to enter a verdict for a defendant upon the general issue, and upon a plea of set-off, is not inconsistent; and the plea of payment stands upon the same footing as that of set-off. [Maule J. Suppose at the trial the plaintiff had failed in the proof of his case; and the defendant had proved payment of 100l., would not the verdict have been entered for the defendant on both issues? Tindal C. J. But there is the plea of set-off. I cannot see how the arbitrator can have found for the defendant on the first plea, and also on the plea of set-off. Maule J. As to inconsistency, I think there is none. But as to the set-off, if the arbitrator had found a sum of money due from the plaintiff to the defendant, the plaintiff would have been bound to pay it; and the arbitrator should have made his award accordingly. Such would be the result, if the defendant never was indebted to the plaintiff, and there was a set-off due to the defendant; all matters in difference being referred to the arbitrator.] It may be said that the arbitrator ought to have found the amount due from the plaintiff to the defendant, and have stated the deduction that was to be made, if any; but no such objection is stated in the rule. [Tindal C. J. I do not see how the objection is to be got over, that the arbitrator has not decided all matters in difference between the parties. I think the rule must be made absolute.]

Channell Serjt. then proposed to abandon the issue upon the set-off, on the authority of *England v. Davison*; and to consent that the verdict should be entered upon [650] that issue for the plaintiff, and that the plaintiff should have the costs of that issue and of the action; to which

Bompas Serjt. consented.

Rule accordingly (a).

(b) By which it is ordered, that "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant, shall be deducted from the plaintiff's costs."

(a) And see *Bradbee v. The Governors of Christ's Hospital*, post.

[651] THE AYLESBURY RAILWAY COMPANY v. MOUNT. May 25, 1842.

[S. C. 5 Scott, N. R. 127 ; 2 D. N. S. 143 ; 11 L. J. C. P. 258.]

By a railway act (6 W. 4, c. lxxxvii, s. 95), the company were empowered to sue subscribers for calls ; and (sect. 96) the directors were empowered to make calls from the subscribers and proprietors for the time being ; and if any owner or proprietor for the time being should neglect to pay the call, the company might sue for the same, or the directors might declare the shares forfeited. And it was enacted (sect. 98), that in any action brought by the company against any proprietor for the time being for calls, it should be sufficient to declare and allege "that the defendant, being a proprietor of a share in the said undertaking, is indebted, &c. for a call or calls, &c., whereby an action hath accrued to the said company by virtue of this act," without setting forth the special matter ; and on the trial it should only be necessary to prove that the defendant, at the time of making the calls, was a proprietor, &c., and that the call was made and notice given. And (sect. 101) proprietors were enabled to sell their shares, subject to the rules and conditions therein mentioned ; and it was provided that on every sale, the conveyance should be kept by the company, who were to enter in a book a memorial of such transfer and sale, and indorse the entry thereof on the deed of sale and on the certificate of the share sold ; and that, until such memorial should have been made and entered, the seller should remain liable for all future calls, and the purchaser should have no part of the profits, nor any interest or vote in respect of such share ; and no person (sect. 102) was to sell any share upon which a call should have been made, after the day appointed for the payment thereof, unless at the time of the sale he should have paid the full amount of the call.—Held (in C. P.), that the power to sue proprietors "for the time being," (under sect. 96) did not extend to persons who were not original subscribers and were not proprietors at the time the call was payable ; and therefore, that where a proprietor had transferred his shares, after a call had been made, but before it was payable, such transfer having been duly entered and indorsed (under sect. 101) the company had no right of action against such transferor.—In an action by the company for a call, the declaration was, that "the defendant, before the commencement of the suit, to wit, on, &c., being the proprietor of divers shares, before and at the commencement of the suit, was and still is, indebted to the company in, &c. ; whereby, and by reason of the said sum being unpaid, the defendant still is indebted, and an action hath accrued, &c."—Plea, that true it is that the defendant on, &c., was the proprietor of the shares in the declaration mentioned, but that after the making of the call, and before the same was payable, to wit on, &c., he transferred his shares to J. S., which transfer was duly entered and indorsed before the call was payable, whereby the defendant ceased to be proprietor of the shares, and to be liable to the call.—Held, in Cam. Seacc. in error, reversing the judgment of the court of C. P., on demurrer to the plea,—that the declaration was good, either as an indebitatus count, or as disclosing a liability under the circumstances stated.—Held, also in error, that the plea was bad, as amounting to an argumentative plea of nunquam indebitatus.

Debt. The declaration stated that the defendant, before the commencement of this suit, to wit, on the 6th day of March 1838, being the proprietor of divers, [652] to wit, fifty shares in a certain undertaking, mentioned in a certain act of parliament, &c. (a), was, and the defendant before and at the time of the commencement [653]

(a) 6 W. 4, c. lxxxvii.

The following sections of this act were referred to in the argument :

Sect. 90 declares the time and manner in which dividends are to be made, and provides that no dividend "shall be paid, in respect of any share, after a day appointed for any call of money in respect thereof, until such call shall have been paid."

Sect. 91 enacts, "that the said company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards, from time to time as occasion may require, to, cause the names of the corporations, and the names and additions of the several persons, who shall then be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of

of this suit, was and still is, indebted to the said company in the sum of 250l., for a call of a certain sum of money, to wit, the sum of 5l. upon each of the said [654] shares, &c., whereby, and by reason of the said sum of 250l. being and remaining wholly unpaid, the defendant still is indebted to the plaintiffs in the same, and an action hath accrued, &c.

[655] Plea: that true it is, that before the commencement of this suit, to wit, on the said 6th of March 1838, in the declaration mentioned, the defendant was the proprietor of the said shares in the undertaking in the said declaration mentioned; and

shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company; and, after such entry made, to cause their common seal to be affixed thereto."

Sect. 93 enacts, "that the said company shall, in some proper book to be provided by the said company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to any share therein; and every proprietor of the said undertaking, &c. may at all convenient times have recourse to and peruse such book."

Sect. 95 enacts "that the several parties who have subscribed, or shall hereafter subscribe, for or towards the said undertaking shall, and they are hereby required to, pay the sums of money by them respectively subscribed for, or such parts or proportions thereof, as shall from time to time be called for by the directors of the said company, under and by virtue of the powers of this act, at such times and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said company to sue for and recover the same in any court of law or equity, together with interest on such unpaid sum of money, at the rate of 5l. per cent. per annum, from the time when the same was directed to be paid up to the day of actual payment."

Sect. 96 enacts, "that the said directors shall have power from time to time to make such calls of money from the subscribers and proprietors of the said undertaking for the time being, to defray the expenses of and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or money paid for, or in respect of, any such shares shall not amount to more than the sum of 20l. on any such share, and so that no such call shall exceed the sum of 5l. upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking; and an interval of three calendar months at the least shall elapse between the day appointed for payment of one call and the day appointed for payment of another call, and twenty-one days' notice at the least shall be given of every such call [by advertisements in certain newspapers]; and all moneys so called for shall be paid to such persons, at such times and places, and in such manner as in the said notice shall be appointed; and the respective owners of shares in the said undertaking shall pay their ratable proportion of the money to be called for as aforesaid, to such persons, and at such times and places, and in such manner, as shall be appointed as aforesaid, &c. And if any owner or proprietor for the time being of any such share shall not so pay such his ratable proportion, then and in such case and as often as the same shall happen, he shall pay interest for the same, after the rate of 5l. per cent. per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his ratable proportion, together with interest, if any, then, or at any time thereafter, it shall be lawful for the said company to sue for and recover the same in any of His Majesty's courts of record, by action of debt, or on the case, or by bill, suit or information, as the said directors may and they are hereby authorized to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold."

Sect. 98 enacts, "that, in any action to be brought by the said company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for, or in respect of, any call, it shall be sufficient for the said company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said company in such sum of money as the calls

that the call in the declaration mentioned was made under and pursuant to the provisions of the said act, for an instalment of 5l. per share, to be paid by the proprietors or owners of the capital of the company on or before the 9th of April then next ensuing; but that afterwards, and before the commencement of this action, and before the said 9th of April thereinbefore mentioned, when the said call was payable as aforesaid, to wit, on the 7th of April 1838, he, the defendant, so being such proprietor as aforesaid, sold and disposed of all his said shares in the said undertaking (the said shares being the same shares in respect of which the plaintiffs claim to be paid the said call), to one Charles Thompson, and the said C. T. then took and accepted the same; and the defendant then, to wit, on the said 7th of April 1838, after the said call was [656] made, &c., and before the same was due and payable, by a deed under the seal of the defendant, and also under the seal of the said C. T. (and which deed then being in the possession of the plaintiffs, the defendant was unable to bring the same into

in arrears shall amount to, for a call, or so many calls, of such sums of money upon a share belonging to the defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matter; and, on the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given, as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever: and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, upon such call, unless it shall appear that any such call exceeded 5l. per share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that notice was not given as hereinbefore required: and, in order to prove that the defendant was a proprietor of such share in the said undertaking, as alleged, the production of the book in which the said company is by this act (s. 93) directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Sect. 101 enacts, "that it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned; and the conveyance of such shares shall be by writing, duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties as the case may require, that is to say, &c.: and on every sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said company, or by the secretary or clerk of the said company, who shall enter in some book, to be kept for that purpose, a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which entry and indorsement the sum of 2s. 6d. and no more shall be paid to the said company; and the said company, or the secretary or clerk as aforesaid, is hereby required to make such entry or memorial accordingly, and on demand, to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security; and such indorsement, being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and, until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any note in respect thereof, as a proprietor of the said undertaking."

Sect. 102 enacts, "that no person or corporation shall sell or transfer any share which he or they shall possess in the said undertaking, upon which any call shall have been made, after the day appointed for the payment of the same, unless at the time of such sale or transfer he or they shall have paid the full sum of money which shall have been called for, in respect of such share."

court there), in consideration of the sum of 5l. paid to the defendant by the said C. T., did assign and transfer to the said C. T. the said shares in the declaration mentioned, to hold to the said C. T., his executors, &c., subject to the several conditions on which the defendant held the same immediately before the execution thereof; and the said C. T. thereby then agreed to accept and take the said shares subject to the conditions aforesaid, as by the said deed, &c.: that the said deed was duly stamped before the same was executed by either party, and was made and executed according to the provisions of the act: that the defendant and the said C. T. then duly delivered the said deed (the same then, and before the said call was payable, being first duly executed by both the defendant and the said C. T.) to the said company, to be kept by the said company according to the provisions of the said act, and then requested the said company to enter in the said company's books kept for that purpose, a memorial of the said transfer and sale, and to indorse the entry of the memorial on the said deed; which memorial and indorsement the said company then, and before the said call became due and payable, made, according to the act: and thereupon and before the said call became due and payable, to wit, on the said 7th of April, the said company duly received the said deed on behalf of the said company, the plaintiffs in this action, and then duly entered the memorial in the said company's book, and then duly indorsed the entry of the memorial of the said deed according to the said act, and then accepted and received the said transfer of the said [657] shares of the defendant to the said C. T., whereby the defendant then, and before the commencement of this action, and before the said call had become due and payable, ceased to be the proprietor and owner of the said shares, and then ceased to be liable to the said call, under and by virtue of the provisions of the said act, in the declaration mentioned. Verification.

Demurrer: assigning for causes, that the plea did not traverse, or confess and avoid, the cause of action stated in the declaration, or that the defendant was indebted as therein alleged; that, if the plea was pleaded by way of traverse, then the same was an argumentative, and not a direct, denial of the matters charged in the declaration, and improperly concluded with a verification instead of concluding to the country; that the plea amounted to a plea that the defendant never was indebted as in the declaration alleged, and should have been so pleaded; that, if the plea was intended to be pleaded by way of confession and avoidance, then the same did not sufficiently, or at all, confess that the defendant ever became or was indebted as in the declaration alleged; or, if it did sufficiently confess such liability, it shewed no matter by which the same had been discharged: that the plea did not aver or shew that C. T. ever became liable to pay the call; that the plea did not sufficiently admit or deny that the defendant was a proprietor of the shares in the declaration mentioned, or a subscriber to the undertaking at the time the call was made, or that due notice was given of the making of the call as required by the act, or that the defendant ever became or was liable to pay the same calls, or was indebted to the plaintiffs as in the declaration alleged: that the plea was wholly immaterial, and admitted the cause of action stated in the declaration; that no single, certain or material issue could be taken thereon, &c. Joinder.

The case was argued in last Michaelmas term by

[658] Channell Serjt. (with whom was Bovill), in support of the demurrer. He contended that, although the defendant had transferred his shares, and such transfer had been registered by the company after the call had been made, and before it was payable, the defendant was not discharged from liability in respect of such call; that the words "subscribers to, and proprietors of, the said undertaking for the time being," in the earlier part of the 96th section of the act, must be taken to refer to parties who were subscribers and proprietors at the time of making the call; that a similar construction must be put upon the words "proprietors for the time being" in the 98th section; and there was nothing in the 101st and 102d sections repugnant to that construction. He referred to *The Aylesbury Railway Company v. Thompson* (2 Railway Cases, 668), where the court of Queen's Bench had decided that the transferee of these very shares was not liable to be sued in respect of them, not being the proprietor of them at the time the call was made. He also cited *The Edinburgh, Leith and Newhaven Railway Company v. Hibblewhite* (b); *The Birmingham, Bristol and Thames Junction Railway*

(b) 6 M. & W. 707, 8 Dowl. P. C. 802, 2 R. C. 237. See also *The South Eastern Railway Company v. Hibblewhite*, 12 A. & E. 497.

Company v. Locke (1 Q. B. Rep. 256); and *The London and Brighton Railway Company v. Fairclough* (ante, vol. ii. 674), as authorities to shew that the plea was bad in form.

Stephen Serjt., contrâ, argued that the declaration was bad in substance, as it did not allege that the defendant was a proprietor at the time that the action was brought, as it should have done, if framed upon the 98th section of the act. [Tindal C. J. The company are not limited to any precise form of declaration by that section. It merely says that "it shall [659] be sufficient for them to declare and allege" so and so.] The plea shews a good defence under the act, viz. that although the defendant was the proprietor of the shares in question at the time the call was made, yet he had ceased to be so at the time the call became payable. [Tindal C. J. That construction would give great facilities for defrauding the company. A proprietor might transfer his shares just before the call became due, and take them back again immediately afterwards.] The contrary construction would bear equally hard in the case of a bona fide transfer. There is nothing in the act to restrain the transfer of shares between the making of the call and the time when it becomes payable. The company are bound to record the transfer, and before a transfer was recorded they would look for payment to the party who held the shares at the time the call was payable. Or if, as decided in *The Aylesbury Railway Company v. Thompson*, they cannot recover against the transferee, it may be that their remedy is wholly lost. The present defence could not have been set up under the plea of "never indebted" under the rules of pleading, H. T. 3 & 4 W. 4, II. reg. 3. [Tindal C. J. The plea of "never indebted" denies that the plaintiff ever had a cause of action, which seems to be all that the defendant would require in this case.] The present plea confesses that the defendant was once a proprietor, and avoids the liability arising therefrom by shewing that he ceased to be so before the call became due.

Channell Serjt. was heard in reply.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This is an action of debt, brought by the Aylesbury Railway Company against William Mount, for a call upon certain shares in that company. The declaration, [660] in substance, states that the defendant having, before the commencement of the suit, been a proprietor of shares, was, and still is, indebted to the company for a call on each of his shares; and that, by reason of the call remaining unpaid, an action had accrued to the plaintiffs. The plea states, that the call was made payable on the 9th of April, and that the defendant transferred his shares by deed to one Charles Thompson, and that the company entered a memorial of the transfer according to the provisions of the act, before the call was payable. To this plea there is a demurrer; and the substantial question is, whether an action for a call can be maintained against a proprietor, who does not appear to have been an original subscriber, and who has transferred his shares, after an instalment of the subscription has been called for by the directors, and before the time appointed for payment of it.

It is clear that, at common law,—that is, independently of the railway act,—the matters stated in the declaration do not shew a cause of action; it is therefore necessary to consider whether the act gives any right of action under the circumstances disclosed in the declaration. The act in question is the 6 W. 4, c. lxxxvii., for making the railway therein mentioned; and it is obvious that the present question must be determined solely by reference to the clauses of that act which bear upon it.

The proprietors of shares (not being subscribers—whose case is provided for, by s. 95) are made liable by s. 96, which provides that the owners of shares shall pay the calls at the time appointed, and that if any owner for the time being shall refuse to pay, he may be sued, or his shares may be declared to be forfeited. It is clear that the remedy by forfeiture is a remedy against the owner for the time being, and is wholly inoperative against a person who has transferred his shares; the time being must, therefore, in this place, as far as for-[661]-feiture is concerned, mean the time at which the call was payable; for it is at that time that the default on which the forfeiture accrues takes place; and the right to sue is clearly given against the same owner for the same time being. This 96th section, therefore, which is the only section that gives an action against a shareholder, gives it in express terms against owners for the time being, and does not give it to any other description of persons. Section 90, which provides that no dividend shall be paid on any share after a call shall be made, unless it shall have been paid, confirms this view of the effect of sect. 96, for as sect.

101 enables shareholders to transfer without limitation as to time, and sect. 102 prohibits sales only after the day of payment of a call, unless it be paid, it is clear that a sale may lawfully be made, and the company be required to enter a memorial of such sale, after a call has been advertised, and before the day for payment has arrived; and sect. 90, by giving a remedy against the owner under the transfer, clearly assumes that he, and not the party who has transferred, and who has ceased to have any right to the dividends, is to be considered as the party to pay the call. In addition to these considerations, it may be observed, that although sect. 98 does not prohibit actions other than such as are within its provisions, and although, if a clear right of action were given by some other part of the act against owners other than those for the time being, it would not be taken away by this section, yet its provisions go far to shew that an action against a shareholder who had ceased to be an owner when the right of action arose, was not in the contemplation of the legislature. This section is applicable in terms only to any action against any proprietor for the time being: the form of declaration given by this section is, that the defendant, being a proprietor, is indebted to the company for a call upon a share belonging to the defendant. The case of a sale between the notice to pay an instalment and the day appointed for payment, is one so obviously likely to be of frequent occurrence, that it is probable that a form of proceeding applicable to such a case would have been provided, if it had been intended that in such a case the action should be against the former owner; and a similar or stronger remark arises from the absence of any express provisions for a continuing liability, if it were intended to exist. The provision in sect. 101 that the seller should continue liable till a memorial of the transfer is entered, and that, in sect. 102, prohibiting a transfer after a call is payable, seem to shew that if any further liability on a shareholder who had transferred, or any further restraint on alienation, had been intended, it would have been expressly provided.

We are aware that in an action brought by the Aylesbury Railway Company against Thompson, the party to whom the present defendant had transferred the shares after a call made and before it was payable, the court of Queen's Bench held that the defendant was not liable to pay the call, on the ground that the plaintiffs had not complied with the clause in s. 98, which provides "that on the trial of such action (i.e. against a proprietor for the time being), it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls or any other matter whatsoever; and that the company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such calls, unless it shall appear that any such call exceeded 5l. per share, or was made payable before the expiration of three calendar months from the day [663] appointed for payment of the last preceding call, or that notice was not given as hereinbefore required." The court of Queen's Bench appears to have considered that this clause restricted the plaintiffs from recovering, unless they gave such proof as is mentioned therein. It was not necessary for that court to decide whether an action would lie against a party situated as the present defendant is, nor did they decide that it was not necessary to allege and prove (if it were denied), as well that the defendant was a proprietor at the time of action brought, as at the time of the call. The 98th section indeed applies, in terms, only to actions brought against a proprietor for the time being: it assumes that it is established that the defendant is such a proprietor, and then makes the provision relied on by the court of Queen's Bench, viz. "on the trial of such action, it shall only be necessary to prove," &c. In order that it may appear to be such action, the declaration is required to allege that the defendant, "being a proprietor, is indebted;" if that allegation be admitted, the admission shews it to be such action; if it be denied, the section immediately after the clause in question goes on to give a mode of proving it, in these words, viz., "and in order to prove that the defendant was a proprietor of a share in such undertaking, as alleged," the production of the book shall be *prima facie* evidence, &c. This court is not called upon to say, whether the decision of the Queen's Bench is or is not correct; it is sufficient that it appears to us that no right of action for a call is given by the act, or exists independently of it, against a party who having held a share at the time the call was made (but not appearing to be an original subscriber), has transferred and entered a memorial

of his transfer, before the call is payable. It is clear that the declaration in the present case is not in the form given in s. 98 of the railway act; for, to be within that section, it should allege that the [664] defendant, being a proprietor of a share, is indebted to the company; and there is no allegation in this declaration that the defendant, being a proprietor, is indebted.

But as it might be that a right of action might be given by some other part of the act, in a case such as that stated in this declaration, it was necessary to consider whether such right of action was in fact given. And it appears to us, on a review of all the material provisions of the act, that there are not more than three cases, if indeed there be so many, in which an action for calls can be maintained; and these are, first, against a party who is owner for the time being, under s. 96; secondly, against a party who was a subscriber, under s. 95; or, thirdly, against a party who, having transferred his shares, is no longer a shareholder, but whose liability is continued by s. 101, in consequence of no memorial of the transfer having been entered. It is clear that the present declaration does not state either the first or the second of these three cases; as it does not allege the defendant to be a proprietor or a subscriber; but it may be contended that it substantially shews a case of the third description; and that it must be taken, not being demurred to, to insist on the right, which under s. 101 may exist against a former shareholder probably upon the true construction of the act. Such a person ought to be treated as an actual shareholder.

But supposing this to be otherwise, and that the declaration is to be considered as shewing a sufficient cause of action, the declaration is well answered by the plea, which, on this supposition, is good in substance, because it shews that the defendant, having transferred his shares and entered a memorial of the transfer before the call was payable, is not liable; and also good in form, because, as it admits all the matters of facts stated in the declaration (which are only that the defendant was a proprietor, that a call was made, and that it remains unpaid) and by introducing affirmative matter not inconsistent [665] with those facts, shews that notwithstanding those facts the defendant is not liable; it confesses and avoids the matters of fact stated in the declaration, and properly concludes with a verification, and not to the country.

It may be suggested that a party who becomes a shareholder, at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently when an instalment is called for, it is debitum in presenti, solvendum in futuro, and that the shareholder at the time the call was made being the debtor, should therefore be the party to pay. But the general scope of the act is, to treat a shareholder (at least one who takes by transfer, and is not an original subscriber,) as identified with his share, and as having nothing to do with the company, either with respect to rights or liabilities, before he becomes, or after he ceases to be, a shareholder; the express provisions of the act, giving remedies by action, by forfeiture, and by withholding dividends against those who held the shares at the time the call was payable, and the absence of any express provision continuing the liability of a shareholder of whose transfer a memorial is entered, shew that the act considers the debt as not arising until the day appointed for payment. The duty of a shareholder who takes by transfer, to pay a call, is the creature of the act: the act requires the payment to be made at the time appointed by the directors; at that time, and not before, the duty arises; and it is a duty which, by the terms of the act, is cast on the owner for the time being.

On the whole, therefore, we think that this action cannot be maintained, and the judgment ought to be for the defendant.

Judgment for the defendant.

[666] A writ of error having been brought in the Exchequer Chamber upon the foregoing judgment, the case was argued after Hilary term 1843 (a).

Bovill for the plaintiffs in error. First, as to the liability of the defendant. The declaration states that he was and is indebted for calls, and by reason of the money being unpaid, still is indebted, and that an action hath thereby accrued by virtue of the act. By sect. 96, the liability is imposed upon proprietors for the time being; and calls are to be made upon them, and are made recoverable from them by action. By sect. 98, the proof required in such action is, that the party was proprietor at the

(a) Friday, February 3d. Before Lord Abinger C. B., Parke B., Alderson B., Patteson J., Coleridge J., Rolfe B., and Wightman J.

time of making the calls; and this shews the meaning of the expression "for the time being" in sect. 96, which is repeated in sect. 98. The liability, the remedy and the proof are therefore complete. The defendant insists that he is discharged from his liability by the sale and transfer of his shares, and the entry of such transfer. The general right of sale is given by sect. 101, and by the same section the company are compelled to register the transfer; but such registry determines the liability of the seller as to future calls only. All the proceedings in this case appear to be regular. The act clearly contemplates a transfer of shares; but it contains no clause to the effect that a liability, once imposed, is discharged by the transfer. On the other hand, the express provision that the registry of the transfer is to protect from future calls, shews that it was not to have the effect of discharging a proprietor as to prior calls. The declaration states a liability once existing on the part of the defendant; and, his plea, to be good, must admit that statement. There is certainly [667] nothing in the act to discharge the entire liability; or to shew that the call is not to be paid at all, but is to be wholly lost to the company. Then if the liability continues, the question is, on whom it rests. The court of Queen's Bench have decided, in *The Aylesbury Railway Company v. Thompson* (2 Railway Cases, 668), that the purchaser is not liable, because no liability is imposed upon him by the act. It follows that as the call, and the liability expressly imposed thereby, are not discharged by the proceedings which the act directs, the seller remains liable and is the only party who is so.

The judgment of the court below, proceeds merely upon the ground that, as the company have the option of declaring a share forfeited in case of non-payment of the call, and that as such forfeiture can be enforced only against the holder of the share at the time the call is payable, the remedy by action must also apply to him. But the forfeiture is an additional remedy given against the share which the purchaser agrees to take subject to the rules and conditions mentioned in the act, this condition of forfeiture in case of the non-payment of the call being one of them. In such a case the purchaser would have a remedy over against the seller. In the same way, by sect. 90, no dividend is to be paid after a call is payable, until such call has been paid. So by sect. 71 the shareholder cannot vote until the call has been paid; but it is not said "paid by him." The liability is imposed upon, and the remedy by action is given against, the party who is the shareholder at the time the calls are made; and this is quite consistent with there being a remedy also against the purchaser, affecting the share in his hands, although there may be no remedy against him personally. The judgment of the court below, in throwing doubt upon that of the Queen's Bench in *The* [668] *Aylesbury Railway Company v. Thompson*, assumes that the words "for the time being," apply to a proprietor at the time calls are payable, but that is in fact the whole question.

Secondly, as to the sufficiency of the declaration. The defendant being liable, the declaration properly describes his liability, which is imposed upon the proprietors at the time the call is made. The declaration follows the substance of the ninety-eighth section, which does not give any form in express words. It is good in substance therefore, and is not specially demurred to. It is also good as shewing a liability under sect. 101; for upon the face of it the defendant might be a proprietor who had sold his shares, but their transfer had not been registered. It is also good as a common indebitatus count.

Thirdly, as to the plea. It is bad, inasmuch as it does not confess any debt or liability to pay. If it offers any defence at all, it is upon the ground that, before the defendant's liability to pay arose, an event occurred, namely, the transfer and registry, whereby he never became indebted; it is to the same effect as the plea denying notice of the calls, in *The Edinburgh, Leith and Newhaven Railway Company v. Hibblewhite* (6 M. & W. 707). The plea here confesses a matter of inducement only, but gives no colour and contains no confession of a cause of action. So, if the declaration is good under sect. 101. In any point of view the plea is bad for not confessing and avoiding.

Biggs Andrews was heard for the defendants in error, in support of the judgment below.

Per curiam. The plea is clearly bad, as amounting to a plea of never indebted. And the declaration may be sus-[669]-tained upon one of the grounds put by Mr Bovill, either as amounting to an ordinary indebitatus count, or as a count in the statutable form, disclosing a possible state of things under which the defendant might

be liable by virtue of the act of parliament. Whether the defendant was or was not such a proprietor as to become liable to the call according to the act of parliament, would be matter of evidence at the trial.

Judgment reversed.

STEWART v. STEELE. June 13, 1842.

[S. C. 5 Scott, N. R. 517.]

In an action on a policy, the captain was detained to give evidence for the plaintiff at the trial, from May to December 1836, and again from October 1840 to March 1841. The defendant having obtained a new trial on payment of costs, the master, on taxation, disallowed the first detention of the captain, but allowed for the second detention 150*l.*, at the rate of one guinea per diem. The court refused to interfere. —The master having allowed three counsel and only one copy of the shorthand notes of the evidence at the first trial. Held, right.—The master also allowed in the costs of the motion for the new trial, the fee paid to a barrister who conducted the case at the trial, and disallowed that paid to a junior barrister. Held, that as the leader, not being of the degree of the coif, was not entitled to be heard in banc, the fee to him had been improperly allowed, and that the fee to the junior for taking notes should have been allowed.

Assumpsit on a policy of insurance upon a ship called the "Sherburne," valued at 8000*l.*, from the 1st of May 1835 to the 30th of April 1836.

At the trial, before Tindal C. J., at the sittings in London after Hilary term, 1841, a verdict was found for the plaintiff on one issue, and for the defendant on another.

At the sittings in banc after Hilary term, 1842, a rule obtained on behalf of the defendant for a new trial, on the ground that the verdict was against evidence, was made absolute on payment of costs.

The plaintiff's costs of the first trial having been [670] taxed, the following statement, which had been agreed upon by the parties, were submitted to the court upon a motion to review the master's taxation:—

"That in the bill of costs submitted to the master for taxation under the said rule, a sum of 400*l.* was charged as having been paid to Captain Warren, the master of the ship 'Sherburne'; that the said sum of 400*l.* was claimed as a payment made to him for detention from the 17th of May to the 31st of December 1836, being 228 days; and for his further detention from the 10th of October 1840 to the 1st of March 1841, being 142 days, after the rate as stated in the affidavit, by an arrangement with the captain, of one guinea per diem. That the defendant's attorney contended before the master that, under the rule above mentioned, the charge of detention ought not to be allowed; that it was a charge not properly within the rule, and, if it could be supported, was and formed part of the general costs in the cause. That in the interval between the first and second detention, the defendant applied for and obtained an order for the examination of witnesses in Calcutta in the East Indies, and the plaintiff subsequently obtained a similar order to examine his witnesses; and that it appeared by the affidavit of Captain Warren that his presence in India during the execution of the commission was considered necessary, and he went to India and returned to this country in September 1840, and was again detained as a witness in this cause from the 10th of October 1840, until the 1st of March 1841; that he was thereby prevented following his employment as such commander; and that his salary and profits whilst following his employment as commander of a merchant vessel in the East India trade, amounted to about 1000*l.* a year, exclusive of board and lodging. That the sum of 400*l.* was altogether exclusive of the payment made for his expenses to, from, and in India, and was totally unconnected therewith.

[671] "That it was admitted on the taxation that Captain Warren went out to India with the interrogatories, to collect the witnesses who had been employed in and about the repairs and other matters connected with the said ship; and the defendant's attorney submitted to the master that the question as to whether the witness was properly detained or not, or whether he should have been examined before the master or under the commission in India, did not arise under this rule, and the point was not discussed. That the master decided that the plaintiff was not entitled to the costs of

detention on the first occasion under the rule; that if allowed at all, they should be allowed as costs in the cause; but in respect of the second detention, the master allowed the sum of 150l., being after the rate of one guinea per diem.

"That in the said bill of costs the sum of 40l. 3s. was charged for the travelling expenses of G. D. Dale, a witness from Kendal, distant from London 276 miles, and for eleven days' detention, of which sum the master allowed 26l. That on the 13th of February the cause was appointed for trial on the 22d. That on the 15th of the same month, after some previous correspondence, it was arranged by the defendant's and plaintiff's attorneys, in consequence of the defendant's witnesses having to come from Scotland, and the cause being expected to occupy a considerable time, to apply to have it appointed for some particular day not earlier than the 26th of February, and counsel were instructed to make the necessary application. That such application was made on the 17th of February by Mr. Serjt. Wilde and Mr. Martin, of counsel with the respective parties, and the Lord Chief Justice appointed the trial to take place on the 2d of March; but Sir W. Follett, the plaintiff's counsel, not being able then to attend, a second application was made on the 18th of February, and the cause fixed for [672] the 26th of February, on which and the following day the cause was tried. That in the affidavit of increase it is stated that the witness G. D. Dale left his residence on the 16th and arrived in London upon his subpoena on the 18th of February; but in consequence of the postponement the said G. D. Dale on the 19th returned to his residence, and again attended on his subpoena on the 25th of February. That the defendant's attorneys contended before the master that the said G. D. Dale was unnecessarily required to leave his residence so early as the 16th, and that the plaintiff's attorneys should have written to postpone his coming to London.

"That the master allowed to the plaintiff the whole fees paid to three of the counsel for the plaintiff, with the exception of Sir W. Follett, who was specially retained and brought in, from which 30 guineas were taken off, 70 guineas being considered by the master as a full fee had he not been so specially brought in.

"That the master disallowed one copy of the plaintiff's brief and other papers, and the fee of 33l. paid to Mr. Martin with such brief on the part of the plaintiff.

"That the fees so allowed to counsel were as follows:—

"To Sir W. Follett 70 guineas.

"To Mr. R. V. Richards 50 guineas.

"To Mr. Serjt. Wrangham 40 guineas.

"That the master so allowed the sum of twenty guineas for the fee paid to Sir W. Follett on shewing cause against the rule for a new trial, although Sir W. Follett did not argue on the said rule; and that a further sum of 2l. 4s. 6d. was also allowed for a refresher paid to Sir W. Follett, and for his clerk, and for the usual attendances upon him.

"That the master disallowed one copy of the plaintiff's brief to shew cause against the rule nisi, and the fee of 8l. 13s. paid to Mr. Martin with such brief. That [673] the brief on the part of the plaintiff, to shew cause against the rule nisi, consisted of nine sheets of paper, and did not detail the evidence given upon the said trial; and that, as an appendix to such brief, a copy of the short-hand writer's notes of the evidence given upon the trial, was made for each of the plaintiff's counsel; and that the master disallowed three out of the four copies of such evidence, but allowed as for the one copy the sum of 31l."

R. V. Richards for the plaintiff. The master should have allowed the 400l. paid to Captain Warren, and not merely 150l. for the second detention. It is difficult to see how any distinction can be drawn between the two detentions, and how the first can be said to be costs in the cause, and the second costs under the rule for a new trial. It is clear that both detentions were with a view to the first trial, for there is no pretence for alleging that the captain was detained in this country on account of the second trial. He may die before the next trial, or the plaintiff may not choose to call him. [Tindal C. J. The first detention was necessary for the real decision of the cause. Maule J. It may be argued, that if the first detention was applicable to the trial which has failed, it will be equally applicable to the second trial.] It was held in *Tremain v. Barrett* (6 Taunt. 88, 1 Marsh. 463), that if a witness is bonâ fide sent from a foreign country for the sake of his testimony in an intended action, though the writ is not sued out until after his arrival, the plaintiff is entitled to the costs of bringing him over, his subsistence, and compensation for his loss of time spent here

pending the suit, for the purposes thereof, and to the costs of his return. So, in *Loneragan v. The Royal Exchange Assurance* (7 Bingh. 725, 5 M. & P. 447), it was decided [674] that a successful party is entitled to the expense of detaining a foreign witness in this country to await the trial of the cause, although opportunity is afforded of examination upon interrogatory. So in *Mount v. Larkins* (8 Bingh. 195, 1 Moo. & Sc. 357), subsistence was allowed in costs in a policy cause to the master of a ship insured, a material witness, from the time of subpoena to the time of trial, although the witness resided in England, was not examined, was a master in the Royal Navy, and did not shew the permission of the Admiralty for him to engage in the merchant service. Also, in *Temperley v. Scott* (8 Bingh. 392, 1 Moo. & Sc. 601), it was held that a captain of a ship was properly allowed for his subsistence according to his station, for the whole time during which he was detained to give evidence as a witness in the cause.

With respect to the witness from Kendal, the master cannot be said to have allowed too much; there would have been nothing unreasonable if he had allowed the whole, 40l. 3s.

The allowance of only one copy of the evidence in a case where so much depended on the particular expressions of the witnesses, is clearly insufficient. It was as necessary that each of the counsel should be furnished with a copy, as that they should have separate briefs.

Sir T. Wilde, Serjeant, contra. The master ought to have disallowed the 150l. for the second detention of the captain, as well as the 250l. for the former detention. The costs of detaining a witness are costs in the cause, and ought to abide the ultimate event; for the detention of a witness, whether for a long or a short period, does not fall within the costs of the rule for a new trial. [Tindal C. J. I think the master was right [675] as to the first detention of the captain, for the matter is still in fieri. Coltman J. Suppose the captain had been detained only two days?] Where a witness is detained for a long period, his detention is referable rather to the general conduct of the cause than to any particular trial. As respects the witness Dale, too much has been allowed, for it is clear that he need not have been sent for so soon. With regard to the amount of fees to counsel, the court will not interfere with the master's discretion. But the allowance of Sir W. Follett's fees clearly cannot be supported, for he was not in a situation to be heard in this court (a). [Tindal C. J. The master says that he allowed the fee paid to Sir W. Follett under a belief that he was entitled to be heard.] There can be no doubt that one copy of the evidence was enough for the plaintiff's counsel. [Tindal C. J. We all think that one copy of the evidence was sufficient.]

Richards replied.

TINDAL C. J. With respect to the fees to counsel, the ancient practice is, for the junior counsel to take notes, although he cannot be heard. The fee to Mr. Martin, therefore, should have been allowed. As Sir W. Follett, however, could not be heard by the court (a), the fee paid to him should have been disallowed. With respect to the only remaining point, as to the 150l. allowed for the second detention of the captain, I cannot say that the master has exercised an improper discretion in allowing that sum; for the captain was not like an ordinary witness who could be sent for at any time.

The rest of the court concurred.

Rule accordingly.

[676] COLLYER v. STENNETT. May 24, 1842.

[S. C. 5 Scott, N. R. 34; 12 L. J. C. P. 73.]

Case, by a tackle-house porter of the city of London, claiming a right to the landing and portorage of certain goods imported into the port of London. The declaration alleged, "that from time whereof, &c., the mayor and commonalty and citizens of the city of London have had, and have been used and accustomed to have, and ought of right to have had, and still of right ought to have, by themselves and the

(a) Not having been, as Mr. Richards, engaged in the cause before the restoration of the practice of the court.

persons by them in that behalf deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, and loading, except to the houses of aliens, of all goods, wares, and merchandise imported into the port of London and not consigned to aliens or an alien, for reasonable reward in that behalf."—Among other documentary evidence the plaintiff put in an act of common council of the 6th of March 1607, which, after reciting, "that the freemen tackle-house porters and street porters had vehemently complained against the porters under the packer (or alien porters) of the said city, for that they of late time had, contrary to usage, intruded into the labour and business of packing, shipping, and unshipping, lading and taking up, as well of the goods of English merchants as of strangers, where they had been accustomed to deal only in the labour of packing, shipping, unshipping, lading, and taking up of the goods and merchandises of merchants strangers," enacts, "that the porters to the packer of goods of merchants strangers in the said city shall not in anywise intermeddle or deal with the shipping, unshipping, &c. of any manner of goods, wares, or merchandises of any merchant or merchants, or of any other person or persons whatsoever English born, that is or shall be free of the said city or not free, but shall content themselves with the labour of packing, shipping, unshipping, &c., the goods, wares, and merchandises of merchants strangers only." An *inseximus* charter of Charles I. was also produced, granting and confirming to the mayor, aldermen, and commonalty of the City of London amongst other things, "the offices and occupations of carriage and portorage of all wools, &c. and all other merchandises whatsoever, as well of a denizen whose father is, was or should be an alien born out of the limits of our allegiance, &c., as of an alien born beyond the seas, &c., which shall be carried into London from the river of Thames to the house or repository of such alien aforesaid, and from thence to the same river." A subsequent clause provides, "that no other porter, &c. shall presume to intermit or intrude, &c. to carry or lade any of the said goods or merchandises from any wharf or shore within the limits aforesaid, to any ship or vessel, or to unlade any goods or merchandises from any ship or vessel upon any wharf, shore, or land within the limits aforesaid, without the special appointment or licence of the said mayor, &c.; and that the porter or carrier appointed by the mayor, &c. shall have, &c., from the said merchants, as well aliens born without the allegiance of us, &c. in parts beyond the seas, as of the said denizens born, &c. within the power or allegiance of us, &c., whose father is or shall be an alien born without the allegiance of us, &c. for carriage or portage of the said goods, such sums of money, &c. as in a certain schedule to these presents annexed are mentioned," &c.—It appeared from parol evidence, that whenever goods of aliens had been imported into the port of London consigned to English merchants, they were taken by the tackle-house porters; but if the alien porters disputed their right, and it turned out that the goods belonged to an alien, they were given up to the alien porters.—Held, that the allegation in the declaration was not sustained, as the evidence shewed that the rights granted or confirmed by the charter of Charles I. of the unshipping and portorage of aliens' goods (all of which were abolished by the 3 & 4 W. 4, c. 66, and an agreement made in pursuance of that statute), were not confined to goods landed and sent to the houses of aliens, but extended to all goods of aliens imported into the port of London.

Case. The declaration stated that from time whereof the memory of man was not to the contrary, the mayor and commonalty and citizens of the city of Lon-[677]-don have been used and accustomed to have, and ought of right to have had, and still of right ought to have by themselves and the persons by them in that behalf, deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, loading, and housing (except to the houses of aliens) of all goods, wares, and merchandise imported into the port of London, and not consigned to aliens or an alien, for reasonable reward in that behalf; that also from time whereof the memory of man was not to the contrary, the mayor, aldermen, and commons of the said city in common council assembled, have been used and accustomed to make and pass, and of right ought to have made and passed, and still of right ought to make and pass, when and as by them deemed meet, acts and ordinances for the distribution of the said work and labour, and the ordering and regulating of the persons deputed, appointed, and permitted as aforesaid; that also from time whereof the memory of man is not

to the contrary, the mayor and aldermen of the said city with the consent of the commonalty in common council assembled, have been used and accustomed to make, and of right ought to have made, and still of right ought to make, when and as by them deemed meet, ordinances for remedying bad and defective customs and [678] matters newly arising and requiring amendment, and for which no remedy had been provided, such ordinances being reasonable, not prejudicial to the King or the people, and not repugnant to the laws or statutes of England; which same custom and all other customs, liberties, privileges, and franchises of the said city were by the authority of a certain parliament, held in the seventh year of the reign of King Richard the Second, ratified and confirmed to the then mayor, commonalty, and citizens of the said city and their successors; that also before the committing of the grievances thereafter mentioned, to wit on the 27th of March 1798, by a certain act, and ordinance then made by the mayor, aldermen, and commons of the said city in common council assembled, it was enacted and established among other things, that the tackle-house porters belonging to the said city, and no other person or persons whatsoever, should have, enjoy, and perform the work or labour, with the assistance of such persons as should be employed by them respectively in manner thereafter mentioned, of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandise whatsoever, which should be imported into the port of London in any ship or vessel which should come from all or any place north of the United States of America (Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted), France, Spain, Portugal, Holland, Hamburgh, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Barbary, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States, the East Indies, Asia, and Africa, and of all lead, wine and brandy which should come from the British plantations, and all other parts and places; and it was also thereby further enacted, that it should be lawful for each tackle-house porter to employ one or more servant or servants, according as [679] the quantity of business might require, and that every such servant should be duly and regularly admitted one of the ticket-porters of the said city; and it was thereby also further enacted, and established that the tackle-house and ticket porters, or any or either of them should not take for their work or labour more than was limited or appointed for the same, in and by the table schedule thereafter inserted upon pain as therein mentioned: that also afterwards and before the committing of the grievances hereinafter mentioned, to wit on the 11th of June 1801, by a certain other act and ordinance then made by the mayor, aldermen, and commons of the said city in common council assembled, it was enacted and established, that from and after the 15th of June 1801, the said clause in the said act of common council of the 27th of March 1798, by which it was enacted, that the tackle-house porters belonging to the said city, and no other person or persons whatsoever should perform the work or labour of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever, which should be imported into the port of London, in any ship or vessel which should come from all and any place north of the United States of America, &c. as thereinbefore mentioned should be and the same was thereby repealed; and it was thereby further enacted and established that the tackle-house porters belonging to the said city, and no other person or persons whatsoever, should have and enjoy the work or labour with the assistance of such persons as should be employed by them respectively, in manner mentioned in the said act of the 27th of March 1798 of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever, which should be imported into the port of London in any ship or vessel which should come from all and any place and places north of the United States of America [680] (Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted), France, Spain, Portugal, Holland, Hamburgh, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States (Surinam, Demarara, and Berbice only excepted), the East Indies, Asia, and Africa, and of all lead, wine or brandy which should come from the British plantations, and all other parts and places.

That after the making of the said several acts and ordinances, and after the said 15th of June 1801, to wit on the 8th of January 1836, divers to wit, 163 casks of olive oil, not consigned to aliens or an alien, were imported into the said port of London, in and by a certain ship called the "Susan and Anne" which came with the

said casks of olive oil on board thereof, into the said port from France, to wit from Marseilles in the kingdom of France; that the said casks of olive oil then were in and on board of the said ship at a certain wharf within the said city called Botolph Wharf, and ready and about to be unshipped, landed, and carried otherwise than to the house or houses of aliens or an alien; that before the said casks of oil were so imported as aforesaid, the plaintiff was, and from thenceforth continually hitherto has been, and still is a tackle-house porter belonging to the said city, and that at the time when the said casks of olive oil were so ready and about to be unshipped, landed, and carried as hereinbefore mentioned, and also at the time when the said casks of olive oil were unshipped, landed, and carried as hereinafter mentioned, he the plaintiff was on the said wharf with divers to wit, three servants, then being ticket-porters of the said city duly and regularly admitted, and then was ready and willing and offered to unship, land, and carry the said casks of olive oil, and no other tackle-porter belonging to the said city then was present to unship, land, or carry the said casks of olive oil; of all which premises the defendant [681] before and at the time of the committing of the grievances thereafter mentioned had notice, yet the defendant, although he was not at the time of the committing of the grievances thereafter mentioned, one of the tackle-house porters belonging to the said city, and well knowing that the plaintiff then was one of such tackle-house porters, and then was ready and willing to unship, land, and carry the said casks of olive oil, and that tackle-house porters belonging to the said city, and no other person or persons whatsoever, ought to have, enjoy, and perform such work and labour with such assistance as in the said recited ordinances in that behalf mentioned; but contriving, and wrongfully and injuriously intending, to deprive the plaintiff of the gains and profits which otherwise would have accrued to him from or by reason of his unshipping, landing, and carrying the said casks of olive oil, and otherwise to injure the plaintiff in that behalf, heretofore, to wit on the day and year last aforesaid, wrongfully and injuriously hindered and prevented the plaintiff from unshipping, landing, and carrying the said casks of olive oil or any part thereof, and wrongfully and injuriously did then, to wit, by certain persons by him in that behalf employed, and which same persons were not, nor was any of them then tackle-house porters or a tackle-house porter belonging to the said city, and otherwise than to the house or houses of aliens or an alien, unship, land, and carry the said casks of olive oil; by means whereof the plaintiff then wholly lost, and was deprived of, all the gains and profits, amounting in the whole to a large sum of money, to wit the sum of 100*l.* which might and ought to have accrued, and otherwise would have accrued to the plaintiff from and by reason of his unshipping, landing, and carrying the said casks of olive oil. To the plaintiff's damage of 100*l.*

Pleas: first, not guilty; secondly, that the mayor and [682] commonalty and citizens of the city of London have not from time whereof the memory of man was not to the contrary, had, nor have they been used and accustomed to have, nor ought of right to have had, nor still of right ought they to have by themselves and the persons by them in that behalf deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, loading, and housing, except to the houses of aliens, of all goods, wares, and merchandise imported into the port of London, and not consigned to aliens or an alien, for reasonable reward in that behalf, *modo et formâ*; concluding to the country.

Third plea, that from time whereof the memory of man was not to the contrary, the mayor, aldermen, and commons of the said city in common council assembled have not been used and accustomed to make and pass, nor of right ought they to have made and passed, nor still of right ought they to make and pass when and as by them deemed meet, acts and ordinances for the distribution of the said work and labour, and the ordering and regulating of the persons deputed, appointed, and permitted, as in the declaration admitted, *modo et formâ*; concluding to the country.

Fourth plea, that the said act and ordinance in the declaration mentioned, and therein supposed to have been made by the said mayor, aldermen, and commons of the said city in common council assembled, was not made by the said mayor, aldermen, and commons in common council assembled, *modo et formâ*; concluding to the country.

The plaintiff, by his replication, joined issue on each of these pleas.

At the trial before Tindal C. J., at the sittings in London after Trinity term, 1840, the following facts appeared:—

The plaintiff was a tackle-porter appointed by the [683] Mercers' Company, and the defendant, who was a wharfinger, was the occupier of Botolph Wharf in the city of London. A ship called the "Susan and Anne" of Ipswich, having arrived at the defendant's wharf from Marseilles with a cargo of olive oil, the plaintiff went to the wharf on the 8th of January 1836, and claimed a right to land the cargo. The defendant, however, refused to allow him or his assistants to do so, and employed other parties to unload the vessel. The cargo belonged to alien merchants, who had consigned it to merchants in London, and had drawn bills on the consignees for the proceeds, which bills had been accepted.

The plaintiff put in the following documentary evidence to establish the right claimed:—

An act of common council of the 25th of October 1570, granting to the company of cloth-workers four porters.

An act of common council of the 15th of August 1579, which recited that certain parties had been appointed to give "their opynions touchinge the establishinge of a certeyn order for the number of tackle-houses for porters, and chieflie shoulde consider whether it be necessarye that the companyes latelie erected shoulde so continue or not." The report of the persons so appointed, set forth, among other things, that "it is thought good that theis tackle-houses alreadye erected shall stande in force as followeth: first, whereas in reason of the Packers' Companye, forasmuch as they have the onely worke of strangers, ought in equitye to be restrayned from workinge to anye cytizens, yet for that it is convenient that all men maye make choise of his owne workmen, the saide porters shall be at libertie to worke as well to cytizens as forryners, alwayes provided that such persons as shall hereafter be admitted into the saide socyetie of porters shall be freemen and no forrenes."

[684] "And forasmuch as it appeareth to the saide L. Maior, aldermen, and common counsell that the saide orders so devised and reported by the persones so appoynted as is afforesaide, be good and beneficiale to the cyttee to be observed: It is therefore ordeyned and enacted by the L. Maior and his worshippfull brethren the aldermen and the common counsell assembled, and by aucthoritye of the same, that the saide orders above recyted shal be dulye kept, obayed, and performed accordinge to the forme, tenor, and purport thereof, anye other acts of common counsell, ordenances, usage, or other matter heretofore had or made to the contrarye in anye wise notwithstandinge."

An act of common council of the 26th of March 1607, by which, after reciting "that the freemen tackle-house porters and street porters had vehemently complained against the porters under the packer of the said city, for that they at late time had, contrary to usage, intruded into the labour and business of packing, shipping, and unshipping, landing, and taking up as well of the goods of English merchants as of strangers, where they had been accustomed to deal only in the labour of packing, shipping, unshipping, lading, and taking up of the goods and merchandises of merchant strangers," it was amongst other things "ordeyned and established by the Right Honourable the Lord Maior, the aldermen his brethren, and the commons in common counsell assembled, and by the authoritye of the same, that no person or persons whatsoever shall at any tyme hereafter be admytted or allowed in any of the tackle-houses in the said cyttie as a maister or fellow porter, unless hee bee a freeman of the said cyttie, and shall be thereunto admytted and allowed by master, wardens and courts of assystantes, of such worshipful companye of this cyttie as shall have a tackle-house, or hath had [685] usuall porters apperteyninge to a tackle-house in the said cyttie."

"And it is likewise ordeyned, enacted, and established by authoritye aforesaid, that the porters commonlye called the porters to the packer of the gooddes of merchaunte straungers in the said cyttie, or any of them, shall not at any tyme or tymes hereafter in anywyse intermeddle or deal with the shipping, unshipping, ladinge, unladinge, packinge, taking upp, carriage or housinge of any manner of gooddes, wares, or merchandizes of any merchaunte or merchauntes, or of any other person or persons whatsoever, English borne, that is or shall bee free of the said cyttie or not free, but shall content themselves with the labour of packinge, shippinge, unshippinge, ladinge, unladinge, taking upp, portage, and housinge of the gooddes, wares, and merchandises of merchant strangers onelye."

An extract from the proceedings at a common council held on the 26th of January

1608, whereby a tackle-house which had then lately been erected by the Mercers' Company, was ratified and confirmed.

An act of common council of the 16th of October 1766, for adjusting the differences which then existed between the tackle-house porters and ticket porters.

An act of common council of the 6th of December 1712, enacting, that instead of two only one governor of the fellowship or society of porters of the city, should in future be appointed.

An act of common council of the 27th of March 1798, for settling the differences between the tackle-house and ticket porters, and to prevent obstructions and delay in the business of the merchants, which enacted among other things, "that the tackle-house porters belonging to this city, and no other person or persons whatsoever, should have, enjoy, and perform the work or labour,—with the assistance of such persons [686] as should be employed by them respectively in manner thereafter mentioned,—of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever which should be imported into the port of London in any ship or vessel which should come from all and any place or places north of the United States of America, (Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted), France, Spain, Portugal, Holland, Hambro, Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Barbary, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States, the East Indies, Asia and Africa, and of all lead, wine, and brandy which should come from the British Plantations, and all other parts and places, and all prize goods captured on board any ship or vessel, and which should be brought to the port of London and condemned by the Court of Admiralty in England; and also all prize goods which should be imported from the places thereinbefore respectively allotted to the said tackle-house porters."

And it was further enacted, "that every person who should act as a tackle-house porter, ticket porter, or packer's porter, otherwise alien porter, or who should intermeddle with the work or labour or either of them within the city of London or liberties thereof, or receive or take any of the emoluments of any or either of them not being duly authorized so to do, should forfeit and pay for every such offence the sum of 5l."

And it was also enacted, "that the packer's porters, otherwise called alien porters, or any of them, should not in anywise intermeddle in the labour of packing, shipping, unlading, or otherwise intermeddle with any goods, wares, and merchandises except such as belong to merchant strangers; and should not employ any person or persons under them, except such as should be duly [687] and regularly admitted ticket porters of this city, upon pain of forfeiting and paying for every such offence the sum of 5l."

And it was further enacted amongst other things, "that if any porter whatsoever should at any time or times refuse to pack, lade, ship, unlade, land, carry, load, unload, or otherwise deliver any goods, wares, and merchandises of any merchant or merchants whatsoever (other than and except such as belong to merchant strangers) upon every reasonable request from time to time for that purpose made, every porter so offending without reasonable excuse, to be allowed and certified by the governor of the said society for the time being (who was thereby authorised and required to allow and certify the same from time to time if he in his discretion should think proper), should forfeit and pay for every such offence a sum of money not exceeding 5l., nor less than 40s.; and such merchant and merchants should, and lawfully might also from time to time when, and as often as the case should happen (if no porter was in attendance and ready to perform the work of which the declaration of such merchant and one other person then present should be sufficient evidence), employ any person or persons whatsoever, to pack, lade, ship, unlade, land, carry, load, unload, or otherwise deliver his or their goods, wares, and merchandises aforesaid," &c.

An act of common council of the 11th of June, 1801, whereby it was, amongst other things, enacted, "That the tackle-house porters belonging to this city, and no other person or persons whatsoever should have, enjoy, and perform the work or labour (with the assistance of such persons as should be employed by them respectively in manner mentioned in the said act of the 27th of March, 1798) of unshipping, landing, carrying, loading, and housing of all goods, wares, and merchandises whatsoever, which should be imported into the port of [688] London in any ship or vessel which should come from all and any place and places north of the United States of America

(Hudson's Bay, Quebec, Canada, and Nova Scotia only excepted), France, Spain, Portugal, Holland, Hambro', Bremen, Germany, the countries called the East Countries, Russia, Italy, Turkey, Barbary, Morocco, Gibraltar, the Mediterranean, the South Seas, that part of America south of the United States (Surinam, Demerara, and Berbice only excepted), the East Indies, Asia, and Africa; and of all lead, wine, and brandy which should come from the British plantations, and all other ports and places, and all prize goods captured on board any ship or vessel, and which should be brought to the port of London, and condemned by the Court of Admiralty in England; and also all prize goods which should be imported from the places therein-before respectively allotted to the said tackle-house porters." And it was further enacted, "That all and every other the clauses, powers, provisions, and authorities and table of rates contained or referred unto in the said act of the 27th of March 1798, and not thereby varied or repealed should be, and the same were thereby declared to be, and remain in full force and effect, as fully and effectually to all intents and purposes whatsoever as if the same several clauses were therein repeated and thereby respectively enacted, established, and ordained, any thing thereinbefore contained to the contrary thereof in anywise notwithstanding."

Extracts from the charter granted to the city by King Charles the Second in the sixteenth year of his reign, setting out, by *inspeximus*, a charter of Charles the First, were also put in, among which were the following:—

"To all to whom these present letters shall come greeting: Whereas our well beloved the mayor, commonalty, and citizens of the city of London and their predecessors within the port of London, within the [689] liberties and franchises of the city of London and suburbs thereof, have had, exercised, and enjoyed, or claimed to have, exercise, and enjoy, the office of package of all cloths, wools, woollfells, calf-skins, goat-skins, bales of tin, and all other merchandises whatsoever to be packed, casked, piped, barrellled, or otherwise vesseled out of the said port, or to be transported to any of the parts beyond the seas of the goods and merchandises as well of aliens and persons born under any foreign allegiance in any parts beyond the seas, wheresoever they should be customed; and also the office as well for surveying or scavage of all goods or wares of any merchant, either alien or denizen, whose father was or should be an alien born without Our allegiance, and from the parts beyond the seas, to be brought to the said port by way of merchandise, as also for the surveying, delivering, or balliage of all goods and wares of any such merchants aforesaid, to be exported from the said port into the parts beyond the seas, or otherwise, on the account of merchandises upon and through the river Thames within the said port, in any ship, boat, barge, or vessel whatsoever floating, laden, remaining, or being off any shore of the said river of Thames, and upon any wharf or shore of the same river which should happen there to remain or be delivered or unladen, as well by water as by land, within the port aforesaid, within the franchises and liberties of the said city and suburbs thereof; all which they have enjoyed time out of mind, and by virtue of several charters or letters patent of Edward the Fourth late King of England, in the first and eighteenth years of his reign to them granted, and also by virtue of a certain other charter or letters patent of Henry the Eighth, late King of England, to the said mayor and commonalty and citizens aforesaid, granted in the third year of his reign, by whatsoever name or names the same are called in the said letters patent, by authority of [690] parliament confirmed, or by colour of the same letters patent, or any of them, or by the prescription aforesaid, with divers fees and rewards to the said offices belonging and appertaining: And whereas divers questions and differences have of late arisen and about and concerning the offices aforesaid, and the execution thereof within the port aforesaid, within the liberties and franchises of the city aforesaid, and suburbs thereof, whereby the said mayor, and commonalty, and citizens of the city of London aforesaid have been hindered and disturbed in the offices aforesaid and in the exercise of them: Know ye that We, for the moving and utter taking away all doubts and questions about the said offices, and likewise for the corroborating, amplifying, increasing, declaiming, and establishing the liberties and privileges of the said city, of Our special grace, certain knowledge, and mere motion, and also for and in consideration of 4200*l.*, &c., have for Us, Our heirs, and successors, created, ordained, and constituted, and by these presents do create, ordain, and constitute that from henceforth for ever hereafter there shall be within the said port of London and the limits and bounds thereof, within the liberties and franchises of the said city and suburbs thereof, the office and offices,

employment and employments of package of all woollen cloths, woollfells, calfskins, goatskins, bales of tin, and all other merchandises whatsoever, to be packed, casked, piped, barrelled, or anyways vesselled, with a survey of the measure, number, and weight of the said merchandises; and also the survey of all customable merchandises to the said port within the liberties and franchises of the said city and suburbs thereof coming, and out of the said port going, as well by land as by water, within the liberties and franchises of the said city aforesaid and suburbs thereof, as well of the goods of any denizen whose father is or shall be an alien, as of the goods of aliens, whereso-[691]-ever the same shall be customed, as also an office or employment of carriage and portage of all wools, woollfells, bales of tin, and of all other merchandises whatsoever, as well of any denizen whose father is or shall be an alien born, without the allegiance of Us, Our heirs or successors, and under any foreign allegiance, in any the parts beyond the seas which shall be carried into London from the river of Thames to the house or warehouse of such alien, and from thence to the said river, together with the fees, sums of money, profits, and emoluments of the said office or employments and other the premises in two tables or schedules hereunto annexed mentioned, and respectively limited and appointed, all and singular which fees, sums of money, profits, and emoluments in the said tables or schedules expressed as due and lawful fees to the said several offices of package or portage annexed and belonging, and in the execution of the same offices and either of them respectively to be had and taken, We do, for Us, Our heirs, and successors, ratify, establish, and confirm by these presents; and the same fees, sums of money, profits, and emoluments as the said tables or schedules before mentioned, We do, for Us, Our heirs, and successors, grant unto the said mayor, commonalty, and citizens of the city aforesaid, and their successors for ever by these presents. And furthermore, of Our special grace, certain knowledge, and mere motion, and for the consideration aforesaid, We do, for Us, Our heirs, and successors, give and grant to the said mayor, commonalty, and citizens of the city aforesaid, and their successors, the said office or employment of package of all and all manner of woollen cloths, woollfells, calfskins, goatskins, bales of tin, and all other merchandises whatsoever to be packed, casked, piped, barrelled, or anyways vesselled, with the survey of the measure, number, and weight of the said merchandises, together with the fees, sums of money, profits, [692] and emoluments aforesaid, and also the office or employment of carriage and portage of all wools, woollfells, bales of tin, and all other merchandises whatsoever, as well of any denizen whose father is or shall be an alien born without the allegiance of Us, Our predecessors, heirs, or successors, as of any alien born without the allegiance of Us, Our predecessors, heirs, or successors, and under any foreign allegiance in parts beyond the seas, which shall be carried into London from the river of Thames to the house of such alien, and from thence to the said river, together with the fees, sums of money, profits, and emoluments aforesaid; to hold and exercise the offices and employments aforesaid, and either of them, with their appurtenances, and the dispositions, orderings, surveyings, and corrections thereof, and of either of them, together with all fees, sums of money, profits, and emoluments whatsoever to the said offices or employments, or either of them, in the said tables or schedules to these presents annexed and respectively appointed to the said mayor and commonalty and citizens of the said city, and their successors for ever: and also to exercise and occupy the said offices and employments, and every and either of them, by themselves or by their sufficient minister or ministers, deputy or deputies, without any account or other things to be therefore rendered or made to Us, Our heirs, or successors (besides the rent hereafter by these presents mentioned to be reserved and paid to Us, Our heirs, and successors), and without incurring any penalty or forfeiture of the offices aforesaid, or either of them, or of any parcel thereof, although they or their deputies, officers, or servants do not pack the said goods or merchandises when they are ready, and upon reasonable request and notice thereof given for the performing the said services; and that no other porter or carrier, or any person or persons whatsoever, shall presume to in-[693]-termit or intrude him or themselves to carry or lade any of the said goods or merchandises from any wharf or shore within the limits aforesaid, into any ship or vessel, or to unlade any goods or merchandises from any vessel upon any wharf, shore, or land within the limits aforesaid, without the special appointment or licence of the said mayor and commonalty and citizens of the said city aforesaid, or of their officers or deputies, for that purpose first had and obtained; and that the porter or carrier appointed, and from time to time to be

appointed, by the said mayor, and commonalty, and citizens, and their successors, or by their sufficient officers or deputies for the time being shall have, take, or receive of and from the said merchants as well aliens born without the allegiance of Us, Our predecessors, heirs, and successors, and under any foreign allegiance in parts beyond the seas as of the said denizens born or to be born within the power or allegiance of Us, Our predecessors, heirs, or successors, whose father is or shall be an alien born without the allegiance of Us, Our predecessors, heirs, and successors, for carriage or portage of the said goods and merchandises, such sums of money for their labour aforesaid as in a certain schedule, to these presents annexed, are mentioned and appointed, without any account or other thing to be therefore rendered or made to Us, Our heirs or successors, (besides the rents hereafter in these presents mentioned to be paid to Us, Our heirs, and successors). &c. &c.

"And whereas We are informed that, with intent to defraud and deceive the said mayor, and commonalty, and citizens of the city aforesaid of the fees and profits to the said several offices belonging and appertaining, several goods and merchandises have been fraudulently laden and unladen by divers persons at certain wharfs or places commonly called St. Katharine's, Tower, South-[694]-wark, Beck Shore, Wapping, Redrith, Deptford, Greenwich, and Blackwall, and all other places between Blackwall and London Bridge on both sides of the river Thames aforesaid, supposing the same places to be without the port of London aforesaid and the liberties, franchises, and suburbs thereof, We will and by these presents for Us, Our heirs and successors, do ordain and declare that for ever hereafter all and singular merchant strangers born without Our allegiance in parts beyond the seas and under foreign obedience, and also the sons of such merchant strangers who henceforth shall lade or unlade any goods or merchandises customable in the port of the city of London aforesaid, or in any of the said places or wharfs above mentioned shall from time to time render and pay or make, and cause to be rendered and paid unto the said mayor, commonalty, and citizens of the city aforesaid, and their successors, or their officers, deputies, and servants such wages and fees as are in the said tables or schedules mentioned and expressed: and further, because We are given to understand that divers goods and merchandises of merchants, as well aliens born without Our allegiance, under foreign obedience in parts beyond the seas, as also such denizens whose father is or shall be an alien and born under foreign allegiance in parts beyond the seas, which are carried out of the port of the said city and brought into the said port from foreign parts and beyond the seas, are very often subtilly concealed and coloured under the names of other persons, to defraud Us of Our customs and other things to Us belonging for such goods and merchandises to the prejudice and loss of Us, Our heirs and successors, and also of the said mayor, and commonalty, and citizens of the said city of the fees and sums of money so as aforesaid respectively limited, appointed, and ordained by reason of the exercise of the offices aforesaid, or any of them: We therefore, being willing to look after [695] Our indemnity in this behalf, and also to the intent that the said mayor, and commonalty, and citizens may the better detect the frauds, covins, and deceits of all persons so concealing and withdrawing the said goods and merchandises, and the fees aforesaid, We do for Us, Our heirs and successors, give, and, by these presents, grant to the said mayor, and commonalty, and citizens, and their successors, that the mayor of the city aforesaid for the time being, and the sufficient deputies, servants, or officers of the said mayor, commonalty, and citizens of the city aforesaid, in that behalf from time to time duly assigned, shall and may have full power and authority to give and administer the oath upon the Holy Evangelists, from time to time, to all such persons suspected, or to be suspected of the said withdrawals, concealments, colourings, frauds, or covins, and that it shall and may be lawful to the said mayor, his minister and deputy, or officers for the time being, by all lawful ways and means, to compel all such persons suspected, or to be suspected, as shall refuse or deny to take the same oath, although express mention of the true yearly value or of the certainty of the premises or any of them, or of any other gifts or grants by Us, or by any of Our progenitors or predecessors to the said mayor and commonalty and citizens of the city aforesaid, or any of them heretofore made, is not made by these presents, or any statute, act, ordinance, provision, proclamation, or restraint to the contrary thereof, heretofore had, made, published, ordained, or provided, or any other thing, cause, or matter whatsoever, in any wise notwithstanding."

It was clearly proved that the corporation had exercised the right to appoint what were called alien porters, by whom all goods of aliens brought into the port of London, were landed and packed. Evidence was also given that the port of London extends from Yantlet [696] Creek to Staines Bridge, including the whole of the Thames and both banks of the river; that besides many private wharfs, there are certain sufferance wharfs appointed by the commissioners of customs for the reception of certain goods liable to duties. That there are between the Tower and London Bridge, eight or ten wharfs or quays called legal quays, Botolph Wharf being among the number, for shipping and landing goods liable to duties; that oil from the South Seas and tallow are for the most part landed and warehoused on the Surrey side of the Thames; and that certain other goods are generally discharged in the stream. It was not shewn that the tackle-porters had ever interfered in the case of vessels unloading on the Surrey side, or unshipping in the stream, or had exercised their office at the sufferance wharfs or anywhere, except at the legal quays.

It also appeared that the tackle-porters had been in the habit of taking the goods of aliens consigned to English merchants, but if the alien porters came and disputed the right, and it turned out on inquiry that the goods belonged to an alien, the tackle-porters gave way to the alien porters. No tackle-houses were shewn to be now in existence.

The only instance of "carrying" proved was, with respect to a quantity of tea belonging to the East India Company, which had been landed by tackle-house porters from a vessel in Long Reach, and carried by them, in town carts, to the warehouses of the company.

Several tackle-house porters and freemen, were called as witnesses on the part of the plaintiff, but were withdrawn on its being objected by the defendant's counsel, that they had a direct interest in the event of the suit. Other witnesses who were freemen were also objected to; some on the ground of their being freemen and of the interest they had in maintaining [697] the alleged rights of the city, and others on the ground that in addition to being freemen they were ticket-porters, and consequently interested in sustaining the right in question, inasmuch as the act of common council of the 27th of March 1798 provided that none but ticket-porters should be employed as assistants to the tackle-house porters. The Lord Chief Justice overruled the objection to these witnesses, and they were examined, their names being indorsed on the record at the request of the plaintiff's counsel.

At the close of the plaintiff's case, on its being objected by the counsel for the defendant that there was no proof of the exercise of the alleged right to the housing of goods, the plaintiff's counsel applied to amend the declaration by striking out that word. Leave to amend was given, liberty being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the amendment was not warranted by the 3 & 4 W. 4, c. 42, s. 23. It was also contended on the part of the defendant that any rights formerly exercised by the corporation with respect to the landing, portage, &c. of aliens' goods, were surrendered by the agreement made between the government and the corporation pursuant to the statute 3 & 4 W. 4, c. 66 (a); for that the [698] offices confirmed by the charters referred to in that act

(a) Which, after reciting that "it was expedient that the offices, occupations, or employments of package, scavage, balliage and portage given, granted, or confirmed by divers charters of His Majesty King Edward the Fourth and of His Majesty King Charles the First, and by the 5 Hen. 8, c. 8, to, and now held and enjoyed by, the mayor and commonalty and citizens of the city of London, and the duties, fees, and emoluments thereof should be abolished, and that the mayor, aldermen, and commons of the city of London in common council assembled were willing and had consented that the said offices and the duties, fees, and emoluments thereof should be relinquished and abolished in consideration of a sum of money to be paid to them for the same, and provided they were authorised to lay out and invest the same in the purchase of land or other hereditaments," enacts (sect. 1) "that it shall be lawful for the Lord High Treasurer or the Commissioners of His Majesty's Treasury, or any three or more of them, to pay, from and out of all or any of the duties, revenues, and incomes composing the consolidated fund of the United Kingdom of Great Britain and Ireland, or out of the growing produce of the said fund, to the chamberlain of the city of London, on behalf of the said mayor and commonalty and citizens, such sum of money

were not limited to the portage, &c. of goods consigned to aliens, or carried to the houses of aliens, but extended [699] to all goods imported into the port of London, which were the property of aliens, and consequently that the exception to the custom, as stated in the declaration, was too narrow.

Under the direction of the Lord Chief Justice a verdict was returned for the plaintiff with nominal damages, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the evidence did not sustain the declaration as amended.

Channell Serjeant in Michaelmas term 1840, obtained a rule nisi to enter a nonsuit on the ground that the amendment made at the trial was not authorised by the 3 & 4 W. 4, c. 42, s. 23, inasmuch as it altered the character of the right which was in issue between the parties; and also that the declaration as amended was not supported by the evidence; *Fazakerley v. Wiltshire* (1 Str. 462, 10 Mod. 338); the exception being limited to goods consigned to aliens, whereas the evidence shewed that it applied to all goods the property of aliens to whomsoever consigned. He also obtained a rule for a new trial on the ground that the freemen ticket porters were not admissible witnesses; *Burton v. Hinde* (5 T. R. 174); *Davies v. Morgan* (1 C. & J. 587); *The Bailiffs, &c. of Godmanchester v. Phillips* (4 Ad. & E. 550, 6 N. & M. 211); and that the verdict was against the evidence, the claim embracing the whole of the port, and the evidence being restricted to an exercise of the right at the legal quays; and that there was not sufficient evidence of any exercise of the right of carrying. He also obtained a rule to arrest the judgment, on the ground that the custom alleged in the [700] declaration as amended was bad for uncertainty, the carrying being alleged without limit, and that the remuneration was not averred to be reasonable, or the amount set out, so as to enable the court to judge whether it was reasonable or not; *Laybourn v.*

as may be agreed upon between the said commissioners and the said mayor and commonalty and citizens as a compensation or satisfaction for the said offices, occupations, or employments of package, scavage, balliage, and portage, and the fees and emoluments thereof, and also to pay out of the said fund or the growing produce thereof, the costs and charges in any manner incident or relating to the preparing and passing this act."

Sect. 2 enacts "that the said sum to be paid as aforesaid shall be paid and received as full satisfaction and compensation to the said mayor and commonalty and citizens for the loss of the said offices and of the fees and emoluments thereof, and that on the day after the day on which the said sum shall be paid as aforesaid, the offices, occupations, or employments of package, scavage, balliage, and portage, granted or confirmed to the said mayor and commonalty and citizens by the said charters and act of parliament, or intended so to be, and the future duties, fees, and emoluments thereof, and all the estate and interest of the said mayor and commonalty and citizens, and their successors, of, in, and to the same, whether they may be entitled thereto respectively by virtue of the said charters and act of parliament, or by virtue of any other charters or acts of parliament, or by presumption or otherwise, and every of them, shall cease and determine, and be utterly void to all intents and purposes whatsoever."

"Provided always (sect. 3) that nothing in this act contained shall abridge, prejudice, or otherwise affect, or be deemed or construed to abridge, prejudice, or otherwise affect, any of the rights of the said mayor and commonalty and citizens of the city of London to which they are or may be entitled under or by virtue of the aforesaid charters or act of parliament, or otherwise, to have and exercise any of the offices or employments granted or confirmed to the said mayor and commonalty and citizens by the aforesaid charters or act of parliament, except the said offices or employments of package, scavage, balliage, and portage, or any of them, or to receive and enjoy the duties, fees, profits, and emoluments to such offices, or any of them (except as aforesaid) belonging or appertaining, or any other rights or privileges to which the said mayor and commonalty and citizens are entitled; but that the same shall be and continue in full force and virtue, and may be enforced and recovered by the same remedies and claimed or pleaded in the same manner as if this act had not been passed."

Sects. 4 and 5 empower the corporation to lay out the money in the purchase of land or of ground-rents.

Crisp (8 C. & P. 397, 4 M. & W. 320); and, further, that the declaration contained no averment that the persons employed in unloading the cargo in question were not ticket porters, it being merely alleged that they were not tackle porters.

Talfourd Serjt. and John Henderson in last Michaelmas term shewed cause (*b*). The important question is, what were the rights of the city of London with regard to the goods of aliens, which were purchased by the government under the provisions of the 3 & 4 W. 4, c. 66. The right here claimed is by prescription, whereas the right of the city to the portage of alien's goods depends, not on immemorial custom, but on the charters referred to in the 3 & 4 W. 4, c. 66; and with respect to the latter right, there can be no doubt, it was included in that statute. [Maule J. You say that this right is prescriptive, and not granted by charter; but if prescriptive and also intended to be granted by the charters, do you allow that it was purchased by government?] The charter of Edward the Fourth grants, among other things, "the office of portage of all wools, &c. which shall be carried in London from the river Thames unto the houses of strangers; and, contrariwise, from the said houses unto the said water, &c." These words were clearly meant to apply only to goods conveyed to the houses of aliens resident in London, and not to goods the property of foreign merchants; for it is an indispensable condition that the goods shall be carried "into the houses of [701] strangers," in order to give the corporation of London a claim to the portage. So, the charter of 16 Car. 1 grants "the office, &c., of carriage and portage of all wools, &c., as well of a denizen whose father is, was, or should be an alien born out of the limits of our allegiance, or that of our predecessors, &c., as of an alien born beyond the seas out of the limits of our allegiance, or that of our predecessors, &c., and under any foreign allegiance, which shall be carried into London from the river of Thames, to the house or repository of such alien as aforesaid, and from thence to the same river." Under this charter, to give the city of London a right to the carriage of goods, it is manifest that they must not only be the goods of aliens, but must be conveyed to their houses. The acts of common council of the 26th of March, and the 27th of March 1798, treat the right to the portage of goods consigned to English subjects, and that of goods consigned to aliens, as distinct. It is true, that the latter ordinance directs that the alien porters shall not intermeddle with goods, "except such as belong to merchant strangers;" but that expression may be taken to mean goods belonging to merchants living in London as strangers, and not goods the property of merchants living abroad. Where goods were consigned to English merchants the duties of scavage and package were not taken, but such goods were entered at the Custom House as British, and were not liable to the alien dues. [Tindal C. J. Upon that point the evidence was contradictory.] It is submitted that the right now claimed is not affected by the 3 & 4 W. 4, c. 66; for that statute is evidently limited to the purchase of alien dues charged upon goods imported by foreign merchants resident in London.

Channell Serjt., (with whom were W. H. Watson and Montague Smith), in support of his rule. It is impos-[702]-sible to contend successfully that the large sum given by government to the corporation of London, was in respect of a right of such a limited description as that suggested. The legislature in passing the 3 & 4 W. 4, c. 66, clearly sought to encourage the importation of foreign goods; but it cannot be supposed, that they would seek to effect that object by encouraging consignments to foreign rather than to English merchants. It is clear, that it was intended by the statute to abolish the offices of package, scavage, balliage, and portage, granted or confirmed by the charters of Edward IV. and Charles I. With respect to the latter charter, the words "house or repository of such alien," on which so much reliance is placed by the other side, are not necessarily confined to the residences of aliens, but may mean any places made use of by the consignee for the deposit of aliens' goods; and it is observable that the subsequent provisions in this charter do not restrict its operation to goods carried to the houses of aliens. The acts of common council of the 26th of March 1607, and 27th of March 1798, place the question beyond doubt, and shew clearly that the right of alien porters extended to all goods the property of aliens, to whomsoever they might be consigned. And this view is confirmed by the evidence given at the trial, by which it appeared, that in case of any dispute arising

(*b*) As the judgment of the court turned upon one point only, the argument upon the others is omitted.

between the tackle-house porters and the alien porters, as to the right to carry goods, if it turned out that such goods were the property of an alien, the former gave way to the alien porters. It therefore follows, that the exception to the right claimed in the declaration is too narrow, and, consequently, that the defendant is entitled to have his rule made absolute, for entering a nonsuit.

Cur. ad. vult.

TINDAL C. J. now delivered the judgment of the court.

[703] This was an action brought to assert a right claimed by the tackle-house porters of the city of London, to the landing and portorage of certain goods imported into the port of London. Upon the trial of the cause a verdict was given for the plaintiff, but leave was reserved to the defendant to move to enter a nonsuit on two grounds; first, that an amendment, which was made in the course of the cause, ought not to have been made; secondly, that a material allegation of the declaration, as amended, was not proved; and a rule nisi for a nonsuit on these grounds, and for a new trial on other grounds, was subsequently granted.

The allegation in the declaration, as amended, was, that from time whereof the memory of man is not to the contrary, the mayor and commonalty, and citizens of the city of London, have had, and have been used and accustomed to have, and ought of right to have had, and still of right ought to have, by themselves, and the persons by them in that behalf deputed, appointed, and permitted, the work and labour of unshipping, landing, carrying, and loading, except to the houses of aliens, of all goods, wares, and merchandizes imported into the port of London, and not consigned to aliens or an alien, for reasonable reward in that behalf.

It was objected to this allegation, that the exception was too narrow; for it was contended that, by the act of 3 & 4 W. 4, c. 66, and the agreement made in pursuance of it, the rights of the city (on whatever foundation they rested), to the unshipping and portorage of aliens' goods were abolished, and in consequence that the exception in the allegation ought to have extended to all goods of aliens imported into the port. That act, after reciting that it is expedient that the offices of package, scavage, balliage, and portorage given, granted or confirmed by divers charters of Edward the Fourth, and of his Majesty King Charles the First, and by an act [704] passed in the 5 Hen. 8, to, and now held and enjoyed by the mayor and commonalty, and citizens of the city of London, and the duties, fees, and emoluments thereof should be abolished, and that the mayor, &c. had consented, in consideration of a sum of money, authorises the commissioners of the treasury to pay such sum as shall be agreed on as a compensation for the said offices. It then enacts, that on the day after the day on which the said sum shall be paid, the offices, occupations, or employments of package, scavage, balliage, and portorage granted or confirmed to the said mayor and commonalty, and citizens, by the said charters and act of parliament, or intended so to be, and the future duties, &c. thereof, and all the estate and interest of the said mayor, &c., of and to the same, —whether they may be entitled thereto by virtue of the said charters and act of parliament, or by virtue of any charters or acts of parliament, or by prescription or otherwise,—and every of them, shall cease and determine, and be utterly void to all intents and purposes whatsoever.

The money agreed upon having been paid, it could not be disputed that the offices granted or confirmed, or intended so to be by the several charters referred to, were abolished; but the question was, what the offices were which were so granted or confirmed by those former charters: it being contended on the part of the defendant, that the offices granted or confirmed by those charters related to all goods of aliens imported; and on the part of the plaintiff, that they related only to goods carried to aliens' houses, or consigned to aliens. The terms of the charter of Charles the First, which is the material charter, are, "the offices and occupations of the carriage and portorage of all wools, woolfells, bales of tin and all other merchandises whatsoever, as well of a denizen whose father is, was, or should be an alien born out of the limits of our allegiance or that of our [705] predecessors, heirs or successors, as of an alien born beyond the seas, out of the limits of our allegiance, or that of our predecessors or successors, and under a foreign allegiance which shall be carried into London from the river of Thames to the house or repository of such alien as aforesaid, and from thence to the same river, together with the fees, sums of money, profits and emoluments of the said offices or occupations, and other premises mentioned and respectively limited and appointed in two tables or schedules annexed to that charter;" and it was con-

tended on the part of the plaintiff, that by the words "house or repository of such alien," must be understood, "house of such alien or repository belonging to or occupied by such alien;" and, the rather because, in a subsequent part of the charter, the more general term "repository" is omitted; the terms used in describing the office, being "the offices and occupations of the carriage and portorage of all wools, &c., and all other merchandize whatsoever, as well of denizens whose fathers are, were, or should be born out of the limits of our allegiance, as of aliens born beyond the seas out of the limits of our allegiance, which shall be carried into London from the river of Thames to the house of such alien, and from thence to the same river." On behalf of the defendant, it was on the other hand contended, that any place made use of by the alien as a place of deposit of his goods, whether occupied by himself or belonging to another whom he chose to entrust with the management of his goods, might properly be considered as the repository of such alien within the meaning of the charter. In favour of the more extended construction contended for by the defendant, the subsequent provision of the charter was referred to, by which it is ordered, that no other carrier or porter, or any person whatsoever, shall in-[706]-trude or interfere in carrying or lading any such goods or merchandise from any wharf or shore within the limits aforesaid to any ship or vessel, or to unlade any goods or merchandizes from any ship or vessel upon any wharf, shore, or land within the limits aforesaid, without the special appointment or licence of the said mayor, &c., and that the carriers or porters appointed by the mayor, &c., may take and receive from the like merchants, as well aliens born in parts beyond the seas, as of the like denizens born within the dominions, &c., whose fathers were aliens born without the limits of our allegiance, for the carriage and portorage of the like goods, such sums of money as are mentioned in a schedule annexed to these presents.

This provision contains nothing to restrict its operation to goods carried to the houses of aliens. A similar remark may be made with respect to other provisions of the charter, by one of which, after reciting that, in order to defraud the mayor, &c., of the fees appertaining to the aforesaid offices, certain goods have been craftily laden and unladed at certain wharfs and places called St. Katharine's, Tower Wharf, Southwark, &c., supposing that the same places are not within the port of London, it is ordained and declared that henceforth for ever, all and singular foreign merchants born beyond the seas out of the limits of our allegiance, and also the sons of such foreign merchants who shall hereafter lade or unlade any goods or merchandizes upon which customs are taken in the port of the city of London aforesaid, or in any of the places or wharfs aforesaid, shall from time to time render and pay to the aforesaid mayor and commonalty, &c., or their officers, deputies, and servants such above-named wages and fees as are mentioned and expressed in the aforesaid table or schedule.

[707] By another clause, after reciting that divers goods and merchandizes, as well of aliens as of denizens whose fathers were aliens, carried out of the port of London to foreign parts, or brought from foreign parts to that port, are frequently kept back, concealed, and coloured under the names of other persons, to defraud us of our customs, and the aforesaid mayor and commonalty, &c., of the fees and sums of money for them as aforesaid respectively limited by reason of and for the exercise of the offices aforesaid, power is given to the mayor of the city, and the sufficient deputies, servants, or officers of the mayor, commonalty, and citizens to administer an oath to all such persons who shall be suspected of the aforesaid withholding, concealments, colouring fraud and covin. This provision appears to us to furnish strong grounds for inferring, that it was not intended that any aliens' goods should be exempt from the payment of the fees due under the charter to the mayor and commonalty and citizens, on the score of their being consigned to one not being an alien, and that such consignment would have been looked upon at the time this charter was granted, as a concealing and colouring the goods of the alien under other persons' names. That such was the interpretation put on this clause of the charter, is clear from the evidence given on the trial of the cause, by which it appeared, that where the goods of any alien have been imported, consigned to an English merchant, the tackle-house porters have taken them; but, if the alien porters came and disputed the right, and upon inquiry it turned out that they were aliens' goods, then the alien porters took them.

What the rights of the alien porters were previously considered to be, appears from the ordinance of the common council of the 6th March 1607. That ordinance recites,

amongst other things, that the freemen [708] tackle-house porters, and street porters, had vehemently complained against the porters under the packer of the said city, (meaning the alien porters,) for that they of late time have, contrary to usage, intruded into the labour and business of packing, shipping, and unshipping, lading, and taking up of the goods and merchandizes of merchant strangers only; and it enacts, that the porters to the packer of goods of merchant strangers in the said city, shall not in any wise intermeddle or deal with the shipping, unshipping, lading, unlading, packing, taking up, carriage, or housing of any manner of goods, wares, or merchandizes of any merchant or merchants, or of any other person or persons whatsoever English born, that is or shall be free of the said city or not free, but shall content themselves with the labour of packing, shipping, unshipping, lading, unlading, taking up, portorage and housing of the goods, wares, and merchandizes of merchant strangers only.

This ordinance being general in its terms, recognizes the right of the alien porters to the shipping and unshipping of all goods of aliens without restriction; and there is no reason for supposing that the right to the office was intended to be confirmed by the charter to the mayor, commonalty and citizens, to a narrower extent than that in which it had been previously enjoyed by their deputies and servants.

These considerations seem to us to shew, that the rights granted or confirmed by the charter, are not confined to goods landed and sent to aliens' houses, but extend to all goods of aliens imported, from which the necessary result is, that the plaintiff has failed to make out the allegation of the custom to the extent stated in his declaration; or, in other words, that the exception stated to the custom is too narrow, for it excepts only the carrying of goods to the houses of [709] aliens, and goods consigned to aliens, whereas it ought to have been an exception, generally, of all aliens' goods; and, on this ground, we think a nonsuit ought to be entered.

The view we have taken of this point, renders it unnecessary for us to say any thing respecting the other points which were discussed on the argument of the case.

Rule absolute accordingly.

MORRISON AND OTHERS v. TRENCHARD. June 1, 1842.

A declaration in assumpsit stated, that the defendant and J. S. by a certain promise in writing, promised the plaintiffs in the words and figures following; that is to say," &c. It then set out a joint and several guarantee, in hæc verba. Held, on special demurrer, that it was no objection to the declaration that it appeared that another contracting party was not sued. Held also, that the mode of stating the promise was sufficient.

Assumpsit. The declaration stated, that the defendant and one William Turtle, by a certain promise in writing, signed by the defendant and the said W. T., and addressed to the plaintiffs, addressed and promised the plaintiffs in the words and figures following, that is to say, "gentlemen (meaning the plaintiffs), opening an account with, and giving credit in your (meaning the plaintiffs'), trade, to William Lacy, of, &c., at our (meaning the defendant's and the said W. T.'s) instance, we (meaning the defendant and the said W. T.) hereby jointly and severally guarantee to you (meaning the plaintiffs), the payment of the running balance of his (meaning the said W. L.'s) account with you (meaning the plaintiffs) from time to time, until further notice." Averment: that the plaintiffs opened an account with W. L., in the way of their trade of haberdashery, and gave credit to him, at the instance of the defendant and W. T.; and that on the 1st of July, A.D. 1841, there was a running balance due to the plaintiffs on the said [710] account, amounting to 65l. 17s. 9d., and that the said W. L., though requested, had not paid the said balance, of all which premises the defendant had notice, and was requested to pay the same, but had wholly refused, &c.

Demurrer: assigning for causes, that no consideration for the defendant's promise was shewn in the declaration; and that the promise, on the face of it, was made jointly with the defendant and W. T.; and that the declaration shews upon the face of it, that the writ was abateable, and ought to be abated by reason of the non-joinder of the said W. T.; and also, that no promise by the defendant was distinctly alleged; also, that the declaration stated matter of evidence, and that the promise ought to

have been stated according to its legal effect (a)¹; also that either the declaration should have been against the defendant and W. T., or the plaintiffs should have manifested their intention to treat it as the several promise of the defendant, omitting all mention of W. T.

Joinder in demurrer.

Channell Serjt., in support of the demurrer.

One objection to the declaration is, that no consideration is shewn for the alleged promise, and that the promise, as stated, is joint, though only one promisor is declared against. The declaration, though it might be good on general demurrer, is certainly informal. Where a promise is joint and several, a plaintiff undoubtedly may treat it as either, but here the plaintiffs, whilst they treat the promise as several, shew that it was in fact joint. [Tindal C. J. That would be ground for a plea in abatement.] Probably that would be so, as the plaintiffs do not shew that Turtle was alive.

Another objection is, that no precise promise is [711] stated. It is said that the defendant promised the plaintiffs "in the words and figures following, that is to say," and the declaration then sets out the guarantee. (The court intimated an opinion that that was sufficient.)

Per curiam. Judgment for the plaintiffs.

FAGAN v. DAWSON AND JOHNSON. June 6, 1842.

An unsealed issue-roll is not a record of the court; and therefore the entry of a nolle prosequi thereon against one of two defendants, is not the proper evidence of such nolle prosequi, to shew that as against such defendant, the action is at an end.

Trespass de bonis asportatis. Pleas; by the defendant Dawson, not guilty, and leave and licence; by the defendant Johnson, not guilty.

At the trial before Tindal C. J. at the sittings for Middlesex, after last Hilary term, the plaintiff's counsel proposed to call the defendant Johnson as a witness; and with a view of removing any objection as to his admissibility (a)², the issue-roll in the cause was produced, with a nolle prosequi as to Johnson entered thereon. This document was not sealed with the seal of the court, but it was marked with an ink stamp, bearing the name of the court, and the number of the roll (b)¹. It was objected by the counsel for the other defendant, that there [712] was no evidence of the nolle prosequi, inasmuch as the issue-roll was not a record, not being properly under seal. Johnson was admitted as a witness upon an understanding between the parties, that in case the court should be of opinion that the document was not sufficient evidence of a nolle prosequi, a nonsuit should be entered.

Bompas Serjt., in last Easter term, obtained a rule nisi to enter a nonsuit accordingly.

Channell Serjt. now shewed cause. He submitted that, under the circumstances, the document was the proper issue-roll. [Tindal C. J. It cannot be considered as the roll until it is brought in.] It is laid down in Archbold's Practice (page 918, 4th ed.), that "in actions ex delicto, the plaintiff may enter a nolle prosequi as to some of the defendants, and proceed against the others, at any time before final judgment, even though they all join in the same plea, and be found jointly guilty" (b)². A similar rule

(a)¹ Vide Com. Dig. Pleader, (C.) 37, 1 Chitt. Rep. 28, 60 (a), 68; 5 Mann. & R. 451; ante, vol. i. 281, vol. iii. 780, vol. iv. 4.

(a)² It is conceived that Johnson, being a party to the record, could not have been made a witness against his will, by entering a nolle prosequi; and that if he was willing to be examined, his co-defendant could not object, whether a nolle prosequi was entered or not. Vide *Worrall v. Jones*, 7 Bingh. 395, 5 M. & P. 251; *Hall v. Curzon*, 9 B. & C. 646, 4 M. & R. 565; *Pipe v. Steele*, 2 Q. B. Rep. 337.

(b)¹ It was stated by Channell Serjt., on shewing cause, that the parchment on which the proceedings in a cause were entered, was sold stamped, as above mentioned, by stationers appointed for that purpose by a judge of the court; which statement was confirmed by one of the masters.

(b)² Citing *Coux v. Lowther*, 1 Ld. Raym. 597; *Dale v. Eyre*, 1 Wils. 306; *Parker v. Lawrence*, Hob. 70; *Lover v. Salkeld*, 2 Salk. 455.

is laid down in Phillips on Evidence (page 67, 9th ed.), as to criminal prosecutions. "Upon an information by the Crown against two or more, if a nolle prosequi be entered by the attorney-general either before or at the trial, as to one of the defendants, such defendant may be called as a witness for the Crown, against his co-defendant" (d). The court will, if necessary, compel the proper entry to be made on the roll; *Bloomfield v. Blake* (2 Dowl. P. C. 237). [Tindal C. J. The question here is, whether an entry has been made at all,—whether the plaintiff is in a condition by legal proof to satisfy the judge that a nolle prosequi has been entered.] It may have been done [713] by agreement; or it may have been entered at nisi prius. [Tindal C. J. In the latter case I should have ordered the officer to enter it.] In *Gree v. Newell* (a) it was decided that the judge of nisi prius might record a nolle prosequi. But the nisi prius record would contain nothing more than a minute or memorandum by the officer; and the roll is the proper place whereon to enter the nolle prosequi.

Bompas Serjt., in support of the rule, was stopped by the court.

TINDAL C. J. Even if Johnson had remained on the record as a defendant, he might have been admitted as a witness, supposing him to have had no interest (b). But as he was called as a witness only upon the understanding that he was off the record, and as I think the evidence of the nolle prosequi was not sufficient, a nonsuit must be entered, unless the plaintiff will consent to a stet processus.

The plaintiff having consented to the entering of a stet processus, a rule was drawn up accordingly.

[714] BRADBEE v. THE MAYOR, &C. OF LONDON, Governors of Christ's Hospital. 1842.

[S. C. 5 Scott, N. R. 79; 2 D. N. S. 164; 11 L. J. C. P. 209.]

Declaration that the plaintiff was possessed of a messuage in London in which he carried on a certain trade, and that the defendants were possessed of a house adjoining thereto; that the defendants, purposing to pull down their house and seven others adjoining thereto, and to erect another house on the site of their first mentioned house, preparatory to their so doing, erected a hoarding in front of their houses; that the hoarding inclosed a public footway, and thereby obstructed the footway and the approach to the plaintiff's messuage, and the passage of persons on that side of the street; that the defendants pulled down the eight houses and erected a house adjoining to the plaintiff's messuage.—First grievance: that the defendants wrongfully, and without reasonable cause, delayed pulling down and re-building for an unreasonably long time after the erection of the hoarding, and wrongfully continued the hoarding so obstructing the footway and approach, for a long and unreasonable time, whereby customers were prevented from frequenting the plaintiff's shop.—Second grievance: that the defendants, by their agents and workmen, conducted themselves so carelessly, negligently, and improperly in pulling down the first-mentioned house of the defendants, that by and through the carelessness, &c. of the defendants and their agents, &c. in pulling down that house, and in neglecting to use reasonable and proper precaution, large quantities of bricks, tiles, &c. fell from the same house into and upon the plaintiff's messuage, and upon and through divers skylights, &c., breaking the glass and damaging goods, &c. &c.—Third grievance: that the defendants, by their agents, &c., conducted themselves so carelessly, &c. in digging and clearing the ground for the foundation of the house so built, and in underpinning, removing a part of, shoring up, and doing other works to the party wall and connected therewith, that by and through the carelessness, &c. of the defendants and their agents, &c., the party-wall and all the walls, floors, &c. of the plaintiff's messuage sunk, cracked, &c., and the messuage was

(d) Citing Bull. N. P. 285 c., Rep. temp. Hardw. 163; *Ward v. Man*, 2 Atk. 229.

(a) 1 Ld. Raym. 716, 1 Comyns's Rep. 113 (*Gree v. Rolls*), 2 Salk. 456 (*Gree v. Rolle*), 12 Mod. 651 (*Greeves v. Rolls*).

(b) See *Worrall v. Jones*, 7 Bingh. 395, 5 M. & P. 251; *Pipe v. Steele*, 2 Q. B. Rep. 733, 1 Phill. Ev. 50, 9th ed. (overruling *Green v. Sutton*, 2 Moo. & Rob. 269).

See also *Attwood v. Small*, 6 Clark & Finn. 232, 293; *Bell v. Banks*, ante, vol. iii. pp. 258, 261.

damaged and lessened in value, &c.—Pleas: first, not guilty; secondly, (as to continuing the hoarding,) an immemorial custom in London that if any person hath had occasion to erect or pull down any building within the city, near to any public way, and hath had occasion for those purposes to erect and continue any hoarding in such a manner as to obstruct or inclose any part of a public way within the city, and hath applied to the Lord Mayor for his licence to erect and continue such hoarding in such manner and for such purpose or purposes as aforesaid, such Lord Mayor hath had full power and authority to license such person, &c. to erect and continue any such hoarding for such purpose or purposes aforesaid, and of such dimensions and in such manner and for such time or times as he hath thought reasonable; and the person so applying and having obtained such licence, hath lawfully and of right erected and continued and been used and accustomed of right to erect, and continue for such purpose or purposes in any such public way so as to inclose or obstruct the same, such hoarding in such manner and of such dimensions and for such time or times as he had been so licensed to do by the Lord Mayor, except so far as such custom, power, or authority hath been affected by the 57 G. 3, c. xxix. The plea then set out a licence from the Lord Mayor conditioned upon obtaining the licence of the surveyor of the pavements, and the granting of such licence by the surveyor of the pavements.—To this plea the defendants, taking the custom by protestation, replied, *de injuriâ, absque residuo causæ*.—Held, that the second grievance charged in the declaration constituted a good cause of action.—Held also, that the custom set out in the second plea was not unreasonable.—Held also, that the plea was sufficiently proved by the production of a licence from the Lord Mayor for the erection, before the defendants' houses, of "a hoard containing in front sixty-four feet, projecting from the same four feet, and to continue four weeks;" and a licence from the surveyor of the pavements, "to erect and continue four hoards in manner and for the time above mentioned."—Held, that as the second plea was pleaded generally to the continuing of the hoarding erected as in the declaration mentioned, the plaintiff was not entitled to damages in respect of the maintenance of that hoarding, or to recover in respect of damages sustained by the reason of the delay in pulling down and rebuilding the defendants' houses, otherwise than by the keeping and continuing of the hoarding.—The cause having been referred to a barrister, who was empowered to direct "that a nonsuit or a verdict for the plaintiff or the defendants should be entered, as he should think proper," and who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the court.—Held, that it was not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up; but that having by his award disposed of all the issues joined on the record, and assessed damages separately in respect of each subject matter of complaint stated in the declaration, and having referred to the court the question as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration, at the request of the defendants, and, at the request of the plaintiff, the question as to the validity of custom and the allegations in the second plea, and as to the plaintiff's right to judgment non obstante veredicto on the second plea, should the issue thereon be found for the defendant, he had properly discharged his duty, and that he was not bound definitely to determine as to the validity of the custom.—The arbitrator having, as to the party-wall, found "that the carelessness, negligence, and unskilfulness of the defendants and their agents, &c., in and about the underpinning of the party-wall, consisted in their underpinning the wall partially and not underpinning the whole, and that the plaintiff's messuage thereby sunk and sustained damage; and that the plaintiff's messuage was an ancient messuage, entitled to be supported at the east end thereof by the party-wall;"—Held, that the defendants had no right to underpin the party-wall, either partially or wholly, unless they could do so without injury to the plaintiff's messuage; and that whether the plaintiff had a several interest in half of the wall, or was tenant in common with the defendants of the whole, the defendants were liable for the injury resulting from their mode of dealing with it.

Case. The declaration stated that the plaintiff, before and at the times of the committing of the several grievances by the defendants thereafter mentioned, was

[715] possessed of a messuage with the appurtenances, situate in Newgate Street, in London, in part of which messuage the plaintiff during that time carried on the trade and business of a fancy-trimming, lace, and fringe manufacturer, and that the defendants during the time aforesaid, [716] were possessed of another house in London aforesaid in the same street, and next adjoining to the said messuage of the plaintiff; that before the committing of the said several grievances, to wit on the 1st of April 1833, the defendants were purposing to pull down their said house; and also divers, to wit seven other houses of the defendants in the same street, adjoining and near to their first mentioned house, and to erect another house on the site of their first mentioned house, and preparatory to their so doing, then erected and placed a certain hoarding in front of their said houses in such a manner, that the said hoarding inclosed a part of a public footway in the said street, running in front of the said messuage and houses of the plaintiff and defendants respectively, to wit that part of the said public footway which was immediately in front of the said eight houses of the defendants, and thereby in part obstructed the said footway, and the approach to the said messuage of the plaintiff, and the passage of persons passing and repassing on foot on the side of the said street on which the plaintiff's messuage was situate; that the defendants afterwards, to wit on the 1st of May 1833, and on divers other days and times between that day and the commencement of the suit, [717] pulled down their said eight houses, and erected on the site of their said first mentioned house, another house adjoining to the said messuage of the plaintiff: yet the defendants, contriving and intending to injure the plaintiff in this behalf, wrongfully, wilfully, and injuriously, and without any reasonable or probable cause, delayed and retarded the pulling down of the said eight houses, and the rebuilding of their said first mentioned house, for an unreasonably long time, to wit three years, after they had so erected the said hoarding, and on that occasion wrongfully, wilfully, and injuriously kept and continued the said hoarding so erected and placed as aforesaid, and so obstructing the said footway and the approach to the plaintiff's said messuage as aforesaid, for a long and unreasonable time, to wit three years, the same being longer, to wit two years longer, than was reasonable or necessary for them to have done in that behalf; whereby during the time last aforesaid, divers customers were hindered and prevented from frequenting the plaintiff's said messuage in the way of his said business, and the plaintiff, by reason of the premises, lost divers great gains and profits, in the whole amounting to a large sum, to wit 2000*l.* which he would otherwise have procured in the way of his said business: and the defendants further contriving and intending to injure the plaintiff, to wit on the 1st of May 1833, and on divers other days and times between that day and the commencement of the suit, by their agents and workmen in that behalf, behaved and conducted themselves so carelessly, negligently, and improperly in pulling down the said first mentioned house of the defendants which adjoined the said messuage of the plaintiff, that, by and through the carelessness, negligence, and improper conduct of the defendants and their agents and servants in that behalf, in pulling down the said first mentioned house of the defendants, and in [718] neglecting to use reasonable and proper precaution in that behalf, divers large quantities of bricks, tiles, mortar, wood, dust, and rubbish fell from the last mentioned house, into and upon divers parts of the said messuage of the plaintiff, and upon and through divers skylights and windows, to wit two skylights and two windows, of the plaintiff, into a room of the plaintiff, part and parcel of the said messuage of the plaintiff, and used by him as a counting-house and warehouse, and thereby broke divers, to wit twenty, panes of glass of the plaintiff, of and belonging to the said skylights and windows, and of great value, to wit of the value of 10*l.* and thereby also divers goods, to wit 100 pounds weight of raw silk, 100 pounds weight of unwound silk, 100 pounds weight of dressed silk, and 100 pounds weight of other silk, which were then in the said room so used as a counting-house and warehouse as aforesaid, and of great value, to wit, of the value of 200*l.*, were greatly spoiled, damaged, and destroyed, and also, by reason of the premises, divers large quantities of rain water on the several days and times aforesaid, penetrated and flowed into all the rooms and apartments of the said messuage respectively, and by reason thereof divers other goods of the plaintiff, to wit, &c. &c., then being in the said rooms and apartments respectively, and of great value, to wit, of the value of 400*l.* were greatly spoiled, damaged, and destroyed, and thereby also the plaintiff and his family were greatly incommoded and annoyed in the enjoyment and habitation of his said messuage, and the plaintiff was also thereby

greatly disturbed and annoyed in his said business, and was greatly impeded and hindered from carrying on the same in his said message.

Second grievance, that the defendants on the several days aforesaid by their agents and workmen in that behalf, behaved and conducted themselves so carelessly, [719] negligently, and improperly, in and about digging and clearing the ground for the foundation of the said house so built on the site of their first mentioned house as aforesaid, and in and about underpinning the party-wall between that house and the said message of the plaintiff, and in and about removing a certain part of the said party-wall, &c. and connected therewith, that, by and through the carelessness, negligence, and unskilfulness of the defendants and their agents and workmen in the premises last aforesaid, the said party-wall and all the walls, floors, beams, ceiling, roof and other parts of the said message of the plaintiff, on the several days last aforesaid, greatly sunk, cracked, and gave way, and were greatly weakened and injured, and the same message was thereby greatly damaged and lessened in value, and put in danger of falling and rendered unsafe for habitation, and, by reason of the premises, the plaintiff was forced and obliged to cause, and necessarily did, to wit on the 22d of October 1834, cause the said message to be surveyed, shored up and propped, and amended and repaired in divers parts thereof, both inside and outside, and in so doing was necessarily put to great expense of his moneys, in the whole amounting to a large sum, to wit 500*l.*, and the plaintiff also, by reason of the premises, and by reason of his said message being, by means of the premises, rendered unsafe for habitation, was forced and obliged to remove, and did remove himself and his family and servants, and part of his furniture, out of his said message, to wit on the day and year last aforesaid, into another place, and was, by reason of the premises, hindered and prevented from inhabiting in his said message, and for a long time, to wit for the space of six months then next following, and was thereby forced and obliged during all that time, to inhabit, himself and his family, another house; and, by reason of the premises last aforesaid, the plaintiff was forced and [720] obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money in the whole, amounting to a large sum, to wit 200*l.*, and was also thereby put to great trouble and inconvenience and greatly injured in his said trade and business; and also, by reason of the premises, the plaintiff during all the time aforesaid lost and was deprived of the benefit, profit, and advantage of a certain lodger, to wit Charles Elmsley, who, before and at the time of the committing of the said grievances, was a lodger in the said message of the plaintiff, from which lodger he the plaintiff would otherwise have derived great profit, in the whole amounting to a large sum, to wit, 100*l.* To the damage of the plaintiff of 2000*l.*, &c.

The defendants pleaded—first, not guilty.

Secondly—as to so much of the declaration as related to the keeping and continuing of the said hoarding so erected and placed as in the declaration mentioned, and so obstructing the said footway and the approach to the plaintiff's said message, for the said space of time in the declaration mentioned,—that from time whereof the memory of man is not to the contrary, until and at the time of the committing of the grievances in the introductory part of that plea mentioned, there had been, and was, and from thence had been, and still was, within the city of London a certain antient and laudable custom there used and approved of, that is to say, that if any person or persons, body corporate or politic, had at any time or times during the time aforesaid, had occasion to erect or pull down any building or buildings within the said city, near to any public way within the said city, and had had occasion for those or either of those purposes, to erect, place, and continue any hoarding in such a manner, as thereby to obstruct or inclose any part of any public way within the said city, and had applied to the Lord Mayor of the [721] said city for the time being, for his permission licence, or authority to erect, place, and continue such hoarding in such manner, and for such purpose or purposes as aforesaid, such Lord Mayor, for the time being of the said city, had during all the time aforesaid, had full and free power and authority to authorise, license, and permit, and had lawfully authorised, licensed, and permitted, and been used and accustomed to license, authorise and permit such person or persons, body corporate or politic, to erect, place, and continue any such hoarding for such purpose or purposes as aforesaid, and of such dimensions, and in such manner, and for such time or times as he hath thought reasonable or proper for such purpose or purposes, and the person or persons, body corporate or politic, so applying as afore-

said, and having obtained such permission, licence, or authority as aforesaid, had, during all the time aforesaid, lawfully and of right erected, placed, and continued, and been used and accustomed of right to erect, place, and continue for such purpose or purposes in any such public way, so as to inclose or obstruct the same, such hoarding, in such manner and of such dimensions, and for such time or times as he or they have been so authorised, licensed, and permitted to do by the said Lord Mayor, for the time being, of the said city as aforesaid, except so far as such custom, power, or authority hath been affected by the statute made and passed in the Fifty-seventh year of the reign of His late Majesty King George the Third, intituled "An Act for better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein:" that the defendants, having occasion to pull down the said houses in the declaration mentioned, and to erect another house on the site of the said house of the defendants in the declaration first mentioned, the whole of such houses and [722] sites thereof, and of the said footway in the said declaration, being then within the city of London, and the houses and sites thereof being near to the said public footway in the declaration mentioned, and the defendants also then having occasion for that purpose, to erect, place, and continue a hoarding in such manner as thereby to inclose and obstruct a part of the said footway, theretofore and before the erection and placing the said hoarding as in the declaration mentioned, and before any of the said times when, &c., to wit, on the 1st of March 1823, applied to Sir Peter Laurie, Knight, then being the Lord Mayor of the said city, for his permission, licence, and authority to erect, place, and continue certain hoardings in such manner as aforesaid; and that the said Sir Peter Laurie so then being such Lord Mayor of the said city as aforesaid, did then duly authorise, license, and permit the defendants to erect and place certain hoardings of certain dimensions, and in certain manners, and to continue the same for certain spaces of time, provided the defendants should also obtain the licence of the surveyor of the pavements, appointed under and by virtue of an act of parliament made and passed, &c., intituled, &c., (57 G. 3, c. xxix.); that afterwards, and after the defendants had obtained such licences and authority as aforesaid, and before the erection of the said hoardings, and before any of the said times when, &c., to wit, on the same 1st of March 1833, the defendants did obtain the leave and licence of Richard Kelsey, who was then the surveyor for the time being of the pavements of the city of London and liberties thereof, under his hand, to erect and continue such hoardings of such dimensions, and in such manner, and to continue the same for the said spaces of time so authorised and permitted by the said Lord Mayor as aforesaid; wherefore the defendants having obtained such leave, licence, permission, and [723] authority as aforesaid, did theretofore, to wit, on the 1st of April 1833, erect and place certain hoardings for such purposes as aforesaid, of the dimensions and in manner so authorised by the said licences as aforesaid, and did thereby and therewith necessarily inclose and obstruct the said part of the said footway in the declaration mentioned, and did, for the purpose aforesaid, keep and continue the said hoarding so erected and placed as aforesaid, and so inclosing and obstructing the said part of the said footway as aforesaid, for the said spaces of time in the said leave and licences, permissions and authorities mentioned, and as it was lawful for them to do for the cause aforesaid; which are the supposed grievances in the introductory part of the plea referred to, and in the said declaration mentioned; doing no unnecessary damage to the plaintiff on the occasion aforesaid. Verification.

Thirdly—as to breaking the said panes of glass in the declaration mentioned; that after, they, the defendants, shortly after the said panes of glass were so broken as in the declaration mentioned, and before the commencement of the suit, to wit, on the 1st of May 1833, caused and procured the said panes of glass so broken as aforesaid, to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiff, by reason of the breaking thereof; and which replacing of the said panes of glass, the plaintiff then agreed to accept and receive, and then accepted and received, in full satisfaction and discharge of the last mentioned damages. Verification.

The plaintiff joined issue on the first plea.

To the second plea, the plaintiff, after taking the custom by protestation, replied *de injuriâ, absque residuo causæ*, concluding to the country.

[724] To the third plea the plaintiff replied, that the defendants did not cause

and procure the said panes of glass so broken as in the declaration mentioned, to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiff by reason of the breaking thereof, and that the plaintiff did not agree to accept and receive, and did not accept and receive the replacing of the said panes of glass, in full satisfaction and discharge of the damages in the same plea mentioned; concluding to the country. Verification.

On the last two replications the defendant joined issue.

Upon the cause coming on for trial before Tindal C. J., at the adjourned sittings in London, after Trinity term 1839, a verdict was taken for the plaintiff for 2000*l.* by consent, subject to the award of a barrister, who by the order of *nisi prius* was empowered to direct that a nonsuit should be entered, or that a verdict should be entered for the plaintiff, or the defendants, as he should think proper, and who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the court,—the costs of the suit to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator.

Several meetings took place before the arbitrator, attended by counsel on both sides, at the last of which it was arranged, that each party should send in a written statement of such questions of law as he or they required to be stated or raised by the arbitrator, by or on the face of his award.

Pursuant to this arrangement, the arbitrator was requested, on the part of the defendants, to raise on the face of his award the following questions:—

[725] 1st. Whether the defendants' wrongfully, wilfully, and injuriously, and without any reasonable or probable cause delaying, and retarding the pulling down of the said eight houses, and the rebuilding of this said first mentioned house, for an unreasonably long time, was, either of itself or coupled with the fact of the erection or continuance of the shore in front of the plaintiff's messuage, a cause of action under the present declaration, independently of the fact of the keeping up of the boarding as alleged in the declaration:—provided the arbitrator was of opinion that the same amounted to cause of action, and that the plaintiff was entitled to recover in respect thereof.

2d. Whether the custom set out in the second plea was a bad custom,—if the arbitrator himself considered it so.

3d. Whether the plaintiff was, under the pleadings in the cause, entitled to enter into evidence, or recover damages, in respect of the continuance of any hoard erected after the houses were pulled down, as well as the continuance of a hoard before and preparatory to their being pulled down—provided the arbitrator himself should be of opinion that the plaintiff was entitled to recover damages in respect thereof.

4th. Whether Mr. Kelsey's licence did not justify the erection of one hoard, pursuant to the licence of Sir Peter Laurie—provided the arbitrator should be of opinion that it did not.

5th. Whether the defendants were bound to underpin more than their own half of the party-wall, and whether they were liable, under the present declaration, for underpinning only their own side, provided they were not guilty of negligence in so doing—if the arbitrator should be of opinion upon the evidence, that they underpinned only their own side of the wall.

6th. Whether the defendants were bound to shore [726] up the plaintiff's messuage—if the arbitrator should be of opinion, that they were liable, under the present declaration, for not doing so, it not being alleged that the plaintiff's messuage was an ancient messuage, or entitled to any support from the defendants' house, or that the defendants by reason of their house, were bound to shore up the plaintiff's messuage, whenever it should become necessary to pull down the defendants' house.

On the part of the plaintiff, the arbitrator was requested, with reference to the points desired to be raised by the defendants for the opinion of the court, to find as follows:—

1st. With reference to the first point, to find and state the facts, whether or not the shore in front of the plaintiff's house was continued for an unreasonable length of time, and whether or not that continuance was not a substantial grievance, independently of the continuance of the boarding, and to assess the damages sustained by the plaintiff by reason thereof, separately.

2d. With reference to the second, third, and fourth points, to raise the point, whether, if the custom was bad, the plaintiff was not entitled to judgment *non obstante*

verdicto, and in case the arbitrator found the issues on the licence for the defendants, also to assess the damages by reason of the continuance of the hoards separately; and to set forth Sir Peter Laurie's licence including the licence of the surveyor of pavements, so as to raise the point of law, whether the latter was a compliance with the condition on which the former was granted, and to state the fact, that the hoard complained of was erected, and continued for the purpose of pulling down the houses.

3d. With reference to the fifth and sixth points, to state the fact, whether or not the plaintiff's house was an ancient house, and whether it had not always been supported at the east end thereof by the party-wall in [727] question, and whether or not, the sinking, &c. of the plaintiff's house was not occasioned by defective underpinning on the part of those employed by the defendants, and also to state the facts, whether or not the party-wall was certified to be a sound wall, and of proper thickness under the building act, and whether the defendants did not underpin the wall in some parts all through, comprising that part of the wall which belonged to the plaintiff's messuage, and to raise the point of law, whether if the defendants underpinned the party-wall under the above circumstances and in manner above described, they were not bound to shore up the party-wall in such a manner as to prevent damage to the plaintiff's messuage, and to assess the damages sustained by reason of the sinking, &c., of the plaintiff's messuage separately; and the arbitrator was also requested on the part of the plaintiff, to assess the damages sustained by reason of the negligence in pulling down the house separately, if he should be of opinion that the plaintiff was entitled to recover in respect thereof.

The arbitrator was also requested, with reference to the last issue, viz.: the plea of accord and satisfaction in regard to the breaking of the glass, if he should be of opinion that that issue should be found for the defendants, to state the fact, whether or not the plaintiff did not sustain damage, as alleged in the declaration, by reason of the breaking of the glass beyond the mere costs of repairing the glass, and whether or not there was any evidence of the plaintiff's acceptance of the repairs of the glass by the defendants in satisfaction of all the damage sustained by the plaintiff, by reason of the breaking thereof.

On the 20th of October 1841, the arbitrator made his award in these terms:—

"As to the first issue joined between the said parties, [728] I award and find that the defendants, except as to the alleged careless, negligent, and improper conduct of the defendants in shoring up the party-wall between the house of the defendants in the declaration first mentioned and the said house of the plaintiff, are guilty of the premises in the declaration in the said cause mentioned, and I do assess the damages sustained by the plaintiff, by reason of the keeping and continuing of the hoarding so erected and placed as in the declaration is mentioned, and so obstructing the said footway and the approach to the plaintiff's house, at the sum of 100l. in respect of the space of time mentioned in the licence of Sir Peter Laurie in the second plea of the defendants mentioned, parcel of the time in the declaration in that behalf mentioned, and at the sum of 50l. in respect of the residue of the time in the declaration in that behalf mentioned; and I do assess the damages sustained by the plaintiff, by reason of the delaying and retarding of the pulling down and rebuilding of the said houses in the said declaration in that behalf respectively mentioned, otherwise than by the keeping and continuing of the said hoarding, at the sum of 100l.; and I do assess the damages sustained by the plaintiff, by reason of the carelessness and negligence and improper conduct of the defendants, their agents, and workmen in that behalf, in pulling down the house of the defendants in the declaration first mentioned, and in neglecting to use reasonable and proper precaution in that behalf, at the sum of 500l.; and I assess the damages sustained by the plaintiff, by reason of the carelessness, negligence, and unskilfulness of the defendants, their agents, and workmen in and about digging and clearing the ground for the foundation of the house so built on the site of the house of the defendants in the declaration first mentioned, and in and about underpinning the party-wall between that house and the messuage of the plaintiff, and [729] in and about removing a certain part of the said party-wall and connected therewith, at the sum of 200l. And as to so much of the premises in the declaration contained as relates to the alleged careless, negligent, and improper conduct of the defendants in shoring up the party-wall between the house of the defendants in the declaration first mentioned, and the said messuage of the plaintiff, I award and find that the defendants are not guilty thereof.

"And as to the second issue joined between the said parties, I find that the defendants having occasion to pull down the houses in the declaration in that behalf mentioned, and to erect another house on the site of the house of the defendants in the declaration first mentioned, the whole of such houses and of the sites thereof, and of the footway in the declaration mentioned, being then within the city of London, and the said houses and sites thereof being near to the said public footway in the declaration mentioned, and the defendants also then having occasion for that purpose to erect, place, and continue a hoarding in such manner as thereby to inclose and obstruct a part of the said footway, before the erection and placing of the said hoarding as in the declaration mentioned, and before any of the said times when, &c. applied to Sir Peter Laurie, Knight, then being the lord mayor of the said city, for his permission, licence, and authority, to erect, place, and continue certain hoardings in such manner as aforesaid; and the said Sir Peter Laurie, so then being lord mayor of the said city as aforesaid, did then duly authorise, license, and permit the defendants to erect and place certain hoardings of certain dimensions and in a certain manner, and to continue the same for certain spaces of time, provided the defendants should also obtain the licence of the surveyor of the pavements appointed under and by virtue of an act of parliament passed in the 57 G. 3, [730] (c. xxix.), for better paving and regulating the streets of the metropolis; and removing and preventing nuisances and obstructions therein: and I do further find that after the defendants had obtained such licences and authority as aforesaid, and before the erection of the said hoardings and before any of the said times when, &c., the defendants did obtain the leave and licence of Richard Kelsey, who was then the surveyor of the pavements of the city of London and liberties thereof, under his hand, to erect and continue such hoardings of such dimensions and in such manner, and to continue the same for the said spaces of time so authorised and permitted by the said lord mayor as aforesaid. And I do further find that the defendants having obtained such leave, licence, permission, and authority as aforesaid, did on the 1st of April 1833, erect and place certain hoardings for such purposes as aforesaid, of the dimensions and in manner authorised by the said licences as aforesaid; and did thereby and therewith inclose and obstruct the said part of the said footway in the said declaration mentioned, and did for the purpose aforesaid, keep and continue the said hoardings so erected and placed as aforesaid, and so inclosing and obstructing the said part of the said footway as aforesaid, for the space of time in the said leaves and licences, permissions, and authorities mentioned.

"And as to the third issue joined between the said parties, I find that the defendants did not cause or procure the said panes of glass so broken as in the declaration mentioned to be replaced with new panes of glass at their costs and charges, in full satisfaction and discharge of the damages sustained by the plaintiffs by reason of the breaking thereof; and that the plaintiff did not agree to accept and receive, and did not accept or receive the replacing of the said panes of glass, in full satisfaction and discharge of the damages in the same plea mentioned.

[731] "And I do certify that this cause was proper to be tried before a judge of the superior court, and not before the sheriff or judge of an inferior court, and likewise that the cause was proper to be tried by a special jury.

"And I do award and order that the costs of the reference and of this my award, be paid and borne by the defendants.

"And I do, at the request of the respective parties, state the following matters for the opinion of the court:

"I state that the hoarding in the declaration mentioned, was erected and placed by the defendants in front of their said houses preparatory to their pulling down their said houses in such manner, that the said hoarding inclosed a part of the public footway in the said street running in front of the messuage and houses of the plaintiff and defendants, and thereby in part obstructed the said footway, and the approach to the said messuage of the plaintiff, and the passage of persons passing and repassing on foot on the side of the said street on which the plaintiff's messuage stood; and that after the said houses of the defendants had been pulled down, the defendants took down the said hoarding and removed the same to a distance of five feet, and there erected and placed the same in front of the site of the last mentioned house, and adjoining the said messuage of the plaintiff in such manner that the said hoarding no longer inclosed any part of the said public footway; and that afterwards the defendants, preparatory to their building another house on the site of the house in the

declaration first mentioned, again removed the said hoarding, and re-erected the same in such a manner that the same hoarding again inclosed a part of the public footway in the said street running in front of the messuage and houses of the plaintiff and the defendants, and thereby again in part obstructed the said public footway and the approach to the messuage of the plaintiff, and the passage [732] of persons passing and repassing on foot on the side of the said street on which the plaintiff's messuage stood.

"I further state that the defendants in their second plea, set out the following custom, that is to say that from time whereof the memory of man is not to the contrary, until and at the time of the committing of the grievances in the introductory part of the defendants' second plea mentioned, there had been and was, and from thence until the time of the pleading of the said plea there had been, and still was, within the city of London, a certain ancient and laudable custom there used and approved of, that is to say that if any person or persons, body corporate or politic, hath or have at any time or times during the time aforesaid, had occasion to erect or pull down any building or buildings within the said city near to any public way within the said city, and hath or have had occasion for those or either of those purposes to erect, place, and continue any hoarding in such a manner as thereby to obstruct or inclose any part of any public way within the said city, and hath or have applied to the lord mayor of the said city for the time being, for his permission, licence, or authority, to erect, place, and continue such hoarding in such manner and for such purpose or purposes as aforesaid, such lord mayor for the time being of the said city hath during all the time aforesaid had full and free power and authority to authorise, license, and permit, and hath lawfully authorised, licensed, and permitted, and been used and accustomed to license, authorise and permit such person or persons, body corporate or politic, to erect, place, and continue any such hoarding for such purpose or purposes as aforesaid, and of such dimensions and in such manner, for such time and times as he hath thought reasonable or proper for such purpose or purposes; and the person or persons, body corporate or politic, so applying as afore-[733]-said, and having obtained such permission, licence, or authority as aforesaid, hath and have during all the time aforesaid, lawfully and of right erected, placed, and continued, and been used and accustomed of right to erect, place, and continue, for such purpose or purposes, in any such public way, so as to inclose or obstruct the same, such hoarding in such manner and of such dimensions, and for such time or times as he or they have been so authorised, licensed, or permitted to do by the lord mayor for the time being of the said city as aforesaid, except so far as such custom, power, or authority hath been affected by the statute made and passed in the 57 G. 3 (c. xxix.), intituled, &c. And I further state that the said custom was admitted by the replication to the second plea, the plaintiff having only traversed the residuum causæ as therein set forth. And if the court shall be of opinion that the second plea of the defendants setting up and justifying under the said custom is not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the second plea, then, so far as I have power and authority so to do, I award and direct that judgment be entered for the plaintiff for the amount of the damage, by him sustained by reason of such grievances, notwithstanding the finding of the said second issue for the defendants.

"And I further state that the licence granted by the said Sir Peter Laurie, including the licence of the surveyor of pavements, and given in evidence before me by the defendants, was and is as follows:—

"'London to wit.—Whereas application hath been made to me Sir Peter Laurie, Knight, Lord Mayor of the city of London by Mr. Long, builder, to erect a hoard before premises being in Newgate Street, London, and the sergeant and yeoman of the channell having returned to me that they have viewed the premises, and consider that a hoard containing in front sixty-two feet, projecting from the same four feet, is necessary to be erected there [734] in order that the premises may be rebuilt with safety to the public; I do, therefore, hereby give liberty that a hoard of the dimensions aforesaid may be erected before the said premises and continue four weeks from the date hereof, provided that the said Mr. Long shall also obtain the licence of the surveyor of the pavements appointed under and by virtue of an act of parliament, made and passed in the fifty-seventh year of His late Majesty's reign intituled, &c.

"Given under my hand and seal, this 25th of June 1833.

"P. LAURIE, Mayor (L. S.)"

"I do hereby give leave and licence to the above named Mr. Long, to erect and continue four hoards in manner, and for the time above mentioned.

"RICHARD KELSEY.

"Surveyor of Pavements' Office, Guildhall.

"N. B.—The pavements that shall be broken or damaged must be made good by the commissioners' workmen at the expense of the parties.

"And if the court shall be of opinion that the licence so given in evidence does not support the allegation of licence contained in the said second plea, or is not a justification of the matters in the introductory part of that plea mentioned, then, instead of the above finding for the defendants upon the second issue, I award and find that the defendants, of their own wrong, and without the said residue of the said cause, committed the grievances in the introductory part of the said second plea mentioned and thereby confessed.

"And I further state that the carelessness, negligence, and unskilfulness of the defendants and their agents and workmen, in and about the underpinning of the said party-wall, consisted in their underpinning the said party-wall, partially and not underpinning the whole [735] of the said wall, whereby the plaintiff's messuage sank, and sustained damage.

"And I further state that the said messuage of the plaintiff was and is an ancient messuage, and had been and was entitled to be supported at the east end thereof by the said party-wall. And I state that the said party-wall was duly certified to be a sound wall, and of proper thickness, under the building act shortly before, and with reference to, the taking down of the same."

In last Michaelmas term the plaintiff obtained a rule, calling upon the defendants to shew cause why judgment should not be entered up for him upon the second issue, non obstante veredicto with 150*l.* damages, or why the verdict should not be entered for the plaintiff upon that issue with 150*l.* damages, upon the ground that the custom set out in the second plea was not good in point of law; and that the licences set out in the award did not support the defendants' plea,—or why, in case the court should be of opinion that judgment should not be entered for the defendants on that part of the declaration professed to be justified by the second plea, the judgment should not be entered for the plaintiff, on the general issue, for the 50*l.* awarded in respect of the continuance of the hoarding beyond the time covered by the licences, on the ground that such continuance was not justified by the licences.

A rule nisi was also obtained by the defendants to set aside the award on the following grounds.

1. "Because the arbitrator has not thereby directed how the verdict is to be entered up, or whether the plaintiff is entitled to recover the whole, or any, and what portion or portions of the damages assessed by the said arbitrator.

2. "Because the arbitrator has not awarded, deter-[736]-mined, or directed, whether judgment is to be given or entered up for the plaintiff for the whole, or any, and what portion or portions of the damages so assessed by the said award, or upon any and which of the issues joined in the said action, or whether judgment is to be arrested in respect of all or any of the supposed causes of action in respect of which he has assessed damages by his said award.

3. "Because the arbitrator has not determined by his said award, whether judgment is to be given or entered up for the plaintiff in respect of the causes of action in the introductory part of the second plea mentioned, and by that plea attempted to be justified, non obstante veredicto, or notwithstanding his finding upon the second issue, or whether judgment is to be entered up for the defendants thereon, or whether the finding of the second issue is a bar to the plaintiff's recovery of the sum of 50*l.* mentioned in the award, and thereby assessed as damages, as well as the sum of 100*l.* in the said award first mentioned.

4. "Because the arbitrator has not determined as to the validity of the second plea, independently of the question of the validity or invalidity of the custom therein set forth, as he ought to have done; but has, without being requested so to do by either of the said parties, raised as a question for the said court, the validity or invalidity of that plea generally.

5. "Because the arbitrator has not determined or directed, whether, in the event of the court's being of opinion, that the second plea of the defendants is not sufficient

to bar the plaintiff from recovering his damages in respect of the grievances confessed by the second plea, judgment is to be entered for the plaintiff, notwithstanding the finding of the second issue for the defendants, for the sum of 100l. in the said award first mentioned only, or for that sum and also for the sum [737] of 50l. in the said award also mentioned, and thereby assessed as damages.

6. "Because the arbitrator has not determined or decided by his said award, whether in the event of the court's being of opinion that the custom set out in the second plea is a good custom, the plaintiff is to recover the sum of 50l. in the said award secondly mentioned, or to have judgment for the same, or whether the second plea is a bar to the plaintiff's recovery of the said sum of 50l., as well as of the said sum of 100l. in the said award first mentioned, the plaintiff not having new assigned.

7. "Because the arbitrator has not determined by his award, whether, in the event of the court's being of opinion that the licence so given in evidence as in the said award mentioned, does not support the allegation of licence mentioned in the second plea, or is not a justification of the matters in the introductory part of that plea mentioned, judgment is to be given or entered up for the plaintiff for the said last mentioned sum of 100l. only, or for that sum and the said last-mentioned sum of 50l.

8. "Because the arbitrator has not determined or decided by his said award, whether the plaintiff is to recover or have judgment for the said sum of 50l., in the event of the court's deciding that the second plea is good.

9. "Because the arbitrator has not awarded or directed by his said award, whether a verdict is to be entered up for the plaintiff for the sum of 100l. assessed by the award, as the damages sustained by the plaintiff by reason of the delaying and retarding of the pulling down and rebuilding of the said houses in the said declaration in that behalf respectively mentioned, otherwise than by the keeping and continuing of the said hoarding; and because he has not awarded, determined, or [738] directed whether judgment is to be given for the plaintiff for such last mentioned damages, or whether the judgment is to be arrested in respect of so much of the declaration as relates to the delaying and retarding of the pulling down and rebuilding of the said houses in the said declaration in that behalf mentioned, otherwise than by keeping and continuing the said hoarding.

10. "Because if the court shall be of opinion that the said award does substantially direct a verdict and judgment to be entered up for the plaintiff for such last mentioned damages, the award is bad for giving damages for that which is not a legal, or any, cause of action.

11. "Because the arbitrator has not stated or raised, by or on the face of his said award, the point of law, whether the defendants' wrongfully, wilfully, and injuriously, and without any reasonable or probable cause, delaying and retarding the pulling down of the said eight houses, and the rebuilding of the said first mentioned house for an unreasonably long time, is a cause of action.

12. "Because he has not stated or raised by or on the face of his said award, the point of law first mentioned in the paper writing, &c., &c., (the defendants points, ante, p. 725.)

13. "Because, if the court shall be of opinion that the award does substantially direct a verdict and judgment to be entered for the plaintiff, for the sum of 500l. in the said award mentioned, and thereby assessed as damages, the award is bad for giving damages for that which is not a legal or any cause of action, namely, for the defendants' neglecting to use reasonable and proper precaution in pulling down the house of the defendants in that count first mentioned; and, because it cannot be ascertained from the award how much of that sum of 500l. is awarded in respect of such last mentioned neglect of the defendants.

[739] 14. "Because it is uncertain, upon the facts stated by the arbitrator upon the said award, whether the plaintiff is entitled to recover the sum of 100l. in the said award first mentioned, and the sum of 50l. therein mentioned, or either of those sums.

15. "Because the facts stated by the arbitrator on the face of his said award are not sufficient to enable the court to decide the points of law thereby intended to be raised, or the several points of law which he was requested, on behalf of the defendants, to raise by his said award.

16. "Because the award is inconsistent, in directing that if the court shall be of opinion that the second plea is not sufficient to bar the plaintiff from recovering his damages in respect of the grievances confessed by the said second plea, judgment shall

be entered up for the plaintiff for such grievances, notwithstanding the finding of the said second issue for the defendants; and also finding, that if the court shall be of opinion that the licence so given in evidence as set out in the award, is not a justification of the matters in the introductory part of that plea mentioned, the defendants of their own wrong, and without the residue of the said cause, committed the grievances in the introductory part of the second plea mentioned.

17. "Because the arbitrator has, by his said award, directed and awarded, that if the court shall be of opinion, that the licence so given in evidence as mentioned in the said award, is not a justification of the matters in the introductory part of the second plea mentioned, the defendants of their own wrong, and without the residue of the said cause, committed the grievances in the introductory part of the second plea mentioned.

18. "Because the arbitrator ought, himself, to have determined by his said award, whether the custom set [740] out in the second plea was a valid custom or not; and also whether the second plea was a good or sufficient plea, so as to have enabled 'the parties to act upon his said award without taking the opinion of the court; the arbitrator having been requested to raise the question, whether the custom so set out was a bad custom, only in the event of his finding and considering it so himself.

19. "Because he has not raised or stated, upon the face of the said award, the points of law, thirdly, fifthly, and sixthly mentioned in the said paper-writing, &c. &c., (the defendants' points, ante, p. 725); and he has not found or stated in his said award sufficient facts to enable the court to determine whether the plaintiff is entitled to recover both or either, and which, of the said sums in and by the said award assessed as damages, for keeping and continuing the hoarding in the declaration mentioned.

20. "Because the matters and facts stated by the said arbitrator, by and on the face of his award, and which, by his said award, he has alleged that he has stated, at the request of the respective parties, for the opinion of the court, are not sufficient to enable the court to form any opinion or to give any judgment thereon.

21. "Because the arbitrator has not stated, in or by his said award, upon what points of law the court are to give their opinion with respect to the facts and matters thereby stated, or what points of law he has stated or raised for the opinion of the court, or referred to them for their decision and determination.

22. "Because the arbitrator has not found or stated, in or by his said award, how long the hoarding erected by the defendants in front of their houses, preparatory to their pulling down the same, remained before the same was removed, so as no longer to inclose any part of the said public footway as mentioned in the said [741] award, or how long it remained in the state last mentioned, before it was again removed and re-erected as in the award mentioned, or how long it inclosed a part of the said footway, or in part obstructed the same, or whether the party-wall mentioned in the said award belonged wholly to the plaintiff or to the defendants, or partly to one and partly to the others, or whether it belonged to them as tenants in common.

23. "Because the arbitrator has not, by his said award, raised the points which, on the part of the plaintiff, he was requested to raise, whereby the award is not binding on the plaintiff, and therefore not mutual.

24. "Because the arbitrator has not, by his said award, determined the cause referred to him, or made his award concerning all the matters referred to him; and because it is impossible from the said award to ascertain how the costs of the suit, which are to abide the event of the said award, are to be taxed, or what costs of the suit the plaintiff is entitled to recover.

25. "Because the award is not final, but imposes on the parties, or one of them, the necessity of applying to, and taking the opinion of, the court before the award can be acted upon; whereas the said arbitrator ought to have made a final award, so that the parties might have acted upon the same without being forced to apply to the court, and should then have raised, upon the face of his award, such points, and such points only, as he was requested to raise by the respective parties in the events mentioned by them, so that they, or either of them, might have taken the opinion of the court upon those points, if they or either of them had thought fit so to do.

26. "Because the award is not final, certain, or mutually binding; because it raises points for the opinion of the court, which the arbitrator was not requested by either party to raise or state on the face of his award, [742] and omits to raise or state other points which the arbitrator was requested to state and raise upon the face of his said award; and because those points of law which are thereby raised are raised in such a

manner that it is impossible for the court to form any opinion thereon, or to decide the same."

Channell Serjt. shewed cause against the defendants' rule. The principal argument in support of the rule, obtained for setting aside this award, will, no doubt, be that the award is not final. In considering that objection it becomes necessary to look at the sort of finality which the parties have stipulated for in their submission. The degree of finality required will be greater in the case of an ordinary reference, than in one where the parties have agreed to take the opinion of the court. Where the arbitrator is, by the terms of the submission, to raise points for the decision of the court upon the face of his award, all that the parties require of the arbitrator is, that he shall find facts which will place the court in a situation to decide. It is perfectly competent to those who enter into an agreement of reference to agree that the arbitrator shall have power so to delegate his authority. There is nothing to prevent the parties to a submission from stipulating that the award shall not be final.

As regards the first and third issues no question is raised upon this point. With respect to the second issue, it is sufficient to say that the arbitrator has disposed of the issue, although he may not have directed in what manner the verdict shall be entered. At all events, it is sufficient in connection with the direction to enter up judgment non obstante veredicto, and with the matters found for the plaintiff.

With respect to the second objection, the arbitrator was not bound to direct in what manner the judgment should be entered up. He had no power to do more [743] than to enable the court to direct the entering up of judgment.

The third objection is merely a repetition of one of the matters contained in the first.

With respect to the fourth objection, the arbitrator has raised a question as to the validity of the custom; and this he was requested by the parties to do; but he has raised no other question as to the validity of the plea.

The fifth objection is founded upon the supposition of the plea being bad. [Cresswell J. The damages are not assessed by the arbitrator upon this issue, but upon the general issue.]

With respect to the sixth and seventh objections, the result of the finding, though conditional, is sufficiently clear, and no new assignment was necessary.

The eighth objection has no foundation in fact.

With respect to the ninth objection, when the arbitrator speaks of damages occasioned by the proceedings of the defendants, preparatory to pulling down the houses, it is evident that he means those which took place before the houses were pulled down.

With regard to the tenth objection, the defendants may have the benefit of the reduction.

With respect to the eleventh objection, the arbitrator was not bound to decide.

With respect to the twelfth objection, the arbitrator has referred the points raised by the defendants to the decision of the court, which he was justified in doing.

As to the thirteenth objection, the arbitrator has properly awarded damages for the neglect on the part of the defendants to use reasonable and proper precaution in taking down their house; *Dodd v. Holme* (1 A. & E. 493, 3 N. & M. 739).

The fourteenth objection is already answered.

[744] The plaintiffs are relieved from the necessity of answering the fifteenth objection, that objection not being stated with sufficient certainty as required by the rule of court. *Boodle v. Davies* (3 A. & E. 200, 4 N. & M. 788).

With respect to the sixteenth objection there is no inconsistency in the direction contained in the award.

As to the seventeenth objection, the arbitrator was not bound to decide upon the matter in arrest of judgment.

With respect to the nineteenth objection a special verdict is the act of the jury, not the act of the parties. Here, the whole proceeding is matter of contract. [Cresswell J. I think there is a case in which it was held that the award must be such as can be enforced.] That would be *Barton v. Ranson* (3 M. & W. 322, S. C. not S. P. 6 Dowl. P. C. 38). There, no power was given to the arbitrator to refer any matter to the decision of the court, or at least he was not required by either of the parties to act upon any such power.

The points raised by the twenty-second objection are not material. No damages

are given for the re-erection of the hoarding, and the arbitrator was not requested to raise any point as to the party-wall.

The twenty-third and twenty-fourth and twenty-sixth objections are too general. As to the twenty-fifth objection the arbitrator was not bound, by the terms of the reference, finally to determine the matters referred.

On the following day Channell Serjt. resumed his argument by consent.

With respect to the third point requested to be raised on the part of the defendants, the delaying and retarding would create no damage, except what was occasioned by the hoarding. [Coltman J. The second 100l. is given independently of any hoarding.]

[745] Addison on the same side. The rule was moved on seven grounds. After being kept back twelve days, it was found when served to contain twenty-six objections. [Tindal C. J. The plaintiff should have applied to amend the rule, if not drawn up agreeably to the motion as made in court. Peacock. It was mentioned that there were other points, and the court said that they might be included in the rule.]

The case of *Barton v. Ranson* does not apply; there can be no finality, where it is agreed that the points shall be raised on record. Here the arbitrator has nothing to do with the judgment, beyond furnishing the court with the materials for deciding. The power given to him is to enter a nonsuit or a verdict. The judgment of nonsuit is the only judgment which the arbitrator has any authority to direct to be entered, though it was formerly considered that a nonsuit could not be awarded because it was not final. In cases not referred, but taking the ordinary course, the judgment resulting from the facts stated is to be entered by the court, whose act it is. An arbitrator represents not the court, but the judge at nisi prius and the jury. Here, the arbitrator has, in fact, drawn the *postea*, which will be entered on the record as in other cases. He has found damages, because he thinks that the custom may be decided to be bad. If the cause had been tried, the judge, under such circumstances, would have said to the jury, "I think the custom which has been pleaded is a bad custom, and, therefore, you will please to assess the damages which the plaintiff has sustained by the wrongful acts attempted to be covered by the plea of custom."

The first objection is answered, by saying that the arbitrator has decided by assessing damages. [Cresswell J. That answer would apply to many of the objections. But the separate assessment of damages is made *diverso intuitu*.]

[746] With respect to the sixth and seventh objections, the arbitrator was not requested by either party to raise any question as to the necessity for a new assignment. But, in fact, he has decided. Whether a new assignment was necessary, would depend upon the evidence. It was a question of fact. If no power had been reserved, the court could not have inquired into the propriety of the decision of the arbitrator upon this point. [Cresswell J. Here, the arbitrator has assessed the damages separately.] That was done at the request of the parties. The case of *Chadwick v. Trower* (6 New Ca. 1, 8 Scott, 1) is far from supporting the thirteenth objection. The arbitrator was not requested to raise the point. The objection cannot now be taken unless the declaration would be bad in arrest of judgment. This case is rather within the principle of *Tuberville v. Stamp* (b), *Westbourne v. Mordant* (Cro. Eliz. 191), *Rex v. Franklin* (5 Price, 614).

Peacock in support of the rule. A submission to arbitration is a contract between the submitting parties, and must be construed, like all other contracts, according to the apparent intention of the contracting parties. No power to refer to the court a point of law arising out of matter submitted to an arbitrator can be inferred. Unless such a power is expressly given by the terms of the submission, it is part of the duty which the arbitrator undertakes, to decide all questions of law incidental to the matters referred to him. In *Anderson v. Fuller* (4 M. & W. 470) the rule is clearly laid down by Alderson J.; and the previous case of *Barton v. Ranson* (3 M. & W. 322) is an authority to the same effect. If the arbitrator, without coming to [747] any decision himself, refers to the court that which he was never requested by the parties so to refer, the award is bad. The arbitrator was bound to shew in what manner judgment was to be entered up. In case of arrest of judgment, or of judgment non obstante veredicto, the costs depend upon the form of the judgment which is to be entered up.

(b) 1 Salk. 13. S. C. 1 Id. Raym. 264, Carthew, 425, 1 Comyns's Rep. 32.

Upon the first objection, therefore, it is submitted that the court cannot enter up judgment, the arbitrator not having directed a verdict to be entered.

The second objection stands upon nearly the same ground.

Upon the third objection it is submitted that the defendants were justified in stating in their plea what was the right which they considered to be derived from the licences. If the plaintiff had new assigned, the defendant might have set up a second licence. The award is not final as to the 50l. [Cresswell J. Must we not understand that the arbitrator awards that sum absolutely?] The fourth and fifth objections rest upon the same point as the third.

As to the sixth objection, it was held in *Barnes v. Hunt* (a) that to support a plea of leave and licence, it was necessary to prove a licence co-extensive with the acts of trespass. But suppose that the defendants had pleaded a licence to do the acts on three days, concluding their plea with the allegation of *quæ est eadem*, a new assignment would have been merely a traverse of the *quæ est eadem*, and the defendants might have pleaded other defences to acts of trespasses committed on other days.

The seventh and eighth objections raise substantially the same objection as the fifth.

[748] The plaintiff is not entitled to the 100l. which form the subject of the ninth, tenth, eleventh, and twelfth objections. (The court intimating an opinion that the claim to this 100l. could not be supported, it was agreed at the bar that it should be struck out of the award.)

With respect to the thirteenth objection, the arbitrator had no power to award damages to the plaintiff on account of the want of precaution charged in the declaration. The defendants were not bound to use precaution. The declaration contains no allegation that the defendants had notice that the plaintiff had any silk upon his premises; *Chadwick v. Trower* (6 New Ca. 1, 8 Scott, 1).

Peacock, on a subsequent day in the same term, shewed cause against the rule obtained on the part of the plaintiff.

The first question is, as to the validity of the custom. It will be contended that it is bad, inasmuch as it leaves it to the lord mayor to determine the length of time during which the hoarding shall be erected. The soil, however, of the streets is vested in the corporation of London (b); and it is not unreasonable that the parties who dedicated the streets to the public should appoint their chief officer to decide how long the streets shall be blocked up. Independently, however, of the soil belonging to the corporation, any party on dedicating a street to the public has a right to reserve such a power as is here reserved to the lord mayor. An individual forming a new street may dedicate it partially to the public, that is to say, subject to the right to stop up a portion of it for the purpose of rebuilding the houses on each side. If that may be done now, it might have [749] been done in former times, and consequently the custom may have had a reasonable commencement.

The custom in question is referred to in Bohnun's *Privilegia Londini*, p. 61, in the following terms, "every builder of houses ought to come to the mayor, alderman, and chamberlain for a special licence for hoard by him to be made in the high streets, and no builder to encumber the streets with any manner of thing taking down for the preparing of his new building, except he makes a hoard, under pain of 40s." So, in Comyns's Digest, London (M) it is said, "By the st M. Ch. 9 H. 3, civitas London habeat omnes libertates suas antiquas et consuetudines suas. By the st. 7 R. 2, Rot. Par. nu. 37 (since printed, 3 Rot. Parl. 160), the citizens of London shall enjoy all their privileges whatsoever, licet usi non fuerint, vel abusi fuerint, and notwithstanding any statute to the contrary. So that they may claim liberties by prescription, charter or parliament, notwithstanding any statute made before 7 R. 2, 4 Inst. 250, 253. But this is intended of franchises that are by lawful title, and not forfeited, and franchises and customs sufferable by, and not repugnant to law, 2 Inst. 20." It is apprehended that this is one of the customs confirmed by the 7 R. 2. It is said by Lord Tenterden in *The King v. The Mayor and Aldermen of London* (9 B. & C. 1, 4 M. & R. 36). "Further, all antient customs and prescriptions are to be considered with

(a) 11 East, 451. In that case, the licence was from the plaintiff in the action; here, from a third person (the lord mayor) under a custom. And see 5 Nev. & M. 27.

(b) By charter of 23 Hen. VI., confirmed by the first charter of Charles I. Vide Pulling, *Laws, Customs, and Regulations of London*, 2d edition, 307 (x).

reference to the rules of the common law ; if found to be repugnant to those rules and contrary to law, on any ground, they have always been held to be invalid. And an act of parliament confirming, in general terms, the antient usages and customs of a city, must, as I apprehend, be considered to confirm those only which have not such repugnance or contrariety. Many matters are good and valid by custom and prescription, which would other-[750]-wise be invalid ; and to such only ought a general confirmatory statute be understood to relate." There is nothing repugnant or contrary to the rules of common law in this custom ; for the discretion reposed in the lord mayor must be vested in some one.

Then, assuming the custom to be good, it will be said that if it be admitted by the plea, or proved before a jury that the hoard was kept up for an unreasonable time, the defendants are not justified in what they have done. With respect to the plea, the arbitrator, instead of submitting the point to the court, should himself have decided whether the plea is good. The charge in the declaration is that the defendants were intending to pull down certain houses and erect others, and continued the hoarding for an unreasonable time. It is conceived that for the purposes of the declaration, and for a justification to such declaration, the reasonableness of the time is immaterial. The claim is for special damage for obstructing a public footway, and whether the obstruction be for a reasonable or an unreasonable time the defendants will be liable, unless they can justify such obstruction. In *Bonafous v. Walker* (2 T. R. 126), which was an action against the marshal of the Marshalsea for an escape, it was objected that the plaintiff could not under the first count of the declaration, which was for a voluntary escape, give evidence of a negligent escape ; but the objection was overruled. So here, although the declaration alleges that the hoarding was kept up an unreasonable time, if the defendants had merely pleaded not guilty, the plaintiff must have recovered if he could have shewn an obstruction of the footway. In an ordinary case of trespass and false imprisonment, the declaration charges an imprisonment without reasonable cause ; but it is no part of the plaintiff's case to prove that there [751] was no reasonable cause for his imprisonment. As these pleadings stand, the only question is, whether the licence of the lord mayor is good. [Tindal C. J. The plaintiff does not appear to charge the original erection of the hoard as a grievance, but the keeping of it up an unreasonable time.] *Tebbutt v. Selby* (6 A. & E. 786, 1 N. & P. 710), shews that the allegation that the act is wrongful, is quite immaterial. The true test is what evidence would the defendants be at liberty to give to rebut the charge in the declaration. The charge itself, without the word "wrongfully," *prima facie* imputes wrong until the defendant justifies the act ; and in so doing, although he professes to answer the whole charge, he does not admit that he exercised the right he might have in a wrongful manner. In an action for a malicious prosecution, to which the plea is, not guilty, it is necessary for the plaintiff to prove the act to have been done without reasonable cause, because that is the gist of the action ; but it is otherwise in trespass. In *Frankum v. The Earl of Falmouth* (2 A. & E. 452, 4 N. & M. 330), the plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that the defendant "wrongfully and injuriously diverted the same ;" and it was held that on a plea of not guilty, the only matter in issue was the fact of the diversion, and that the right to the use of the stream as claimed was admitted. The arbitrator had no authority to raise the point, whether, although the custom was good, the plea was bad non obstante veredicto.

The next point is, whether, supposing the plea to be good, it was proved in point of fact. It is submitted that it was proved by the licences. The question is, whether there is any distinction between the words [752] "hoard," "hoards," and "hoardings." [Tindal C. J. The arbitrator has made none.] The arbitrator has found in the words of the plea, except as to identifying the trespasses, and it is admitted by the replication that the grievances mentioned in the declaration and the plea are the same. The licence of the surveyor (who has chosen to call the hoard "four hoards," because four houses were inclosed), is clearly to be considered as a licence to erect one or more hoards of the dimensions mentioned in the licence of the lord mayor.

With respect to the damages, assuming the plea to be bad, the plaintiff is not entitled to more than the 100l. Supposing, however, the plea to be good, and to have been proved, he clearly ought not to have the 50l. With regard to the 50l. the award is bad for uncertainty ; for the arbitrator has not said that the plaintiff

is to have that sum, but has merely assessed the damages at that amount, and the court cannot give him the sum unless the arbitrator has given the court power to do so. [Tindal C. J. I think that the arbitrator means in substance to say, that if the court think the plaintiff should have the 50l., the verdict is to be so entered up.]

Channell Serjt. and Addison in support of the plaintiff's rule. If the declaration had complained of the original erection of the hoards, the cases cited might have been applicable; but it charges that the defendants wrongfully continued the obstruction for an unreasonable time. This case is in some respects not unlike *Wilkes v. The Hungerford Market Company* (2 New Cases, 281, 2 Scott, 446). There the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from [753] the thoroughfare by the defendants continuing an authorised obstruction across it for an unreasonable time. Here, the plaintiff, in his declaration, assumes that there may have been a right to erect the hoard for a certain period, but complains of the unreasonable time it was kept up.

With respect to the custom alleged, it is submitted that it is bad in point of law. Under it, as laid, the lord mayor is authorised to enclose any part of a public way, and not merely the part near to the houses to be erected or pulled down. It makes the lord mayor the exclusive judge of the time and manner of erecting the hoard, without any restriction as to the period during which it is to be continued; neither is the custom confined to cases of actual necessity. Such a custom might be exceedingly prejudicial to an individual; for there is no opportunity of his being heard before the lord mayor, and no appeal from the decision of the latter. *Morley v. The Goldsmiths' Company* (a case tried before Tindal C. J. not reported) is no authority upon this point; for there the jury found that the hoard was not erected for an unreasonable time. Allowing that the corporation are the owners of the soil, they can only be so subject to the rights of the public. A qualified dedication to the public no doubt may exist, but here the right claimed is set up as a custom.

According to the argument on the other side, no custom would be too unreasonable to be supported, for in every case there must be an owner of the soil. In *Com. Digest*, tit. Prerogative (D 4), it is laid down thus:—"A dispensation makes an act otherwise prohibited lawful to him to whom the dispensation is granted; for *dat jus*, Vaugh. 333. And this prerogative belongs to the King by the common law in case of necessity. Hard. 446, 448. But dispensations are odious in the law, 2 Roll. [754] 179, l. 25." So (D 7), "The King cannot dispense with a thing *malum in se*. Hard. 448. Nor with a thing which would be a nuisance. Hard. 444, 445. So the King cannot dispense with any thing in which the subject has an interest. Hard. 449." Here, the Crown could not have authorised any party to shut up the public way except for a reasonable cause and for a reasonable time, and the lord mayor cannot have a larger authority than the Crown would have possessed in such a case. It is a condition in the licence from the lord mayor, that the party is to obtain such a licence as he is bound to do under the paving act, 57 G. 3, c. xxix. But it is neither alleged in the plea, nor was it proved before the arbitrator, that the licence of the surveyor was granted for either of the purposes mentioned in the 57 G. 3, c. xxix. s. 75. The plea is therefore clearly bad.

The next question is, whether the plea was proved in point of fact. There are two allegations on the record. Supposing the defendants right in saying that the licence of the lord mayor supports the first allegation, a licence from the surveyor must be shewn to establish the further averment. Looking at the lord mayor's licence, it is to erect "a hoard containing in length in front of the said premises sixty-two feet, projecting from the same four feet," and it is to continue four weeks, provided the party shall also obtain a licence from the surveyor under the paving act. The licence of the surveyor, however, is in the following words: "I do hereby give leave and licence, &c. to erect and continue four hoards, in manner and for the time above mentioned." No reference is made in the latter licence to dimensions, and it is therefore either for four hoards of the dimensions given in the lord mayor's licence, or else the averment as to the dimensions is not made out.

As to the damages which are assessed under the general issue, if the plea is bad in point of law, or is not [755] proved in point of fact, the plaintiff is entitled to the 100l. and the 50l. Supposing, however, the court should think the plea good and made out in evidence, the plaintiff is entitled to the 50l. For this is not the case of a single

trespass, but of a continuance of a grievance for an unreasonable time. No new assignment was necessary; for the defendants justify under the licences, and the licence, to be an answer to the declaration, must be co-extensive with the grievances.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This case has been brought before the court upon two cross motions—one rule, obtained by the plaintiff, calling on the defendants to shew cause why judgment should not be entered for the plaintiff on the matter stated in the declaration and proposed to be covered by the second plea, non obstante veredicto, with 150*l.* damages; or why the judgment should not be entered for the plaintiff on the general issue for the sum of 50*l.* awarded in respect of the continuance of the hoarding mentioned in the declaration—the other rule obtained by the defendants, and which calls on the plaintiff to shew cause why the award made in this cause under an order of *nisi prius*, should not be set aside, upon various objections (twenty-six in number) which have been urged against the validity of the award; and we think it will be more convenient to consider, in the first instance, the validity of the award, and afterwards the plaintiff's rule for judgment non obstante veredicto.

With respect to the first objection taken to this award, that the arbitrator was bound to decide as to the amount of damages to be recovered, and to direct how the verdict should be entered up, it appears to us that the arbitrator, upon the proper construction of the order of [756] reference, was not bound to come to such decision, or to give such direction. He has, by his award, disposed of all the issues joined on the record, and has assessed damages separately in respect of each subject-matter of complaint stated in the declaration. By the order of *nisi prius* the arbitrator was bound, at the request of either party, to state on the face of his award any point of law for the opinion of this court; and each party called upon him to state certain points as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration as to the validity of the second plea founded on the custom, and as to the right of the plaintiff to judgment non obstante veredicto, if the issue taken on that plea should be found for the defendants. The arbitrator, therefore, could not make an award which should be final as to those several matters. The case of *Anderson v. Fuller* (4 M. & W. 470) was cited to shew that an arbitrator cannot, without special leave, state a case for the opinion of the court; but here, by the order of *nisi prius*, and by the parties themselves, he was required so to do. The first objection, therefore, fails, and the same answer may be given to the second and third, viz. that the arbitrator has fully discharged his duty by finding the issues, assessing the damages separately, and stating for the opinion of the court such points as the parties required, and that he could not make any final award upon these points.

The fourth objection is, that the arbitrator has not determined as to the validity of the second plea, independently of the question of the validity or invalidity of the custom therein set forth, as he ought to have done; but has, without being requested so to do by either of the parties, raised as a question for the court the validity of that plea generally. But this objection does not appear to be founded in fact. The arbitrator was re-[757]-quested by the plaintiff and the defendants to raise a question as to the validity of the custom, and by the former to raise a question as to the sufficiency of the evidence to prove *residuum causæ*, and he does not appear to have raised any other question respecting it. But even if it could be shewn that he has, inasmuch as he has in the first instance found the issue on the plea generally for the defendants, the matter afterwards stated may be rejected as surplusage; *Barton v. Reason* (3 M. & W. 322); *In re Wright and the Cromford Canal Company* (1 Q. B. 98).

It is a sufficient answer to the fifth objection that the arbitrator has assessed the damages separately as required by the plaintiff, so that the court shall direct what shall be the effect of their decision as to the custom; and the same answer may be given to the sixth, seventh, and eighth objections.

The ninth objection is, that the arbitrator has not decided certain points therein mentioned; but he has by assessing the damages separately submitted all those points to the court, as the defendants themselves required him to do.

As to the tenth objection, it was conceded during the argument that the plaintiff could not recover any damages for the delay in pulling down the houses, independently of the fact of keeping up the hoarding; but the point was raised at the request of the parties, and the validity of the award is not affected by it.

The eleventh and twelfth objections are not founded in fact. The arbitrator has raised the questions referred to in those objections.

The thirteenth objection was founded on the supposed resemblance of this case to that of *Chadwick v. Trower* (6 New Ca. 1, 8 Scott, 1); but upon examination it will be found to [758] be essentially different. The declaration in that case contained two counts, and general damages were given on both; and it was contended for the plaintiff in error that the second count could not be supported: it alleged that the plaintiffs were possessed of a vault with wine in it; that the defendant was about to pull down the adjoining vaults and walls, and that it was the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intention to pull down; and also that it was his duty to use due care and skill, and to take due, reasonable, and proper precautions about the pulling down his vaults and walls, so that for want of such precaution the plaintiff's vault should not be injured, and then alleged that, as a breach of such duty, that the defendant pulled down his vaults and walls without giving the plaintiff notice, and without taking due care and precaution in pulling down, whereby the plaintiff's vault was injured. The court of Exchequer Chamber held that the count was bad on two grounds—first, that the defendant was not bound to give notice; secondly, as it was not alleged that the defendant knew of the existence of the plaintiff's vault, it could not be said that the law imposed upon the defendant the duty of taking precaution against injuring it by pulling down his own walls. The declaration in this case is very different; it charges the defendants with conducting themselves so carelessly, negligently, and improperly in pulling down their house; and in neglecting to use proper precautions in that behalf large quantities of bricks, mortar, &c. fell from the defendants' house into and upon the plaintiff's house, broke the windows, skylights, &c., and occasioned great consequential damage. The plaintiff, therefore, complains, not of some mere omission on the part of the defendants, but of their doing certain acts in so negligent a manner that by those very acts the plaintiff's house was [759] injured. The present case is, therefore, very like that of *Dodd v. Holme* (1 A. & E. 493, 3 N. & M. 739), and the arbitrator was warranted in giving damages in respect of this part of the declaration.

The fourteenth objection is only a repetition of the fifth in a different form. The fifteenth is too general.

The sixteenth is founded upon a supposed inconsistency in the award. But there is not any such inconsistency: the semblance arises from the arbitrator's compliance with the request of the parties, that he would submit to the judgment of the court the validity of the second plea, and also the sufficiency of the evidence to maintain the issue taken upon it.

No attempt was made to support the seventeenth objection, which indeed appears to be wholly unfounded.

The eighteenth objection is, that the arbitrator ought to have determined whether the custom set up in the second plea was good or bad; but he could not do so, as the plaintiff required him to raise the question on the award if he thought it good, and the defendants if he thought it bad.

The nineteenth objection is, that the arbitrator did not raise on his award the third, fifth, and sixth points which the defendants desired to have raised. But the third would have been useless, as no damages are given in respect of the matter to which it refers; the fifth is, in fact, raised, and the sixth was determined in favour of the defendants by the arbitrator's finding that part of the plea of not guilty in their favour.

The twentieth objection is too general.

The twenty-first is also too general. If the defendants had reason to complain that some specific point which they wished to have had raised was not raised, they should have pointed it out.

The twenty-second objection is, "that the arbitrator [760] has not found or stated in or by his award how long the hoarding erected by the defendants in front of their houses preparatory to pulling down the same, remained before the same was removed, so as no longer to enclose any part of the said public footway, as mentioned in his award, or how long it remained in the state last mentioned before it was again removed and re-erected as in the award mentioned, or how long it enclosed a part of the said footway, or in part obstructed the same." But the arbitrator does not appear to have given any damages in respect of the re-erection of the hoarding; it

was therefore unnecessary to raise this point. The twenty-second objection then complains that the arbitrator has not found or stated "whether the party-wall mentioned in the award belonged wholly to the plaintiff or to the defendants, or partly to one and partly to the others, or whether it belonged to them as tenants in common." Now, with respect to the party-wall, the defendants requested the arbitrator to raise for the opinion of the court the following question:—"Whether the defendants were bound to underpin more than their own half of the party-wall, and whether they are liable upon the present declaration for underpinning only their own side, provided they were not guilty of negligence in so doing?" The plaintiff, on the other hand, requested him to state, amongst other things, "whether or not the plaintiff's house was an antient house, and whether it had always been supported at the east end thereof by the party-wall, and whether or not the sinking of the plaintiff's house was occasioned by the defective underpinning on the part of those employed by the defendants." As to this part of the case the arbitrator has stated that "the carelessness, negligence, and unskilfulness of the defendants, their agents, and workmen in and about the underpinning of the said party-wall consisted in their underpinning the said party-wall [761] partially, and not underpinning the whole of the said wall, whereby the said plaintiff's house sunk and sustained damage." Both parties appear to have assumed before the arbitrator that the party-wall belonged one half to the plaintiff and the other half to the defendant, and he was not required to state any question for the opinion of the court upon that point. He has, according to the request of the parties, raised a question as to the liability of the defendants in respect of injury arising from their underpinning only their own half of the party-wall, by stating that the carelessness, negligence, and unskilfulness for which he has given damages consisted in underpinning their own half of the party-wall only. Now there is not, amongst the numerous objections taken to this award, any one distinctly complaining of that assessment of damages. Assuming, however, that the point is raised for the consideration of the court, we are of opinion that the defendants had no right to underpin the party-wall, either partially or wholly, unless that could be done without injuring the plaintiff's house. It may, indeed, be doubtful whether the plaintiff had a several interest in that half of the wall which was next to his house, or whether he and the defendants were tenants in common of the whole; but, in either event, an action on the case was maintainable against the defendants in respect of the injury which resulted from the mode of their dealing with it. See *Comyns's Dig. Estates* (K. 8); *Cubitt v. Porter* (8 B. & C. 257, 2 M. & R. 267).

The twenty-third, twenty-fourth, and twenty-sixth objections are too general.

And the twenty-fifth cannot be sustained; for it has been already shewn that the arbitrator was not bound to make a final award, but had authority and was bound to state a case for the opinion of the court.

[762] The award, therefore, cannot be set aside, and the defendants' rule obtained for that purpose must be discharged.

The rule obtained by the plaintiff for judgment non obstante veredicto remains to be considered. Two grounds have been stated for that motion; first, that the custom set out in the second plea is bad in law; secondly, that the licences stated by the arbitrator to have been proved before him did not support the plea. It was urged that the custom was unreasonable, because the power alleged to be vested in the Lord Mayor is not merely to give a licence to obstruct by a hoarding any part of a public way next adjoining or near to any house to which the party may be about to pull down or erect; but to license the obstruction of any part of any public way within the city of London. But, upon examination of the language of the plea, it will be found that the power is not quite so large: it runs thus, "that from time whereof the memory of man is not to the contrary, until and at the time of the committing of the grievances in the introductory part of the plea mentioned, there had been and was, and from thence hitherto hath been, and still is, within the city of London a certain ancient and laudable custom there used approved of, that is to say, that if any person or persons, body corporate or politic, hath or have at any time or times during the time aforesaid, had occasion to erect or pull down any building or buildings within the said city, near to any public way within the said city, and hath or have had occasion for those or either of those purposes to erect, place, or continue any hoarding in such a manner as thereby to obstruct or enclose any part of any public way within the said city, and hath or have applied to the Lord Mayor of the said city for the

time being for his permission, licence, or authority to erect, place, and continue such hoarding in such man-[763]-ner and for such purpose or purposes as aforesaid, such Lord Mayor for the time being of the said city hath, during all the time aforesaid, had full and free power and authority to authorise, license, and permit, and hath lawfully authorised, licensed, and permitted, and been used and accustomed to license, authorise, and permit such person or persons, body corporate or politic, to erect, place, and continue any such hoarding for such purpose or purposes aforesaid, and of such dimensions, and in such manner, and for such time or times as he hath thought reasonable or proper for such purpose or purposes; and the person or persons, body corporate or politic, so applying as aforesaid and having obtained such permission, licence, or authority as aforesaid, hath and have during all the time aforesaid, lawfully and of right erected, placed, and continued, and been used and accustomed of right to erect, place, and continue for such purpose or purposes in any such public way so to inclose or obstruct the same, such hoarding in such manner, and of such dimensions, and for such time or times as he or they have been so authorised, licensed, or permitted to do by the Lord Mayor for the time being of the said city as aforesaid, except so far as such custom, power, or authority hath been affected by the statute 57 G. 3, c. xxix."—the Metropolitan paving act. It is, therefore, confined to the erection of a hoarding which the party applying for the licence has occasion to erect so as to obstruct part of a public way for the purpose of building or pulling down a house; and we do not discover any thing unreasonable in such a custom. It is convenient that a power to grant such licences should be vested somewhere. It is often necessary for the safety of the public, as well as for the advantage of individuals, that houses should be taken down and rebuilt; and that cannot be done without exposing the public to much danger and annoy-[764]-ance unless a hoarding be erected; and surely it is not unreasonable that a party about to undertake such a work should be enabled to ascertain beforehand what he may do with safety, instead of incurring the peril of a verdict against him in a criminal or civil proceeding, or perhaps in both. The statute 57 G. 3, c. xxix. s. 75, makes it requisite that a person about to erect a hoard should obtain a licence from the surveyor of the pavements of the district. The legislature, therefore, appears to have considered it reasonable that the surveyor should be the judge of the propriety of granting such licences; and this confirms the opinion that an immemorial custom giving the like authority to the Lord Mayor is not unreasonable, especially as the soil of the streets of the city of London is vested in the corporation, and it is possible that on the original dedication of the streets of the city to the public, the power in question may have been reserved to the chief magistrate.

It was further urged that the custom cannot warrant the Lord Mayor in granting a licence to keep up a hoard for an unreasonable time; but if he may, by custom, have power to judge of the expediency of erecting it, we think he may also judge how long it ought to be continued.

Assuming, then, the custom to be good, we think that the licences set out on the award were sufficient to justify the finding of the arbitrator in favour of the defendants on the issue taken on the second plea. The rule for entering judgment for the plaintiff non obstante veredicto must therefore be discharged; and as the plea is pleaded generally to the keeping and continuing of the hoarding erected as in the declaration mentioned, the plaintiff cannot have either the 100l. or the 50l. assessed as damages in respect of the maintenance of that hoarding; neither can he have the 100l. assessed for damages sustained in respect of the delaying and retarding of the [765] pulling down and rebuilding of the houses in the declaration mentioned, otherwise than by the keeping and continuing of the hoarding. We, therefore, think that the plaintiff's rule for entering judgment non obstante veredicto must also be discharged.

Rule discharged accordingly.

DOE DEM. DOVASTON v. ROE. May 23, 1842.

A tenant absconded, leaving the key of the premises with his attorney, to whom he by letter referred the landlord. A copy of the declaration and notice was affixed to the door of the premises, and another copy was served on the attorney. Held, a sufficient service to entitle the plaintiff to judgment against the casual ejector.

Bompas Serjt. moved for judgment against the casual ejector, on an affidavit which stated that the tenant had absconded, having left the key of the premises with his

attorney; and that he had written to the lessor of the plaintiff, referring him to the attorney for the terms on which possession would be given up; that a copy of the declaration and notice had been affixed to the outer door of the premises, and a copy served on the attorney, who, on being so served, stated that he expected to see his client in a day or two, and that if no agreement was come to, he would, in all probability, receive instructions to defend.

Per curiam. There appears sufficient in the affidavit to entitle you to a rule.

Rule absolute.

[766] DOE DEM. HINE v. ROE (LAWRENCE). May 30, 1842.

A copy of the declaration and notice was served on the niece of the tenant upon the premises, on Saturday the 21st of May. On an application being made to her, she refused to make an affidavit, but stated that she gave the copy to the tenant on the Saturday, or on the following day, (Monday, being the first day of the term): Held, insufficient.

Storks Serjt. moved for judgment against the casual ejector. It appeared from the affidavit that the premises were in the possession of two tenants. The service on one of them was by delivering a copy of the declaration and notice, and reading over and explaining the same to his daughter (upon the premises) who promised to deliver the same to her father on the 23d of May (the first day of the term), the father acknowledged to the deponent that he had received the copy of the declaration and notice from his daughter on the preceding Saturday. With respect to the other tenant, it was stated that a copy of the declaration and notice was delivered, read, and explained to his niece (who was a member of his family) upon the premises; that she promised to deliver it to her uncle; and that she had subsequently admitted that she had delivered it to him.

The court said that the rule might go as to the first mentioned tenant; but that as to the other, nothing had been shewn to entitle the party even to a rule nisi. They, however, suggested that the niece should be applied to for an affidavit; and in the event of her declining to make one, the lessor of the plaintiff might possibly have a rule nisi, as he then would have done every thing in his power.

Storks now renewed his motion on an affidavit, from which it appeared that application had been made to the niece for an affidavit, who had refused to make it, but had told the deponent that she had delivered the [767] declaration and notice to her uncle on the day on which they were left with her (Saturday the 21st), or on the following day, — Monday, the 23d, being the first day of term.

Per curiam. It cannot be inferred from this statement that the declaration and notice reached the hands of this tenant on the Saturday, and if he did not receive them until the Sunday, the service would be bad. Therefore, as to the premises occupied by this tenant, the rule must be refused.

Rule accordingly.

IN RE EVANS AND HOWELL. June 11, 1842.

[S. C. 5 Scott, N. R. 240. Followed, *In re Huddersfield Corporation and Jacomb*, 1874, L. R. 77 Eq. 484; L. R. 10 Ch. 92.]

An application made on the last day but one of the term for leave to move, on the last day of the term, to set aside an award, on the ground that the affidavit on which the motion was to be founded, had not arrived from the country, was refused by the court.

In this case all matters in difference had been submitted to arbitration by bond, pursuant to the 9 & 10 W. 3, c. 15, and previous to the commencement of the present term an award had been made in favour of the plaintiff.

Bompas Serjt., on behalf of the defendant, this day asked leave of the court to be allowed to move on Monday (the last day of the term) to set aside the award, the affidavit on which the motion was intended to be grounded not having arrived from the country.

MAULE J. It is enacted by the second section of the 9 & 10 W. 3, c. 15, that "any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as com-[768]-plaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties." By the statute, therefore, a party in whose favour an award has been made is entitled to the benefit thereof, unless a motion be made to set it aside before the last day of the following term. To allow this application would be, in effect, to repeal the act. The motion, if made at all, must be made to-day.

COLTMAN J. concurred.

Motion refused (a)¹.

IN RE JOHN WHYTEHEAD. June 11, 1842.

A rule to prohibit an attorney from practising in this court was granted, on reading a rule of the court of Queen's Bench to the like effect.

Channell Serjt. moved for a rule to prohibit Mr Whytehead, as attorney of this court, from practising herein, upon reading a rule of the Queen's Bench prohibiting him from practising in that court. The learned serjeant cited *Ex parte Yates* (9 Bingh. 455, 2 Moo. & Sc. 618), where an attorney was struck off the roll of this court in accordance with a rule of the court of King's Bench for striking him off the roll of that court, and he was afterwards readmitted in this court, without any inquiry as to the circumstances, upon his being readmitted in the court of King's Bench.

Per curiam. You may take your rule.

Rule absolute (b).

[769] M'KELLAR AND ANOTHER v. REDDIE. June 13, 1842.

A writ issued on the 8th of January. A subsequent writ to continue the former was issued on the 7th of June. On the latter being tendered for entry of record, it was objected to as being out of time. The court granted a rule to enter it of record, valeat quantum.

Bompas Serjt. applied for leave to enter of record a continuation of process under the 2 W. 4, c. 39, s. 10 (a)², in order to prevent the operation of the statute of limita-

(a)¹ The other judges had left the court.

(b) See *Ex parte Hague*, 3 Brod. & B. 257, 7 B. Moore, 64 [769] where this court refused to strike an attorney off the roll upon an affidavit that he had been struck off the roll of the court of King's Bench; the contents of the affidavits on which the court of King's Bench acted not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanor. See also *In re Richard Peter Smith*, 1 Brod. & B. 522, 4 B. Moore, 319.

(a)² By which it is enacted, "That no writ issued by authority of this act, shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ (if any) issued in continuation of a preceding writ shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ, issued in continuation of a preceding writ, shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ, and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

tions. The date of the writ of summons [770] was the 15th of March 1841, of the alias writ of summons the 12th of August, and of the pluries the 8th of January 1842. A second pluries was issued to continue the preceding writ, dated the 7th of June; but on being tendered for entry of record, was objected to by the officer as being too late.

TINDAL C. J. Take your rule, valeat quantum.

The rest of the court concurring,

Rule granted.

HOULDITCH v. THE EARL OF LICHFIELD. June 13, 1842.

A distringas may be issued to compel the appearance of a peer, who is known to be abroad.

Bompas Serjt. having obtained a rule nisi to set aside a distringas, which had been issued to compel the appearance of the defendant, who was known to be abroad, on the ground that the 2 W. 4, c. 39, s. 3, did not warrant the proceeding,

Channell Serjt. now shewed cause. The distringas was properly issued. In *Davis v. The Earl of Lichfield* (1 Dowl. N. S. 363) the court of Exchequer allowed a distringas to issue against the same defendant, and a similar application to the present was there made on the part of the defendant, but without success.

Bompas Serjt., in support of his rule. A distringas can only be issued against a party shewn to be abroad at the time, for the purpose of proceeding to outlawry. [Tindal C. J. In a case like the present it would be a [771] denial of justice to withhold a distringas.] The statute clearly did not contemplate such a case. [Cresswell J. Ought you not to wait until an appearance is entered for you?] Leave to enter an appearance is granted as a matter of course, upon an ex parte statement.

TINDAL C. J. It seems to me that the words of the first part of the third section of the uniformity of process act are sufficiently comprehensive to warrant the issuing of a distringas in a case like the present. The effect will probably be that the sheriff will go to the defendant's house and make a seizure, of which his attorney will have notice, and may then appear for him. If so advised, you can make a stand at the next step.

MAULE J. Should you come to the court to set aside the appearance, it will appear that the defendant has instructed counsel, and therefore is represented (a). No doubt can be entertained that the writ is properly issued.

The rest of the court concurred.

Rule discharged (b).

[772] ALEXANDER v. TOWNLEY. June 13, 1842.

Where a defendant had twice obtained time to plead, the court refused to compel the plaintiff to give security for costs,—although he had been four times a bankrupt, once discharged under the Lord's act, and thrice under the insolvent debtors' acts, upon none of which occasions had his estate paid 15s. in the pound,—except upon the terms of the defendant undertaking not to plead those matters.

Bompas Serjt., on a former day in this term, obtained a rule, calling on the plaintiff to find security for costs, upon affidavits stating that the action was brought to recover 74l. 14s. 1d., the balance due upon four bills of exchange respectively drawn by the

(a) Quære, whether, supposing the objection to the process had been well founded, the court would not have been bound to hear any person, or at least any counsel, who, as *amicus curiæ*, pointed out error in the proceedings of the court, without moving to set it aside; and whether the party who conceives himself to be aggrieved by such proceedings, has not the right to instruct counsel to point out the error without making such counsel his representative, so as to dispense with the necessity of any process to bring such party into court. And see *Rex v. Hobby*, Ryan & M. 241; *Regina v. Featherstonhaugh*, 8 C. & P. 109.

(b) See *Taylor v. Lord Stuart de Rothesay*, ante, p. 388, and *Cassidy v. Stewart*, ante, vol. ii. p. 437.

plaintiff, payable to his own order, and accepted by the defendant, the consideration for which was goods sold and delivered; that between the years 1805 and 1837, the plaintiff had been four times a bankrupt, once discharged under the Lords' act, and thrice under insolvents debtors' acts; that neither of the estates of the plaintiff under the commissions, fiats, or insolvencies, produced sufficient to pay 15s. in the pound of the amount of the debts proved under any of the said commissions, fiats, or insolvencies; and that the plaintiff was still an uncertificated bankrupt.

Channell Serjt. shewed cause upon an affidavit in which it was sworn, that in last Hilary term, the defendant obtained a rule nisi, that a judge's order under which he had been held to bail might be set aside, and also that the proceedings might be stayed, upon the same grounds as those relied on upon the present occasion; that such rule having been enlarged to shew cause at Chambers, was heard before Maule J. on the 2d of February last, when the former part of the rule was made absolute without costs, and the latter part of the rule was discharged; that on the 25th of May the defendant obtained a week's time to plead upon the usual terms; that on the 28th of May the demand for security [773] for costs was made, and that on the 1st of June the defendant obtained a further order for time to plead.

The bankruptcy or insolvency of a plaintiff furnishes no ground for calling on him to give security for costs, unless it occurs after action brought, or the suit is for the benefit of assignees. Archb. Pract. 1014, 7th ed., Tidd, 536, 9th ed., Tidd's New Pract. 267, 268. In *Wray v. Brown* (6 New Cases, 271, 8 Scott, 557), this court refused to order a plaintiff to give security for costs on the ground that he had been three times an insolvent and once a bankrupt, and was only suing as a trustee for a third person. At any rate, if the court were to grant this application, it would only be on the terms that the defendant should undertake not to plead the bankruptcy or insolvency. *Minchin v. Hart* (1 Chitt. Rep. 215), *Manley v. Mayne* (3 M. & R. 381).

Bompas Serjt., in support of the rule. In *Webb v. Ward* (7 T. R. 296) Lord Kenyon says, "It cannot be laid down as a general rule, that an uncertificated bankrupt must, in all cases, give security for costs where an action is brought by him; that would be going much too far. Each case must depend on its own circumstances. But it is fair to say, that if the action be really brought for the benefit of the assignees, they should be responsible for the costs. What weighs with me to grant the present application is, that this action must be brought for the benefit of the assignees; for an uncertificated bankrupt cannot have any property of his own. This is not an action for the fruits of his personal labour since his bankruptcy, but for goods, which if they belong to him at all, must by law be vested in his assignees." Here, if the plaintiff recovers the assignees are entitled to claim the fruits of the verdict. [Tindal C. J. The [774] assignees have not interposed.] Although that may be so, this action must necessarily enure for the benefit of the assignees under the second commission, as the plaintiff has been four times a bankrupt, and his estate has never produced 15s. in the pound. In *Young v. Rishworth* (8 A. & E. 470, 3 N. & P. 585) a plea that the plaintiff became bankrupt and obtained his certificate in 1822, that a second commission issued against him on the 20th of May 1825, under which his effects were assigned in July 1825, and he obtained his certificate in 1826, but did not pay 15s. in the pound, whereby and by force of the statute, the debt demanded in the declaration had vested in the assignees, was held to be a good plea, under the 6 G. 4, c. 16, s. 127, and it was decided that where the estate of a bankrupt after certificate is vested in his assignees by the statute, he cannot sue for an after-accruing debt, although the assignees do not interpose.

TINDAL C. J. Looking at the circumstances of this case, and especially at the fact that the defendant has twice obtained leave to plead in order to set up the bankruptcy and insolvency of the plaintiff, it seems to me that the defendant must elect either to abandon that defence, or to have his rule discharged.

The rest of the court concurring,

Bompas elected to have the rule discharged.

[775] PADDOCK v. FORRESTER AND OTHERS. 1842.

In an action of trespass for breaking and entering lands, and getting coals, earth, soil, and other minerals, the defendants pleaded, secondly, a plea, that the coals, earth,

soil, and other minerals, were not the property of the plaintiff, and other pleas which set up an unqualified right to enter the plaintiff's land and take the minerals. The defendants obtained a verdict in respect of the coals mentioned in the second plea and the plaintiff upon the issues raised by the other pleas.—Held, that the defendants were entitled to the costs of witnesses brought, though not examined, to prove title to the minerals, but that such costs were to be estimated as contradistinguished from those occasioned by the claim of the right set up by the subsequent pleas, of entering the plaintiff's land for the purpose of getting and carrying away the coals.

Trespass for breaking and entering lands, subverting the soil, making and sinking mines, pits, shafts, and holes, and raising and getting, and seizing, taking, carrying away, and converting coals, culm, earth, soil, stones, ore, and other minerals.

Pleas: first, not guilty; secondly, that the coals, earth, soil, and other minerals were not the property of the plaintiff; the third, fifth, and seventh pleas, set up a justification, under a right of mining, in the lessee of the Crown upon an immemorial right, a user for forty years, and for twenty years; the fourth, sixth, and eighth pleas alleged similar rights, subject to making compensation for surface damage; in the ninth and tenth pleas, the defendants justified as servants of his late Majesty, and of her present Majesty; eleventh plea, the statute of limitations; and twelfth plea, not possessed. Replication, issue on the first, second, eleventh, and twelfth pleas; to the third, fifth, and seventh pleas, a traverse of the alleged rights; to the fourth, sixth, and eighth pleas, a claim of compensation and refusal.

The fourth, sixth, and eighth issues were found for the defendants; on the ninth and tenth issues the jury were discharged. Upon motion, the verdict on the issues on the third, fifth, and seventh, and on the second, eleventh, and twelfth issues was also entered for the plaintiff; and that on the first issue was entered [776] distributively, viz. for the defendants as to carrying away the earth, soil, and stone; and for the plaintiff upon the residue of the declaration (a). On the taxation the master's opinion was, that the defendants were entitled to the general costs of the cause, having obtained a verdict upon the fourth, sixth, and eighth issues; and he disallowed the plaintiff all the costs of opposing the rights set up in the third, fifth, and seventh pleas, and allowed the defendants the costs of witnesses, by whose testimony they sought to prove the right of the Crown to enter and take the minerals.

Talfourd Serjt., early in this term, obtained a rule nisi for reviewing the master's taxation.

The master appears to have considered the right to enter the plaintiff's land, and the right to take the minerals, as the same; whereas the right to the land may be in one party, and to the minerals in another. As the plaintiff has succeeded on the issues raised by the pleas alleging an unqualified right, he is clearly entitled to his costs.

Sir T. Wilde and Bompas Serjts. now shewed cause. The master's taxation is right, the defendants being entitled to judgment on the whole record, and to the general costs of the suit. At the trial, the right of the Crown to enter and take the minerals, was admitted; and the defendants having succeeded on the pleas alleging the right to enter, paying compensation, and the jury having found that the compensation tendered was sufficient, the plaintiff was left without any cause of action. One of the pleas denied that the plaintiff was possessed of the minerals, and it was shewn that they be-[777]-longed to the Duchy. The plaintiff, however, did not attempt to make out any case upon the issue thereby raised, and the witnesses were not called. It is objected, however, that the evidence of those witnesses if called would have applied to the issues found for the plaintiff, and therefore that their expenses ought not to have been allowed. There is no foundation for this objection; for where a party is entitled to the general costs, he is entitled to the costs of witnesses brought to establish an issue on which he has succeeded, although their evidence may be also applicable to another issue found for his opponent.

Talfourd and Channell Serjts. in support of the rule. The second issue does not go to the whole cause of action. Two questions only arise on the pleadings; first,

(a) In vol. iii. p. 923, it is stated by mistake, that the verdict upon the first issue was for the plaintiff as to the earth, soil, and stones, and for the defendants as to the residue.

whether the defendants had an unqualified right to enter the plaintiff's lands; and, secondly, whether they had a right to enter—paying compensation; and if so, whether the compensation tendered was sufficient. At the trial the plaintiff took his stand upon the sufficiency of the compensation. [Tindal C. J. Must not each plea be taken singly on taxation?] At any rate the master should be required to review his taxation with respect to the costs of the second issue, as *contra-distinguished* from those of the third, fifth, and seventh; for it is clear that he has allowed costs to the defendants on the second issue which would only be properly allowed on the third, which was found for the plaintiff.

TINDAL C. J. It does not appear to me to be so difficult to define the manner in which these costs should be taxed, as to apply the rule to the different issues. The application of the rule must, in a great measure, be left to the discretion of the master. The costs of the second issue should be taxed as if there was no other [778] issue on the record; and looking at the case as if the second plea had stood alone, the question is what witnesses should be allowed to prove the property of the minerals in the defendants. The plaintiff had a *prima facie* title; he was in possession; and it was necessary for the defendants to make out a title to the coals to shew that they were not wrongdoers. Now it seems to me, that the defendants are not to be so strictly limited, as that when they have established their claim under the lord of the manor, they may not give some other evidence to prove what their title is. They should not, however, be allowed for evidence of winning and taking away coals, for that is the subject matter of a distinct issue. It is desirable to ascertain whether the master attended to this distinction. The case may therefore be referred back to him to see if he has limited himself to giving to the defendants a fair and reasonable allowance for witnesses, brought to prove their property in the coals, as *contradistinguished* from the right to enter and take them away. I do not see that the defendants lose their right to the costs of witnesses upon one issue, because they may have been called to prove another issue.

The rest of the court concurred.

Rule absolute accordingly.

End of Trinity Term.

[779] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banc during this term were, Tindal C. J., Coltman J., Erskine J., Maule J.

BARKER v. BIRCH. Nov. 2, 1842.

By the forty-sixth section of the tithe commutation act, any person dissatisfied with a decision of the commissioners, may bring an action (in the form of a feigned issue) "within three months next after such decision shall have been notified in writing."—Where a writ of summons was issued within three months after the notification of such a decision, but was not served till some time after the expiration of that period, though within four months of the date of the writ, the court refused to set aside the writ, or the service thereof.

Talfourd Serjt. (with whom was Manning Serjt.) moved, on behalf of the defendant, to set aside the writ of summons issued in this case, with costs. It appeared from the affidavit upon which the motion was made, that on the 12th of March 1842, a decision against [780] the interests of the plaintiff, and in favour of the defendant, was made by one of the assistant tithe commissioners, acting under the tithe commutation act (6 & 7 W. 4, c. 71), and that such decision was notified in writing to the plaintiff and defendant on the 15th of the same month. The deponent stated his belief that the action had been brought for the purpose of appealing against such decision. It further appeared, that the writ of summons was issued on the 9th of June 1842; and that a copy thereof was served upon the defendant on the 2d of September; that the defendant on the 5th of September took out a summons before a judge to set aside the writ of summons, on the ground that the action had not been

brought and prosecuted within the time limited by the tithe commutation act; that the summons had been heard before Cresswell J. who refused to make any order, upon the ground that as the summons involved the question of the construction of the act, the application ought to be made to the court.

The learned serjeant argued, that by the forty-sixth section of the tithe commutation act (b), the party [781] who is dissatisfied with the decision of the commissioners, may bring an action in the form of a feigned issue, but the time within which he may do so is limited to three months after notification of the decision. Here, the writ, though actually issued just within the three months, was not served till long afterwards, and after one assizes had in fact passed. The time here is of the very essence of the right of action; it is not like the limitation of an action within a certain period, where the right has already vested. [Tindal C. J. In what respect is the issuing of the writ of summons bad? The writ was properly issued within the three months. It appears to me that the present application is made too soon, and that it will be time enough to apply when the plaintiff declares.] It might then be too late. But to obviate that objection, the present motion may be shaped to set aside the service of the writ of summons. The writ was spent and abandoned, by not having been acted upon within the three months limited by the act. [Tindal C. J. But the issuing of the writ was regular. The words of the statute are, that "any person dissatisfied with any decision of the commissioners, may cause an action to be brought against the person in whose favour such decision shall have been made, within three months next after such decision shall have been notified in writing." Now the plaintiff has done that. Then the act goes on to say, "in which action the plaintiff shall deliver a feigned issue, and proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next, or next but one, after such action shall have been commenced." If the plaintiff cannot [782] comply with that requisition, he cannot proceed.] It is submitted that the action being the creature of the act, the time of the service of the writ is material. [Erskine J. It will be material, if the service has been too late to enable the plaintiff to go to trial within the period limited by the act.] The action is in the nature of an appeal from the decision of the commissioners, and their hands are therefore tied up for several months. [Tindal C. J. The writ in this case has all the attributes of an ordinary writ of summons; it was issued in time under the act, and was in force for four calendar months after its date. I cannot see that either the issuing or the service was irregular. I think you must take your stand when the feigned issue is delivered, if that is out of time.]

Per curiam. Rule refused (a).

(b) Which enacts, "that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant commissioner, may (under sect. 45), if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of 20l., cause an action to be brought in any of His Majesty's courts of law at Westminster against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioner shall direct, to the parties interested therein, or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried; and shall proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next, or next but one, after such action shall have been commenced, to be holden for the county within which such lands, or the greater part thereof, are situated; with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of His Majesty's courts of law at Westminster, to extend the time for going to trial therein, or to direct the trial to be in another county, if it shall seem fit to such court or judge so to do; and every defendant in any such action shall enter an appearance thereto, and accept such issue," &c.

(a) See further as to this case, post, vol. v.

[783] DARLINGTON v. MARTHA PRITCHARD AND FRANCIS WOOD PRITCHARD.
Nov. 7, 1842.

[S. C. 5 Scott, N. R. 610; 2 D. N. S. 664; 12 L. J. C. P. 34; 7 Jur. 677.]

To trespass quare domum fregit by A. against B. and C., the defendants pleaded not guilty, and a justification by C. as owner, and B. as his servant. A. entered a nolle prosequi as to C., and as to B. replied an estoppel by reason of a demise by B. to A. from year to year.—The premises had been let to A. by a verbal demise from year to year, by D., the tenancy commencing at Michaelmas; D. devised them to his son C. (then a minor), charged with an annuity to B. (his widow). After the death of D., A. paid rent to B., both before and after C. attained his majority. A written agreement was afterwards (in March 1836) entered into between A. and B., embodying the terms of the original letting. In March 1840, A. was served with a notice to quit at the following Michaelmas, signed by B. and C. A., having refused to quit, was served with a further notice signed in like manner, that application would be made to the justices for a warrant to turn him out of possession, under the 1 & 2 Vict. c. 74, and a “complaint” was consequently laid before the justices by C., “on behalf of himself and B.,” whereupon the warrant was executed, the plaintiff was ejected, and the key of the house was delivered to B.—Held, that these facts were sufficient to connect B. with the trespass;—Held also, that trespass was the proper form of action against B., under the statute, sects. 3 and 6; and—Held also, that the allegation in the plea that C. was owner, and B. acted as his servant, though not denied by the replication, was not admitted, to the extent of entitling B. to arrest the judgment on the ground of a right of possession confessed to be in C.

Trespass, for breaking and entering the plaintiff's dwelling-house, &c. and seizing his household furniture, and casting it into the street, and ejecting and expelling the plaintiff and his family.

Pleas: first, not guilty. Secondly, that the said dwelling-house, &c. were, and at the time of the committing of the alleged trespasses, &c. were, and from time immemorial had been, within and parcel of the manor of Prees, in the county of Salop, and a customary tenement of that manor, demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same, in fee simple or otherwise, at [784] the will of the lord of the said manor, according to the custom of the said manor; that, before the time when, &c., to wit, on the 14th of October, 1834, Sir Rowland Hill, Bart., then being the lord of the said manor, at his court baron (a) then holden in and for the said manor, before, &c., then being his steward of the court of his said manor, by copy of the court rolls of the said manor, granted to the defendant, Francis Wood Pritchard, the said dwelling-house, &c., in which, &c. to hold to the defendant, F. W. P., his heirs, &c. for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which grant the defendant, F. W. P., afterwards, and at the time of the committing of the first of the alleged trespasses, to wit, on the 30th of September, 1840, entered into the said dwelling-house, &c., and became and was seised thereof in his demesne as of fee, at the will of the lord of the said manor, according to the custom of the said manor: that before the time of the said entry so made by the defendant, F. W. P., as aforesaid, the plaintiff, claiming title to the said dwelling-house, &c., under colour of a certain charter of demise pretended to be thereof made to him, before the committing of the said alleged trespasses, by one John Pritchard, for the term of his natural life, whereas nothing of or in the said dwelling-house, &c., or any part thereof, ever passed by virtue of that charter, entered the said dwelling-house, &c., and was in possession thereof at the time of the said entry by the defendant, F. W. P., as aforesaid; and thereupon the defendant, F. W. P., in his own right, and the other defendant, Martha Pritchard, as his servant and by his command, at the [785] several times when, &c. broke and entered the said

(a) That is, at his customary court, of which the lord or steward is the judge, held at the same time with the court baron, of which the free-holding suitors are the judges.

dwelling-house, &c., and committed the alleged trespasses therein and thereto, as in the said declaration mentioned; and because the said household furniture, &c. of the plaintiff, in the declaration mentioned, before and at the said time were wrongfully in and upon the said dwelling-house, &c., incumbering the same, and doing damage to the defendant, F. W. P., he, the said last-mentioned defendant, in his own right, and the said other defendant, M. P., as his servant and by his command, seized the said household furniture, &c. in the said dwelling-house, &c., so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, whereof the plaintiff then had notice, doing no unnecessary damage to the said household furniture, &c., on the occasion aforesaid, and then quietly ejected and expelled the plaintiff and his family from the possession of the said dwelling-house, &c., and kept and continued them so ejected and expelled from thence hitherto, as they lawfully might for the cause aforesaid; which were the same alleged trespasses, &c. Verification.

The plaintiff entered a nolle prosequi as to the defendant F. W. P. The plaintiff joined issue upon the first plea, so far as the same related to and was pleaded by the said M. P.; and replied as to the second plea, so far as the same, &c., that the said M. P. ought not to be admitted or received to plead the said plea by her above pleaded, as to so much thereof as alleged that the said F. W. P. at the several times when, &c., was seized of the said dwelling-house, &c., in which, &c., in manner and form as in the said plea was alleged, because the plaintiff said, that, before the committing of the several trespasses in the declaration mentioned, and before the said several times when, &c., or any or either of them, to wit, on the [786] 24th of March 1836, the said M. P. demised the said dwelling-house, &c., in which, &c., to the plaintiff; to have and to hold the same to the plaintiff for the term of one whole year thence next ensuing, and fully to be complete and ended, and so on, from year to year, so long as the said M. P. and the plaintiff should respectively please, yielding the rent of 15l. payable half-yearly, to wit, on the 29th of September, and the 25th of March in every year, by even and equal portions; which said demise and tenancy from year to year continued in full force and undetermined until, at and after the said several times when, &c.; by virtue of which said demise the plaintiff afterwards, and before the said several times when, &c., or any or either of them, entered into and upon, and became and was possessed of the said dwelling house, &c., in which, &c., for the said term so to him thereof demised as aforesaid, and remained and continued so possessed thereof under and by virtue of the said demise from thenceforth until and at the said several times when, &c., in the declaration mentioned: that afterwards, and before the said several times when, &c., to wit, on the 29th of September, in the year last aforesaid, the plaintiff paid to the said M. P., and she the said M. P. then received from the plaintiff the sum of 8l. as and for the rent aforesaid, so reserved as aforesaid, for a certain time, to wit, for one half year ending on the day and year last aforesaid; and that afterwards, on each and every 25th of March, and 29th of September, which happened in every year from the time of the making of the said demise, until the said several times when, &c., the plaintiff, as tenant as aforesaid, duly paid to the said M. P., and the said M. P., as the landlady of the plaintiff as aforesaid, received and accepted from the plaintiff, all and every part of the rent which respectively grew due to the said M. P. from the plaintiff under the demise and tenancy as aforesaid. Veri-[787]-fication; and prayer of judgment, if M. P. ought to be admitted or received against the said demise, and acceptance of rent as aforesaid, to plead the said plea by her above pleaded as to so much thereof as alleged that the said F. W. P. at the several times when, &c., was seized of the said dwelling-house, &c., in manner and form, &c.

Rejoinder: that, by reason of any thing in the replication alleged, the defendant M. P. ought not to be barred from pleading the said plea by her pleaded, as to so much thereof as alleged that the said F. W. P., at the said several times when, &c., was seized of the said dwelling-house, &c., in which, &c., in manner and form, &c., because she says that the tenancy of the plaintiff of and in the said dwelling-house, &c., was not in full force and undetermined (a) at the said several times when, &c.: concluding to the country. Issue thereon.

(a) The rejoinder appears to be bad for not shewing some matter by which the tenancy was determined.

At the trial before Erskine J., at the last summer assizes for the county of Salop, the facts of the case appeared to be as follows. At Michaelmas 1823, the plaintiff became tenant from year to year of the premises in question (being copyhold of the manor of Prees in Shropshire), under a verbal agreement with one Robert Pritchard, the husband of the defendant Martha, and the father of the other defendant Francis Wood Pritchard, at the rent of 15l. a year, payable half yearly. R. P. died at Christmas 1833, having devised the premises in question (with other property) to his son F. W. P., then a minor, charged with an annuity to his widow M. P. The defendant F. W. P. attained his majority in 1834, and in the month of October in that year he was duly admitted tenant of the premises. After the death of R. P., the plaintiff regularly paid [788] the rent to his widow, the defendant Martha, down to the year 1836, when a dispute having arisen between her and the plaintiff, an agreement in writing was in the month of March in that year entered into between them as follows:—

“Mr. Darlington agrees to take from Mrs. Pritchard the house, garden and stable he now occupies, with the use of the pump in the yard, for the annual rent of 15l. to be paid half yearly.” (These being in fact the terms of the original tenancy.)

The plaintiff continued to pay rent to the defendant Martha.

On the 23d of March 1840, the following notice to quit was served on the plaintiff:—

“We, and each of us, do hereby give you notice to quit and deliver up to us upon the 29th day of September next, or at such other time as your holding may by legal notice be determined, the peaceable possession of the messuage, and all other the premises, which you now rent of or hold under us, or one of us, situate in the township of Prees, in the parish of Prees, in the county of Salop. Dated, the 23d day of March 1840.”

(Signed) “MARTHA PRITCHARD.
“F. W. PRITCHARD.”

The plaintiff having refused to quit at Michaelmas 1840, was in October in that year served with a notice in writing signed by both the defendants, that they or one of them would apply to the magistrates to recover possession of the premises under the stat. 1 & 2 Vict. c. 74 (a). The notice was in the form set out in the [789]

(a) By sect. 1, after reciting that it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy, it is enacted, “that, when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will, or for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of 20l. a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof), any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession, to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to the act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and, if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew, to the satisfaction of the justices hereinafter mentioned, reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof, of which he is then in possession, to the landlord or his agent, it shall be lawful for such landlord or agent, to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and, upon proof of the service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place

schedule to the act, No. I.(a). The "complaint" laid before the magistrates, was as follows :—

"Shropshire, to wit. The complaint of Francis [790] Wood Pritchard, of Hodnet, in the county of Salop, shopkeeper, on behalf of himself and Martha Pritchard of Prees, in the said county, widow, made before us, two of her Majesty's justices of the peace acting in and for the district of the Whitechurch division of Bradford North, in the county of Salop, in petty sessions assembled; who saith, that Robert Pritchard of Prees aforesaid, tanner, deceased, did in his lifetime let to A. E. Darlington a tenement consisting of a messuage, with a building, garden, and appurtenances thereto belonging, situate in the parish of Prees aforesaid, in the said county of Salop, for the term of one year, under the rent of 15l., and that the said tenancy was determined by notice to quit given by them the said Francis Wood Pritchard and Martha Pritchard (who are, or one of them is, be-[791]-come entitled to the said tenement under the will of the said Robert Pritchard deceased), on the 29th day of September last; and that, on the 3d day of October instant, they the said Francis Wood Pritchard and Martha Pritchard did serve on the said A. E. Darlington a notice in writing of their intention to apply to recover possession of the said tenement (a duplicate of which notice is hereunto annexed), by giving such notice to, &c., at the dwelling-house of the said A. E. Darlington, and reading over and explaining the same, &c.; and that, notwithstanding the said notice, the said A. E. Darlington hath refused to deliver up possession of the said tenement, and still detains the same.

"F. W. PRITCHARD."

"Taken at Whitechurch, in the said county of Salop, the 16th day of October 1840, before us.

"R. C. HILL.

"W. H. POOLE."

The defendant Francis Wood Pritchard alone appeared before the magistrates in support of the complaint. The plaintiff attended with his attorney, and it was contended on his behalf, that a new tenancy was created by the agreement with Mrs. Pritchard in March 1836, which would not expire until Ladyday 1841. The

within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty-one, nor more than thirty, clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: &c. Provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for, or in respect of such entry and taking possession where such person had not, at the time of granting the same, lawful right to the possession of the same premises."

(a) "I, [owner, or agent to [the owner, as the case may be,] do hereby give you notice, that unless peaceable possession of the tenement, [shortly describing it,] situate [which was held of me, or of the said [as the case may be,] under a tenancy from year to year, [or as the case may be,] which expired [or was determined] by notice to quit from the said [or otherwise as the case may be], on the [day of [and which tenement is now held over and detained from the said [be given to [the owner or agent], on or before the expiration of seven clear days from the service of this notice. I, [shall on [next, the day of [at [of the clock of the same day, at [apply to Her Majesty's justices of the peace, acting for the district of [being the district, division, or place in which the said tenement, or any part thereof, is situate], in petty sessions assembled, to issue their warrant, directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

"Dated this

"(Signed)

"[Owner or Agent.]

"To Mr. ."

magistrates, however, were of opinion that the tenancy had expired under the notice to quit at Michaelmas 1840, and granted a warrant (which had been since lost). Under the warrant possession was taken on the 9th of November; and the plaintiff's goods were removed from the premises. The key of the house was taken to Mrs. Pritchard's, by the officer, and laid down on a table in her presence. She was proved to have been frequently afterwards on the premises, which had been turned into a shop, with the names "Pritchard and Son" placed over the door.

[792] It was insisted on the part of Mrs. Pritchard, that the plaintiff ought to be nonsuited, inasmuch, as there was no evidence to connect her with the trespass: and that at any rate the action against her should have been in case and not trespass, as the other defendant, at the time of applying for the warrant, had a right to the possession of the premises, and she was justified as his servant; or, if the application to the magistrates was improperly made, then they had no jurisdiction to grant the warrant (a)¹. The judge overruled the objections; and the plaintiff recovered a verdict for 90l.

Channell Serjt., (on Saturday the 5th of November,) moved for a rule to enter a nonsuit or for a new trial, on the grounds taken at the trial; and also to arrest the judgment upon the ground that the plea stated that the defendant, F. W. Pritchard, was the owner, and entitled to the possession of the premises, and that the defendant Martha, had acted as his servant and by his command, and that this was admitted by the replication, wherein the plaintiff relied upon the estoppel only.

Cur. adv. vult.

TINDAL C. J. now said:—We have looked at the pleadings in this case, and at the notes of the evidence of my brother Erskine. The rule was moved for upon two grounds: first, to enter a nonsuit (as to which no distinct leave was reserved), or for a new trial; secondly, in arrest of judgment.

The action is in trespass, and is brought against two defendants, Martha and Francis Wood Pritchard. Besides a plea of not guilty by the defendant Martha alone, the two defendants pleaded jointly a justification that Francis Wood Pritchard acted as owner, and Martha as his [793] servant and by his command. The plaintiff thereupon entered a nolle prosequi as to the defendant Francis Wood Pritchard; and, as to the other defendant, replied an estoppel by reason of a demise by her to the plaintiff, as tenant from year to year, which was still continuing. This demise is pleaded as an estoppel, because on the face of the pleadings no interest could pass under it, if the fee was in the other defendant, F. W. P. The jury having found a verdict for the plaintiff, the first question is, whether the evidence, as it appears on the notes of the learned judge, is sufficient to shew that such verdict was proper. And upon a careful consideration of the evidence we see no reason to disturb the verdict. It appears that the defendant Martha had, jointly with her son, given the plaintiff notice to quit, and also a notice that they intended to apply to the magistrates under the statute 1 & 2 Vict. c. 74; and that her son afterwards signed a complaint, "on behalf of himself and Martha Pritchard," in order to procure the warrant from the magistrates under that statute. This, we think, was evidence of assent and of an authority, on the part of the mother. There was also evidence to shew that she was treated, and that she acted, as owner of the premises; as we find the key of the house was delivered to her. On the first point, therefore, we are of opinion that there was sufficient evidence to shew that the defendant, Martha, had authorised and assented to the application by her son. But then it is said that the action is misconceived, and that it should have been in case, and not in trespass, inasmuch as the application to the magistrates being improper, they had no jurisdiction to grant the warrant. The third section of the act 1 & 2 Vict. c. 74, however, expressly declares, "that, in every case in which the person to whom any such warrant shall be granted had not, at the time of granting the same, lawful right to the possession of the premises, the obtaining of any such war-[794]-rant as aforesaid shall be deemed a trespass (a)² by him

(a)¹ See 1 & 2 Vict. c. 74, s. 6, post, p. 794, in the judgment.

(a)² It can hardly have been intended to give to a party, upon whose house or land no entry has been made, a formed action of trespass. The word "trespass" appears to be used in this statute in the more extended sense of a tort or wrong, every tort being in strictness a trespass, whether it be punishable in an action de transgressionem in casu proviso, or in an action de transgressionem in consimili casu, or super casum. It may be observed that the statute is not very carefully worded, as in speaking of a

against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant." And in sect. 6 a distinction is expressly taken between case and trespass: for, it enacts, "that, where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit." We therefore think the statute clearly intended that a party who even obtains a warrant improperly should be considered a trespasser; and still more so, where, as in this case, the warrant has been put into execution.

The only remaining point is as to the arrest of judgment. The argument in support of this is, that the second plea contains an allegation that the defendant, Francis Wood Pritchard, was the legal owner and entitled to the possession, and that the other defendant, Martha, as his servant and by his command, committed the trespasses complained of, and that this is not denied by the replication. It is true, it is not denied: but the [795] replication sets up an estoppel as to Martha by reason of the demise made by her to the plaintiff; and the very notion of an estoppel is, that it admits the facts against the allegation of which the estoppel is pleaded, quatenus—but to a certain extent only. It amounts to saying—such is your plea, but you are estopped by law from setting it up. The estoppel, therefore, cannot be relied upon as an admission of facts, so as to be taken advantage of in the cause. We think, therefore, there ought to be no rule.

Rule refused.

NATHANIEL BRADFORD PIERPOINT v. WILLIAM LEVESON GOWER, Esq.
Nov. 7, 1842.

[S. C. 5 Scott, N. R. 605; 2 D. N. S. 652; 12 L. J. C. P. 55.]

By the stamp act (55 G. 3, c. 184), sched. tit. Bond (referred to from tit. Warrant of Attorney), an ad valorem duty is payable where the instrument is "given as a security for the payment of any definite and certain sum of money."—Held, that a warrant of attorney given to secure a principal sum, with interest commencing from a previous day, is only liable to the ad valorem duty on the principal sum.—Where a warrant of attorney had been given to secure a principal sum, upon which the ad valorem duty had been paid, and default had been made in payment, but judgment had not been signed, and a bill of sale reciting the warrant of attorney and the default, was given to secure the payment of the principal sum and such portion of the interest as remained unpaid:—Held, that the bill of sale fell within the exemption in the schedule of the act, tit. Mortgage, as "an additional security for a sum already secured by another instrument;" and, therefore, that such bill was only liable to a common deed stamp.

Trover for chairs and other household furniture. Pleas; not guilty, and not possessed.

The action was brought against the late sheriff of Surrey, who had seized the goods in question under a writ of *fi. fa.*

At the trial, before Tindal C. J., at the sittings in London after last Easter term, it appeared that the plaintiff claimed the possession of the goods by virtue of a conditional bill of sale from his father, Thomas Pierpoint, made under the following circumstances:—On the 9th of November 1840, the plaintiff having ad-[796]-vanced to his father the sum of 1000*l.*, took from him a warrant of attorney as a security, bearing date the same day, the condition of the defeasance being that T. P. should pay to the plaintiff the sum of 1000*l.*, with interest at 5 per cent. from the 1st day of July 1840, on the 1st

tenancy from year to year, the term used is, the popular expression, "a tenancy at will."

day of July 1841, and in default, &c. This warrant of attorney was stamped with a 5l. stamp, and was duly filed (see 3 G. 4, c. 39). The father made default in the payment, but the plaintiff did not sign judgment; and on the 3d of November 1841 the father executed a bill of sale (dated the 30th of October 1841), whereby, after reciting the advance of the 1000l., that the warrant of attorney had been given as a security, and that the sum secured still remained unpaid, he bargained, sold, assigned and transferred unto the plaintiff all and every the household goods, &c., habendum, to the plaintiff, his executors, &c. as his and their own property and effects, "provided nevertheless that in case the said T. P., his heirs, &c., shall well and truly pay or cause to be paid unto the said N. B. P. (the plaintiff), his executors, &c., at &c., the sum of 1000l., with interest for the same after the rate of 5 per cent. per annum from the 30th day of November 1840,—being the day up to which the interest on the said sum so lent and advanced to him the said T. P. as aforesaid has been paid, on the 30th day of November next, without any reduction or abatement whatsoever," then the bill of sale should be void. It further contained a covenant on the part of T. P. to pay the principal and interest on the day specified, with a power of sale in case of default. This deed was stamped with a common deed stamp of 1l. 15s. The plaintiff entered into possession on the same day (3d of November), and the goods were seized by the defendant on the 6th.

No question was raised as to the bona fides of the [797] transaction; but it was contended on the part of the defendant, that the bill of sale did not fall within the exemption in the schedule as to the stamp act (55 G. 3, c. 184), tit. "Mortgage" (b), as "an additional or further security for a sum already secured by any deed or other instrument;" and therefore that it ought to have borne the ad valorem duty on the 1000l.; or, assuming that the ad valorem duty on that sum had been already paid in the stamp on the warrant of attorney, yet as the interest previously due was secured by the bill of sale, it fell within the concluding words of the exemption in question—which provide that if any further sum shall be added to the principal already secured, the ad valorem duty shall be charged in respect of such further sum; and therefore that some ad valorem duty was payable upon the bill of sale. His lordship overruled the objection, but reserved leave to move to enter a nonsuit; and the plaintiff had a verdict for 45l.

Talfourd Serjt., in last Trinity term (26th of May), obtained a rule nisi according to the leave reserved upon the ground taken at the trial, and also upon the ground that the ad valorem stamp upon the warrant of attorney was insufficient, as it was given to secure not only the [798] principal and future interest, but also interest that had already accrued (a).

Bompas Serjt. (with whom was H. Pearson) now shewed cause. No objection was taken at the trial that the stamp on the warrant of attorney was not sufficient. The sum advanced was 1000l.; the warrant of attorney was given as a security for the payment of that definite sum; and, though it was also given to secure the payment of interest, that forms no part of the principal sum secured. The warrant of attorney was therefore properly stamped with a 5l. stamp, which is the ad valorem duty on 1000l. Then, the bill of sale being given as "an additional security for a sum already

(b) Under tit. Mortgage, an ad valorem duty is imposed. Under the "Exemptions from the said ad valorem duty on mortgages, &c., but not from any other duty to which the same may be liable," is the following paragraph: "Any deed or other instrument, made as an additional or further security for any sum or sums of money, &c., already secured by any deed or instrument, which shall have paid the said ad valorem duty hereby charged, &c. to be exempt from the said ad valorem duty hereby charged, so far as regards such sum or sums of money, &c. before secured, in case such additional or further security shall be made by the same person or persons who made the original security; but if any further sum of money, &c. shall be added to the principal money, &c. already secured, or shall be thereby secured to any other person, the said ad valorem duty shall be charged in respect of such further sum of money, &c."

(a) In the schedule under tit. Warrant of Attorney, "given as a security for the payment of money," &c., the same duty is payable as on a Bond for the like purpose. Under tit. Bond, "given as a security for the payment of any definite and certain sum of money, exceeding 500l. and not exceeding 1000l." the duty payable is 5l.

secured by an instrument" (namely, the warrant of attorney), which had "paid the said ad valorem duty" of 5l., it fell within the exemption under title Mortgage, although not exempted under the terms of the schedule "from any other duty to which the same may be liable," namely, the common deed stamp of 1l. 15s., which was impressed upon it. In *Robinson v. Macdonnell* (5 M. & S. 228) it was decided, that a deed indorsed on a former deed, as a further security for advances made under the first deed, was exempted by the 48 G. 3, c. 149 (the then existing stamp act) from an ad valorem duty, if the first deed were stamped with an ad valorem stamp. In *Barker v. Smark* (7 M. & W. 590) it was held, that a bond conditioned to secure a principal sum, with interest at 5 per cent., commencing from a previous day, is only liable to stamp duty on the principal sum. The only difference is that the bill [799] of sale in this case admits the payment of part of the interest. The whole of the language of the stamp act has reference to the principal sum due, and not to the interest. [Maule J. That the by-gone interest was not treated as principal appears from the fact of there being no interest payable upon it.]

Talfourd Serjt., in support of the rule. The bill of sale, which was put in to support the plaintiff's title, bore an insufficient stamp on the face of it. In order to shew that it was sufficient, the plaintiff relied upon the ad valorem stamp on the warrant of attorney; the two points are therefore mixed up together. Undoubtedly no question was raised at the trial as to the inadmissibility of the warrant of attorney by reason of the insufficiency of the stamp; but as the plaintiff seeks to set up the stamp on the warrant of attorney in aid of the bill of sale, he is bound to shew that the stamp on the former is sufficient. Now the warrant of attorney is given to secure interest antecedently due; the sum secured therefore is the principal and that portion of the interest which becomes of the nature of principal. *Barker v. Smark* was decided upon the case of a bond, which is distinguished by Parke B. from the case of a mortgage. [Maule J. The ad valorem stamp in question is imposed under the title "warrant of attorney," and not "mortgage." What distinction can be drawn between a bond and a warrant of attorney?] A bond is clearly a security for the payment of money, within the meaning of the stamp act, and of the subsequent act of the 3 G. 4, c. 117, s. 3(a); but it [800] may be doubted whether a warrant of attorney is such a security within these statutes, although it cannot be denied that in one sense it is a security for money. [Tindal C. J. Why should not a warrant of attorney be within the exemption as well as a bond, seeing that they are dealt with in the same way in respect to the imposition of the duty?] The plaintiff might have taken out execution on the 1st of July 1841 for the principal and interest. It never could have been intended that a creditor in his situation, instead of availing himself of that remedy, should hold the instrument as a security for unlimited accumulations of interest.

TINDAL C. J. That argument would equally apply to the case of a mortgage after the expiration of the time appointed for the payment of the principal and interest.

(a) Which enacts, "that where any deed or other instrument already made, or hereafter to be made, as an additional or further security for any sum or sums of money, or any share or shares in any of the government or parliamentary stocks or funds, or in the bank of England or the bank of Ireland, already or previously secured by any bond on which the ad valorem duty on bonds, charged by the said recited acts of the fifty-fifth and fifty-sixth years of the reign of his said late majesty, and the schedules thereto respectively annexed, shall have been paid, such deed or other instrument shall be, and be deemed to be, and to have been, exempt from the several ad valorem duties charged by the said acts, and the said schedules respectively, on mortgages, and shall be charged and chargeable, only with the ordinary duty payable on deeds in general, in Great Britain and Ireland respectively; but if any further sum of money or stock shall be added to the principal money or stock already secured, the said ad valorem duties respectively shall be charged in respect of such further sum of money or stock; and if necessary, for the sake of evidence, the deeds and instruments hereby exempted from the said ad valorem duties shall be stamped with a particular stamp, for denoting or testifying the payment of the ad valorem duty upon all the deeds and instruments relating to the particular transaction, provided such deeds and instruments shall be produced at the stamp office in London or Dublin (as the case may require) and shall appear to be duly stamped with the duties to which they are liable."

But I think, upon general principles, that before we can say that any instrument requires a double [801] stamp, the language of the legislature should be clear upon the subject.

Per curiam. Rule discharged.

AVELINE AND ANOTHER v. WHISSON. Nov. 9, 1842.

[S. C. 12 L. J. C. P 58.]

To a declaration in covenant upon an indenture of lease, by the lessor against the assignee of the lessee, a plea that the indenture was not signed by the plaintiff, or by any agent authorised in writing, is bad.

Covenant. The declaration stated that, heretofore, to wit, on the 26th day of July, A.D. 1819, by an indenture made between certain parties since deceased and the plaintiffs, of the one part, and one Richard Martin of the other part, (profert of the counterpart of the indenture, sealed with the seal of the said R. M.), the plaintiffs and the said other parties demised unto the said R. M., his executors, &c., a certain piece of ground with the messuage, &c., thereupon erected, &c. And the said R. M. did, in and by the said indenture, for himself and his heirs, &c., covenant with the said other parties and the plaintiffs, their executors, &c., (amongst other things,) that he the said R. M., his executors, &c., should and would at all times, &c., well and sufficiently repair the premises by the said indenture demised, and yield them up in good and sufficient repair at the end of the term, &c. The declaration then stated that R. M. entered, and that afterwards, on the 1st January 1833, his estate and interest vested in the defendant by assignment; that the defendant entered and continued possessed thereof, until the 29th of September 1841, when the said demise ended and determined. Breach: that the defendant did not well and sufficiently repair [802] the premises during the term, or yield them up in repair at the said end and expiration thereof.

Third plea; that the indenture in the declaration mentioned was not signed by the said parties deceased and the plaintiffs, or by any agent or agents of the said parties deceased and the plaintiffs, thereunto lawfully authorised by writing; nor was any lease of the said premises so by the said indenture alleged to have been granted, demised, &c., put in writing and signed by the said parties deceased and the plaintiffs, or any agent or agents of the said parties deceased and the plaintiffs, thereunto lawfully authorised by writing. Verification.

Demurrer; assigning for causes that the defendant had not, by his said third plea, either confessed and avoided, or traversed any matter of fact alleged in the declaration, and had not attempted to put in issue any matter of fact alleged by the plaintiffs, but had introduced and attempted to put in issue matters of fact not alleged, or necessary to be alleged. And that the said plea was no answer to the declaration, but was evasive and argumentative; and also that the defendant by his said plea, denied and attempted to put in issue the signing of the indenture in the declaration mentioned by the said parties deceased and the said plaintiffs, or by any agent duly authorised by the said parties, but did not put in issue, or attempt to put in issue, the due execution of the said indenture by the said parties, by sealing and delivering the same? and that the issue attempted to be raised by the said plea, was utterly immaterial and incompetent to decide the question between the plaintiffs and the defendant; and also that the defendant, by his said plea, had attempted argumentatively and vaguely to put in issue the consideration for the execution by the said R. M., of the counterpart of the said indenture in the declaration mentioned; and also that the said third plea concludes with a verification, [803] whereas if it amounts to any thing, it amounts to a traverse, and ought to have concluded to the country; &c. Joinder in demurrer (a).

(a) The following points were marked for argument: on the part of the plaintiff:—

“First, that it is no defence to an action on a counterpart lease against a lessee or his assigns, that the indenture was not executed by the lessor.

“Secondly, that even supposing it to be a defence during the continuance of the

Talfourd Serjt. in support of the demurrer. The plea attempts to set up a defence under the statute of frauds; but that statute does not apply to this case, the lease being under seal. The plea is bad in form and substance. In form, it is a mere argumentative traverse of the demise. In substance it is bad, as the defendant by admitting that the counterpart was under the seal of his assignor, is estopped from denying the execution of the original deed (b). [Maule J. Should not the estoppel be pleaded?] That is not necessary where the estoppel appears upon the pleadings (c). An assignee of a lease; by indenture is estopped by the deed which estops his assignor; *Taylor v. Needham* (1 Wms. Saund. 325 a.(c)): and here [804] the assignor Martin would have been clearly estopped. [Maule J. Can the other side contend that a deed requires signature? This is not like a lease by parol.]

Channell Serjt., who was to have supported the plea, after referring to 1 Wms. Saund. 291, n. (1), admitted that an allegation of a demise being by indenture, imports that the demise is by an instrument in writing and under seal.

Per curiam. Judgment for the plaintiff (a).

J. MERCER v. J. K. CHEESE AND ELEVEN OTHERS. 1842.

[S. C. 5 Scott, N. R. 664; 2 D. N. S. 619; 12 L. J. C. P. 56. Not followed, *Price v. Price*, 1847, 4 D. & L. 541.]

To assumpsit for work and materials, &c., the defendants pleaded that the promises were made jointly with T. M., and that before action brought, the plaintiff for and on account of the sum due, and of the promises of the defendant and T. M., drew a bill on T. M. which he accepted and delivered to the plaintiff, who received the same for and on account of the said sum and of the said promises. Held, that the plea was good, as raising a *prima facie* defence; and that it lay on the plaintiff to shew that the bill was overdue and unpaid, or had been negotiated.

Assumpsit. The declaration was for work and materials, goods sold and delivered, and upon an account stated.

Plea, by the defendants J. K. Cheese and six others, as to the sum of 150l. parcel, &c., that the said alleged promises in the declaration mentioned, as to the said sum of 150l. parcel, &c., were made by the defendants jointly with one Thomas Morris, to wit on the day and year in the declaration mentioned; and further that after the making of the said promises by the defendants, and the said T. M. as aforesaid, and before the commencement of this suit, to wit on the 24th of December 1840, the [805] plaintiff, for and on account of the said sum of 150l. parcel, &c., and of the said promises of the said defendants and the said T. M. in respect thereof, made and drew his certain bill of exchange in writing, bearing date, to wit, on the day and year last aforesaid, and directed the same to the said T. M., and thereby required the said T. M. three months after the date thereof, to pay to the plaintiff's order the sum of 150l.; and the said T. M., for and on account of the said sum of 150l. parcel, &c., and the said promises of him the said T. M., and the defendants in respect thereof, then

demise, it ceases to be so when the term has expired, and the full benefit of it has been enjoyed by the lessee or his assigns.

"Thirdly, that if the defence were substantially good, it is badly and inartificially pleaded, for the reasons stated in the demurrer."

On the part of the defendant it was said, that "in addition to arguing that the plea was good in form, on the authority of *Maggs v. Ames*, 1 Moo. & P. 294; and, in substance on the authority of *Cardwell v. Lucas*, 2 M. & W. 111; and other cases; (see *Berkeley v. Hardy*, 5 B. & C. 355), it will also be contended:—

"First, that the declaration stating no term, an estate for life must be presumed, which would not pass, except by feoffment or conveyance under the statute of uses.

"Secondly, that no term within the statute of 32 Hen. 8, c. 34, is shewn to have been granted, and therefore no cause of action is disclosed against the defendant as assignee of a term either under that act, or at common law."

(b) As to the popular distinction between an original deed and a counterpart, vide *Hall v. Ball*, ante, vol. iii. p. 242.

(c) See *Sanderson v. Colman*, ante, p. 209.

(a) See *Cooch v. Goodman*, 2 Q. B. 580, 2 G. & D. 159.

accepted the said bill so drawn by the plaintiff as aforesaid, and then delivered the same to the plaintiff who then took and received the same, of and from the said T. M., for and on account of the said sum of 150l. parcel, &c.; and the said promises of the defendants and the said T. M. in respect thereof. Verification.

There was a similar plea as to the further sum of 150l. other parcel, &c., with regard to another bill of exchange drawn by the plaintiff upon and accepted by T. M. on the 27th of March 1841, at two months' date.

Special demurrer, stating for causes, that it is not alleged in, nor does it appear from, either of the said last-mentioned pleas, that the bills of exchange therein mentioned were not, nor was either of them, due before and at the time of the commencement of this suit; and that on the contrary thereof it appears, from the lapse of time since the making of the said bills and the dates thereof respectively, that the same were, and each of them was, overdue at the time of the commencement of this suit, and it is not alleged in nor does it appear from, either of the said pleas, that the plaintiff ever indorsed or transferred the said bills of exchange therein mentioned, or either of them, to any other person or persons, nor but that each of the said last-mentioned bills was, at the time of the commencement of this suit, and [806] still is, in the possession of the plaintiff as the holder thereof, and then and still wholly unpaid; and also for that it is not alleged in either of the said pleas, that the said T. M. delivered the bills of exchange therein mentioned, or either of them, to the plaintiff, for and on account of the said sum of money and promises, as to which such plea is pleaded; and also for that the alleged taking by the plaintiff from the said T. M. of such bills of exchange, or either of them, does not affect, suspend, alter or take away the remedy of the plaintiff against the defendants in the present action, for the debt due from the defendants, there being no agreement of the plaintiff to such effect alleged, either with the said T. M. and the defendants, or with either of them, nor any consideration for such agreement.

Channell Serjt., in support of the demurrer. The pleas in question are in the nature of pleas in confession and avoidance; but although they confess the cause of action, they do not sufficiently avoid it. It is not stated whether the bills were overdue, or whether they were still running; but it appears from the dates mentioned in the pleas that they were in fact overdue. It was necessary that the pleas should shew, either that the bills were due and had been paid, in which case the defendants would have been satisfied—or that they had been indorsed to a third party; and that thereby the liability of the defendants to the plaintiff was discharged. But as the pleas are framed they contain no answer to the action. The plaintiff having a just demand against the defendant, is not barred of his remedy by taking a bill which is neither honoured when due, or negotiated by him. The other side will rely on *Kearslake v. Morgan* (5 T. R. 513); where it was held that a plea to an action of assumpsit, that the defendant was the payee of a promissory note, made by one Pierce, and indorsed it to the plaintiff "for and on account of" the debt was a good plea; but in that case, Pierce, the maker of the note was an entire stranger to the cause of action between the plaintiff and defendant, and the defendant gave Pierce's security for the debt; but in this case the defendants shew that Morris, the acceptor of the bills, is a joint contractor with them, and they do not therefore give the security of a third party. In *Sard v. Rhodes* (1 M. & W. 153. Tyrwh. & Gr. 298), which was an action by the indorsee against the acceptor of a bill; the defendant pleaded that after the bill became due, one G. P. the drawer of the bill made his promissory note and delivered the same to the plaintiff in full satisfaction and discharge of the bill; the plaintiff replied that although he accepted the note in full satisfaction and discharge of the bill, yet that the note was not paid when due, and still remained unpaid; and it was held that the replication was bad, and that the plaintiff having accepted the note in full satisfaction and discharge of the bill, could not sue upon the latter; and in giving judgment, Parke B. observed; "The note is in the plaintiff's hands overdue and unpaid, and he may sue for it. It is averred to have been accepted in full satisfaction and discharge of the bill. The plaintiff, therefore, takes it for better or worse. This is not like the case of *Kearslake v. Morgan* where it was admitted that the non-payment of the note when due,—there being no laches on the part of the plaintiff,—would revive the remedy on the original debt; for there it was averred that the indorsement was, "for and on account" of the original debt. If it had been averred here that the promissory note was given for and on account of the bill, it might have

been different." In the present [808] case the averment in the plea is, not that the bills were given in full satisfaction and discharge, but, as in *Kearslake v. Morgan*, that they were given for and on account of the original debt; and it appearing upon the face of the plea that the bills were overdue and not paid, the remedy on the original debt would revive, it not being shewn that the bills were in the hands of a third party. In *Lewis v. Lyster* (2 C. M. & R. 704. Tyrwh. & Gr. 185) also, the plea contained an allegation that the second bill was accepted in full discharge and satisfaction of the former bill. There are no circumstances in this case to shew that the defendants' situation is rendered at all worse by the fact of the bills having been given. The plaintiffs' remedy may have been suspended while the bills were running; but it revived upon their becoming due. [Coltman J. The dates in the plea are all laid under a videlicet.] That is so, but as far as they go, they shew that the bills were overdue. [Tindal C. J. But can you rely upon the dates for any purpose?] The plea admits the original liability of the defendants, but shews no sufficient discharge thereof. In *Simon v. Lloyd* (3 Dowl. 813, 2 C. M. & R. 187, 5 Tyrwh. 701) in assumpsit for goods sold, &c., the defendant pleaded as to 9l., part of the debt, that he, at the plaintiff's request put his name as acceptor to a stamped instrument, purporting to be a bill of exchange for 20l., (there being no drawer's name to it), partly for the debt, and partly for his accommodation, and delivered the same to the plaintiff, who accepted it in payment of the debt; and that the bill had not become due at the time the action was commenced. The plaintiff replied that the instrument then remained in his hands unnegotiated and unpaid, and without any drawer's name to it; and it was held, that this replication was no answer to the plea, and that the plea was good.

[809] Talfourd Serjt., contra. The real question is, whether sufficient is stated in the plea to shew a *prima facie* defence, so as to throw on the plaintiff the onus of replying matter in answer. *Kearslake v. Morgan* is in favour of the affirmative of that proposition. How should the defendants know where the bills are at present? That is a circumstance that lies particularly in the knowledge of the plaintiff. If they have not been indorsed, it was his duty to state that circumstance by way of replication. Assuming that the bills are overdue, still the plaintiff, on the authority of *Kearslake v. Morgan*, is bound to shew that they are unpaid and remain in his hands.

Channell Serjt. in reply. It is admitted on the other side, that the fact of the plaintiff having taken the bills in question would not operate as an extinguishment of his debt; and that the plea is only good as shewing that the remedy was suspended. The question is, whether the defendants having admitted their primary liability, and set up the suspension of the remedy on the bills, are not bound to go further and shew the continuance of such suspension. [Maule J. Whether the bills are due or not, Morris is liable to be sued upon them, either by the plaintiff, or by the person in whose hands they are. Tindal C. J. It appears from the plea that the plaintiff consented to take a security from Morris, which he, the plaintiff, is enabled to assign over. The plaintiff can tell whether he has assigned it over; but the defendants cannot.]

Channell Serjt. then prayed leave to amend, by withdrawing the demurrer and replying; which was
Granted.

[810] DOE DEM. WOODROFFE v. ROE. Nov. 12, 1842.

The court granted a rule for judgment against the casual ejector, where the declaration was by mistake entitled of T. T. 6 Vict., instead of T. T. 5 Vict. and there was no date to the notice.

Channell Serjt. moved for judgment against the casual ejector. The declaration was entitled by mistake "Trinity term 6 Victoria," instead of "5 Victoria." In *Doe dem. Crooks v. Roe* (6 Dowl. P. C. 184), where a similar mistake was made in entitling the declaration of "Trinity term 1 Viet." that being a term which had not arrived, this court nevertheless granted the rule. In that case undoubtedly the notice attached to the declaration was regular as to the time of appearance (b); here, the notice had no date.

(b) See *Goodtitle dem. Ranger v. Roe*, 2 Chitt. Rep. 172, *Anon. ib.* 173 (two cases);

[811] [Tindal C. J. referred to *Doe dem. Greene v. Roe* (8 Scott, 385) as being in point.]

Per curiam. Rule granted.

CRESWICK AND OTHERS v. WOODHEAD. Nov. 12, 1842.

It is no answer to an action by several executors, that one of them had renounced the executorship and had never taken upon himself the administration of the estate.

Debt by Thomas Creswick, Nathaniel Creswick and William Younge, executors of the last will and testament of William Lowrie, deceased. The first count of the declaration set out an indenture of mortgage, whereby the defendant covenanted to pay a certain sum to the said W. L., his executors, &c. There were two other counts on similar indentures; and the declaration concluded with the usual profert by the plaintiffs of the letters testamentary of the said W. L.

Plea: that the said W. Y. never was executor of the last will and testament of the said W. L., deceased; and that, although he was named and appointed such executor in the last will and testament of the said W. L., deceased, yet he afterwards, and before acting as such executor, or taking upon himself the administration of the estate and effects of the said W. L., de-[812]-ceased, and before the commencement of this suit, to wit, on, &c., duly renounced such executorship, and he never has in any way revoked such renunciation, nor since taken upon himself the administration of the estate and effects of the said W. L., deceased, or any part thereof. Verification.

Replication—that the said W. Y. was executor to the last will and testament of the said W. L., deceased, in manner and form as the plaintiffs had in their declaration above alleged; concluding to the country.

Special demurrer—assigning for causes, that the traverse taken in and by the replication was improper in this, that it took issue on the fact that the said W. Y. was at some time executor, which was admitted by the plea; but the plaintiffs ought to have traversed that the said W. Y. was and is executor, so as to traverse that he was still executor at the commencement of the suit; and the traverse taken by the said replication was wholly immaterial; and that the material allegation in the plea was, that the said W. Y. renounced his executorship before the commencement of the suit, and ought not, therefore, to have joined in the action, and was not executor at the commencement of the suit; that the plaintiffs by not traversing the last-mentioned allegation, had admitted the same, and that the said W. Y. had ceased to be executor

Doe dem. Gore v. Roe, 3 Dowl. P. C. 5; *Doe dem. Smithers v. Roe*, 4 Dowl. P. C. 374; *Doe dem. Wills v. Roe*, 5 Dowl. P. C. 380; *Doe dem. Phillips v. Roe*, 4 Scott, 359, acc. In all these cases the date in the notice corrected the mistake in the title of the declaration. See also Adams on Ejectment, 181, 2d edit.; and *Doe dem. Blozam v. Roe*, 3 M. & W. 187, 6 Dowl. P. C. 388. In *Doe v. Greaves*, 2 Chitt. Rep. 172, the notice to appear was wrong, and nothing is said in the report about the title of the declaration; Holroyd J. held the mistake immaterial, and granted the rule. And see *Doe v. Roe*, 1 Tyrwh. 280, 1 C. & J. 330, acc. In *Doe dem. Gowland v. Roe*, 5 Dowl. P. C. 273, there was a mistake in the title of the declaration, and nothing is said about the notice; and Littledale J. held it an irregularity, and refused the rule. In *Doe dem. Symes v. Roe*, 5 Dowl. P. C. 667, there was a mistake in the notice, which was explained to the tenant at the time of service, and a rule nisi was granted. In *Doe dem. Watts v. Roe*, 5 Dowl. P. C. 149, there was also a mistake in the notice, which does not appear to have been explained, and a rule nisi was granted. In *Doe dem. Wilson v. Roe*, Willmore, Woll. & Dav. 606, there was an error in the title of the declaration, and the notice to appear “in next Michaelmas term,” had no date, but it was served in October; and the case having been referred by Littledale J., in the bail court, to the full court, it was held sufficient. In *Doe dem. Vincent v. Roe*, 9 Dowl. P. C. 43, under exactly similar circumstances, this court refused the rule. In *Doe dem. Giles v. Roe*, 7 Dowl. P. C. 579, there was an error in the declaration, and no date to the notice (as in the principal case), and Littledale J. refused the rule. See also *Doe dem. May v. Roe*, ib. 580, n. (a). In *Doe dem. Greene v. Roe*, 8 Scott, 385 (upon the authority of which the principal case was decided), this court, under similar circumstances, granted the rule.

before the commencement of the suit; that the traverse taken by the plaintiffs in their replication amounted, at most, to an argumentative traverse that the said W. Y. had renounced his executorship, as in the plea was alleged, and that such traverse was therefore improper; that the plaintiffs, instead of traversing some material averment in the plea, had merely reiterated the statement in the introductory part of their declaration, which was an argumentative, and therefore an improper way of traversing the defendant's [813] plea; and that the replication was in other respects informal and insufficient. Joinder (a).

Channell Serjt., in support of the plea. As a general rule, undoubtedly, a party who is named executor, although he has not proved the will, may and ought to join in a suit, it being the will, and not the probate, that makes a party executor; but the non-joinder of such executor can only be taken advantage of by plea in abatement. Here, the plea admits that Younge was executor under the will, but states that he afterwards renounced, which is sufficient upon general demurrer. [Talfourd Serjt., who was to have supported the replication, observed that the authorities are collected in 1 Wms. Saund. 291 i. k. n. (h). Tindal C. J. *Hensloe's case* (9 Co. Rep. 37 a.), which is there cited, seems decisive.] It was there resolved that where many are named executors and some of them refuse, and others prove the will, those who refuse may afterwards at their pleasure administer, notwithstanding their refusal before the ordinary. But, in that case, no direct renunciation was set up, as here. The renunciation here must, on general demurrer, be assumed to have been a renunciation by deed of all Younge's estate and interest. In a case of mere refusal, the interest of the executor might be kept alive; but where there is a renunciation, his interest would be de-[814]-stroyed. An executor who had renounced by deed could hardly release. [Tindal C. J. In *Robinson v. Pett* (3 P. Wms. 249) the Lord Chancellor said that the defendant's having renounced (b) the executorship did not put him in a different situation from the other executors as to receiving an allowance for his trouble; "because," his lordship said, "he is still at liberty, whenever he pleases, to accept of the executorship." Talfourd Serjt. referred to *Wankford v. Wankford* (1 Salk. 299, 307).

Per curiam. Judgment for the plaintiffs (d).

YONGE v. FISHER. Nov. 14, 1842.

Semble, that a notice of trial "for the sittings after term," in London, is irregular as a notice of trial for the adjournment day.—But where, after such notice, a cause was inserted in the list for the adjournment day, and the defendant's attorney obtained a judge's summons for an order to strike the cause out of the list, which, upon hearing the parties, the judge refused to make: Held, that the irregularity, if any, was thereby waived.

Shee Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the trial of this action, the verdict found thereon and all subsequent proceedings in the cause should not be set aside for irregularity; and why a bond given by the defendant in pursuance of an order of Erskine J. dated the 8th of July 1842, should not be cancelled, and why an order of Coleridge J., dated the 16th of August 1842, should not be rescinded; and why the [815] plaintiff should not pay the costs

(a) The following points were marked for argument on the part of the plaintiffs:—

"That the defendant's plea is insufficient in law, inasmuch as it admits the said William Younge to have been appointed executor of the will. The plaintiffs will also contend that the replication, in averring that William Younge was executor of the last will and testament of the said William Lowrie, deceased, in manner and form as the plaintiffs had in their declaration alleged, sufficiently alleged him to have been executor at the commencement of this suit; and that it was unnecessary, and would have been improper to allege that he was executor at the time of the replication."

(b) There appears to be no method of renouncing but by refusal by means of some act recorded in the spiritual court. See 1 Wms. Exors. part 1, b. 3, ch. 6, s. 1, p. 205, 3d ed.

(d) As to the effect of renunciation, see 1 Wms. Exors. part 1, b. 3, ch. 6, s. 2, p. 206, 3d ed.

of trial and the subsequent proceedings, and also the costs incurred in the cause since the 15th of June last, and the costs of the present application.

The affidavits upon which the rule was obtained disclosed the following facts:— On the 4th of June last the defendant's attorney received the issue in the cause indorsed with a notice of trial "for the sittings after this present Trinity term, to be holden at the Guildhall of the city of London." The day appointed for the sittings after term was the 15th of June. The cause was not set down for trial pursuant to the notice, and, in consequence thereof, on the 20th of June, the defendant's attorney dispensed with the attendance of a material witness for the defence. On the 24th of June the defendant's attorney (having frequently searched the marshal's list of causes previously) first discovered that the cause had been set down in the list of new causes for the adjournment day. On the following day he took out a summons before a judge to strike the cause out of the list for the adjourned sittings. On the 27th the summons was attended by both parties before Cresswell J.; but his lordship declined to interfere with the cause list, and endorsed upon the summons "No order." On the 29th the cause was tried as undefended, and an order was given for speedy execution. On the 2d of July the defendant's attorney took out a summons before a judge to stay the judgment and execution till the ninth day of the present term. On the 8th of July both parties attended before Erskine J., when his lordship made an order that, upon the defendant bringing the amount of the verdict into court, or giving security for the same within one week to the satisfaction of one of the masters, all proceedings in the cause should be stayed till the ninth day of this term. The time for giving security was afterwards enlarged, and, after [816] various negotiations and attendances before a judge at chambers, a bond was ultimately executed by the defendant and two sureties on the 8th of August. The plaintiff afterwards took out a summons to tax his costs of the execution and levy and other incidental costs subsequent to the judgment, and for payment thereof by the defendant (a); and Coleridge J. made an order that the said costs should be costs in the cause. Merits were also sworn to.

The learned serjeant contended that notice for the sittings was not a notice for the adjournment day, under the rule of this court H. 3 G. 3 (b); and that the plaintiff should have set down the cause for the day of the sittings, and have made it a remanet.

Channell Serjt. now shewed cause upon an affidavit, which stated that it was well known from a notice in the sittings paper, issued by authority of the court, that no cause would be tried on the day appointed for the sittings, but that the court would meet only to adjourn until a future day; that the cause was entered on the 21st of June, seven days before the adjournment day, that on the 18th, three days after the nominal sittings day, the plaintiff gave the defendant's attorney notice [817] of his intention to produce certain documents at the trial, and that on the 20th the defendant's attorney attended at the plaintiff's office to examine them; that the plaintiff then told the defendant's attorney that he should enter the cause the next day, for the 27th, the adjournment day.

The learned serjeant contended that there had been no irregularity, or if there had, that it had been waived by the subsequent steps taken by the defendant. [Maule J. Though the notice might have been irregular as a notice of trial for the adjourned sittings, what else could the defendant have understood by it? Tindal C. J. When the rule of H. 3 G. 3 was made, causes were tried on the sitting day; but now there is public notice that no causes will be tried on that day, but that the court will

(a) The affidavits did not state when the execution was levied; but it was stated that the defendant's attorney opposed the granting of the order before Coleridge J., upon the ground that the plaintiff, having signed his judgment and executed the writ of fi. fa. subsequently to the order of Erskine J., which gave time to the defendant to find security for the amount of the verdict, with a stay of proceedings, which time had afterwards been enlarged, had executed the writ in his own wrong.

(b) "In every notice of trial to be given for the sittings after any term, to be holden at the Guildhall of the city of London, it shall be specified whether the cause is intended to be tried at the first day of such sittings, or at the adjournment day."

There is a similar rule in Q. B., T. T. 51 G. 3, and in the Exch. H. T. 1 W. 4. See 1 Lush's Prac. 438.

adjourn to some future day. The notice must be construed with a reasonable intentment. The defendant could not have been misled by it.]

Shée Serjt. was then called upon to support the rule. The notice being expressly for the day of the sittings, cannot be intended to be for the adjournment day. The trial, therefore, on or after that day was irregular. If the notice was intended for the adjournment day, it was irregular on the face of it. The defendant has been injured by his cause being taken as undefended. [Erskine J. The cause was not taken out of its turn.] It was taken in a hurry. [Tindal C. J. The hurry cannot hurt the defendant. If there has been an irregularity, and it has not been waived, the defendant may set aside the proceedings.] The defendant was not bound to return an irregular notice; the retaining of it therefore was no waiver of the irregularity; *Dignam v. Mostyn* (a)¹.

[818] TINDAL C. J. Whether there has been an irregularity or not in this case it is not necessary to determine. Perhaps it would be better to adhere to the old rule, as it has not been abolished. But if there has been an irregularity, it is one in extremos apices juris. I cannot help thinking that the notice must have been understood to mean that the cause would be tried on the first practicable day. But even if there were an irregularity, I think it has been waived. On the 20th of June, five days after the day appointed for the sittings, there was a meeting between the plaintiff and the defendant's attorney, when the former gave verbal notice to the latter that the cause would be entered for the 27th, which the defendant's attorney must have known was intended for the adjournment day. Afterwards a summons was obtained to strike the cause out of the list, and both parties attended and were heard before my brother Cresswell on the 27th. That was clearly a waiver of any irregularity in the notice. But, notwithstanding such waiver, as there is an affidavit of merits, I think there should be a new trial, upon the security of the verdict already given, which must still stand and be extended to the costs; the costs of the present application being considered as costs in the cause.

COLTMAN J. I think the fact of the parties having referred the matter to my brother Cresswell puts an end to the question.

ERSKINE and MAULE JJ. concurred.

Rule absolute accordingly (a)².

[819] PETTITT v. MITCHELL. Nov. 14, 16, 1842.

[S. C. 5 Scott, N. R. 721; 12 L. J. C. P. 9; 6 Jur. 1016: at Nisi Prius, Car. & M. 424. See *Isherwood v. Whitmore*, 1843, 2 D. N. S. 548.]

Certain woollen and mercery goods were put up to sale by auction. Each lot was described in the catalogue as containing a certain number of yards. The goods were open to public inspection for two days before the sale. By the printed conditions of sale, the purchaser of any lot was to pay down a deposit; the lots were to be taken away with all faults, imperfections, or errors of description, on a day specified; and the remainder of the purchase money was to be paid before the delivery. There was also a memorandum, that all small remnants were to be cleared at the measure stated in the catalogue. The biddings at the sale were to be at so much per yard:—Held, that in such a sale no condition is implied, that a purchaser may inspect and measure the lots, before paying the remainder of the purchase

(a)¹ 6 Dowl. P. C. 547. S. C. per nom. *Dignam v. Ibbotson*, 3 M. & W. 431.

(a)² The rule was drawn up in the following terms:—

"It is ordered, that the verdict found for the plaintiff on the trial of this cause, at the sittings in London after last term, be set aside, and a new trial be had, on the defendant's giving, within ten days, such security as shall be approved of by one of the masters of the court (in case the parties differ [819] about the same) for payment to the plaintiff or his attorney of the costs of this action, also for the costs of and occasioned by this application to the court; provided that, by the result of such trial, the plaintiff shall be entitled to such costs. And it is further ordered, that the bond executed by the plaintiff and his sureties in the said rule mentioned, do stand as a security for the damages to be recovered in this action; and that the order of Mr. Justice Coleridge, in the said rule mentioned, do also stand."

money.—Held also, that such a condition would be at variance with the printed conditions.—Held, by Coltman J., that the condition that the lots were to be taken away with all faults, &c., referred to quantity as well as to quality.—In assumpsit upon a contract of sale, subject to certain conditions, the defendant pleaded another condition qualifying those mentioned in the declaration; but there was no written proof of the existence of any such condition as that set up by the plea. It appeared that the conditions mentioned in the declaration were in writing;—Semble, that evidence of usage, to establish such condition, is inadmissible.

Special assumpsit. First count, that whereas the plaintiff heretofore, to wit, on Thursday and Friday the 3d and 4th days of June A.D. 1841, put up and exposed to sale by public auction in lots, (amongst other things) a large quantity of woollen and mercery and other goods and chattels, then lying and being at and in a certain dwelling house and premises situate, &c., and which said goods were particularly mentioned and described in a certain catalogue thereof, under and subject [820] to the following amongst other conditions of sale, that is to say, that the highest bidder should be the purchaser, and that if any dispute arose between two or more bidders, the lot in dispute should be immediately put up again: that no person should advance less than one ¼d. per yard on biddings under 1s.; on biddings from 1s. to 5s. 2d.; from 5s. to 10s. 3d.; on 10s. and upwards, 6d. per yard; that the purchasers should pay down immediately a deposit of 5s. in the pound in part payment for each lot; that each deposit should be applicable to any lot purchased; and that the purchasers should give in their names and places of abode if required; in default of which the lot or lots so purchased should be immediately put up again and resold. That the lots should be taken away with all faults, imperfections, or errors of description at the purchasers' expense, on Saturday the 5th then instant, that is to say, on Saturday the 5th day of June in the year aforesaid, after the sale; and that the remainder of the purchase money should be paid before the delivery; that, the warehouse room and expenses of removal would be charged on all lots left uncleared after the time specified until such lots were taken away or resold; that, upon failure of complying with any of the said conditions, the deposit money should be forfeited, the lots uncleared within the time aforesaid should be resold by public or private sale, and the deficiency, if any, by such second sale, together with all charges attending the same should be made good by the defaulter or defaulters at that present sale. Averment, that by a certain memorandum printed at the head of the said catalogue, and which said memorandum and catalogue were affixed and annexed to the said conditions, he the plaintiff then announced that the stock comprised in the said catalogue had been measured to the yard's end, and would be delivered with [821] all faults and errors of description: that the purchasers were to pay, in addition to the amount of each lot, 1s.; and that all the small remnants must be cleared at the measure stated in the catalogue; as by the said conditions of sale and memorandum, reference being thereunto had, would more fully appear: of all which premises the defendant, before and at the time when the said goods were so put up and exposed to sale as aforesaid, to wit, on the said 3d and 4th days of June in the year aforesaid, respectively had notice. Averment, that on the said exposure to sale, on the said 3d day of June in the year aforesaid, the defendant was the highest bidder for, and then became and was in due manner declared to be the purchaser of, a certain lot of goods called "lot 19," parcel of the said goods so put up and exposed for sale under and subject to the said conditions and memorandums, consisting of, to wit, one piece of white drill which then measured divers, to wit, thirty-five yards and a half, at and for a certain price or sum of money, to wit, the price or sum of 4l. 5s. 9½d. being at and after the rate of 2s. 5d. per yard, then bid by the defendant for the same. And thereupon afterwards, to wit, on the day and year aforesaid, in consideration thereof, and that the plaintiff at the request of the defendant, had then promised the defendant to perform and fulfil all things in the said conditions of sale and memorandum contained, on the part of the vendor to be performed and fulfilled, he the defendant then promised the plaintiff to perform and fulfil all things in the said conditions of sale and memorandum on his the defendant's part, as such purchaser as aforesaid, to be performed and fulfilled. And although the defendant, in pursuance of the said conditions of sale and memorandum, ought to have cleared and taken away, and paid for, the said lot or parcel of goods, on Saturday the said 5th day of June in the year aforesaid, yet the [822] defendant

(although often requested so to do), did not, nor would at any time, on or before or after the said Saturday the said 5th day of June in the year aforesaid, clear or take away, or pay for, the said lot of goods or any part thereof, according to the said conditions of sale and memorandum, and his said promise; but on the contrary thereof, he the defendant suffered and permitted the said lot of goods to remain uncleared, and without taking away or paying for the same, on and after the said Saturday the said 5th day of June in the year aforesaid, being the day so appointed for taking away and paying for the same as aforesaid, and thereupon afterwards, and after the said Saturday the said 5th day of June in the year aforesaid, and whilst the said lot of goods remained uncleared and unpaid for as aforesaid, to wit, on the 28th day of September in the year aforesaid, he the plaintiff according to the said conditions of sale, and in pursuance thereof, did resell the said lot of goods so remaining uncleared and unpaid for as aforesaid, that is to say, by public sale, at and for a certain price or sum of money, being a much less sum of money, to wit, the sum of 14s. 9½d. less than the amount of the sum of money so as aforesaid bid by the defendant for the same, and thereby there was a deficiency upon such second sale to a large amount, to wit, to the amount of the sum of 14s. 9½d., over and besides the charges attending such second sale. Averment, that the plaintiff otherwise reasonably deserved to have of the defendant another sum of money, to wit, 1s. for the warehouse room of the said last mentioned lot, for and during the interval between the said 5th day of June, and the said second sale thereof; and also the sum of 1s. for such lot money in respect of the said lot as in the said memorandum mentioned; and that the reasonable and necessary charges attending such second sale of the said lot amounted to another sum of money, [823] to wit, 10s. 6d., which said last mentioned several monies make together the sum of 11. 7s. 3½d., of all which said several premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of 11. 7s. 3½d., and which he the defendant ought to have paid to the plaintiff according to the said conditions of sale and memorandum, and of the said promise of the defendant.

The declaration contained twenty-one similar counts in respect of twenty-one other lots.

Pleas: first, non assumpsit. Secondly, that the defendant did not become the purchaser of the said lots, or any, &c. modo et formā. Upon both of which pleas issue was joined.

Thirdly, as to the causes of action in the declaration mentioned, so far as the same relate to the defendant's not clearing or taking away or paying for the said several lots of goods so purchased by him as in the declaration mentioned, that the said goods and chattels and lots were put up and exposed for sale as aforesaid, under and subject to a certain other condition of sale besides the said conditions in the said declaration mentioned, that is to say, that the purchaser of each lot, purchased by him, should be entitled to inspect and examine the lot purchased by him, for the purpose of ascertaining whether the same was of the proper quantity, quality and description according to the contract of sale thereof, before he should take away or pay for the same according to the said conditions, and that he should not be bound to take away or pay for the same without being allowed a reasonable time and opportunity for such inspection and examination. And the defendant became and was the purchaser of the said several lots as in the declaration mentioned, upon and subject to the condition in this plea mentioned, besides [824] the said conditions in the declaration mentioned. And further, that after the defendant became such purchaser, and before the said supposed breaches of his said promise, in respect of his not clearing or taking away or paying for the said several lots, or any or either of them, in the said declaration mentioned, to wit, on the said 5th day of June A.D. 1841, being at a reasonable and proper time in that behalf, the defendant requested of the plaintiff to suffer and permit him, the defendant, to inspect and examine the said several lots so purchased by him as aforesaid, for the purpose of ascertaining whether the same respectively were of the proper quantity, quality and description, according to the said contract of sale, before he should take away or pay for the same respectively, according to the said conditions. Yet the plaintiff then, and from thence until the expiration of the said 5th day of June A.D. 1841, and afterwards from thence hitherto, refused to suffer or permit the defendant to inspect or examine, and hindered and prevented him from inspecting and examining, the said lots so purchased by him as aforesaid, or any or either of them,

for the purpose for which the defendant requested such inspection and examination as aforesaid. And the plaintiff then and from thence hitherto wholly refused to suffer or permit the defendant to have, and hindered and prevented him from having, a reasonable time and opportunity for such inspection and examination of the said lots, or any or either of them; wherefore the defendant did not nor would clear or take away or pay for the said several lots of goods so purchased by him as aforesaid, or any of them, or any part thereof. And the defendant suffered and permitted the said several lots to remain uncleared, and without taking away or paying for the same, on and after the said 5th day of June A.D. 1841, as he lawfully might for the cause aforesaid. Which are the said supposed breaches of promise in the [825] introductory part of this plea, and in the declaration mentioned. Verification.

Fourth, a plea similar to the third, but stating the condition to be, that the purchaser should be entitled to measure the lots purchased by him, for the purpose of ascertaining whether the same were of the proper quantity according to the contract of sale thereof, before he should take away or pay for the same.

Replication to the third plea, that the said goods and chattels and lots were not, nor were any nor was either of them, put up or exposed to sale as aforesaid, under or subject to such other condition of sale, as in the said third plea is in that behalf mentioned, besides the said conditions in the said declaration mentioned, *modo et formâ*; concluding to the country. A similar replication was pleaded to the fourth plea.

Upon both of these replications issue was joined.

At the trial before Erskine J., at the sittings for Middlesex after last Trinity term, the following facts appeared in evidence.

The plaintiff, who was an auctioneer, had put up to sale by auction, on Thursday and Friday, the 3d and 4th of June 1841, a large quantity of mercery and woollen goods, subject to the following, among other, conditions, which were printed at the commencement of the catalogue of articles to be sold.

"3d. The purchasers are to pay down immediately a deposit of 5s. in the pound in part of payment for each lot—each deposit to be applicable to any lot purchased—and to give in their names and places of abode, if required; in default of which the lot or lots so purchased to be immediately put up again and resold.

"4th. The lots must be taken away with all faults, imperfections or errors of description, at the purchaser's expense, on Saturday the 5th instant after the sale, and the remainder of the purchase-money to be paid before the delivery.

[826] "5th. The warehouse room and expenses of removal will be charged on all lots left uncleared after the time specified, until such lots are taken away or resold.

"Lastly, upon failure of complying with any of the above conditions the deposit money shall be forfeited; the lots uncleared within the time aforesaid shall be resold by public or private sale, and the deficiency, if any, by such second sale, together with all charges attending the same, shall be made good by the defaulter or defaulters at this present sale."

At the head of the catalogue was the following announcement:—

"Mr. Pettitt begs to announce that the stock comprised in this catalogue has been measured to the yard's end), and will be delivered with all faults and errors of description; the purchaser to pay in addition to the amount of each lot, one shilling. All the small remnants must be cleared at the measure stated in the catalogue."

There were 485 lots in the catalogue; and the number of yards in each lot was stated. The goods were open to public inspection for two days preceding the sale. The biddings at the sale were at so much per yard. The defendant, who was present, was the highest bidder for the various lots in respect of which the action was brought. On the morning of Saturday the 5th of June, the day on which, according to the conditions of sale, the goods were to be taken away, the defendant attended at the premises where the sale had taken place, and produced the money for the amount of his purchases, 175l., but claimed a right to inspect and measure the goods before he paid over the money. The plaintiff's son, who acted as his clerk, refused to allow the defendant to do so; who thereupon declined to pay for the goods; and they were ultimately resold by the plaintiff at a loss of 31l. 10s. It was in [827]—sisted at the trial, on the part of the defendant, that the conditions stated in the third and fourth pleas were implied by law, and that upon the evidence, as it then stood, the defendant was entitled to a verdict. His lordship was not of that opinion, but reserved leave to the defendant's counsel to move to enter a verdict for him upon that objection.

Evidence was then proposed to be given on the part of the defendant, of the existence of a custom in the trade to the effect of the conditions stated in the third and fourth pleas. This was objected to by the plaintiff's counsel, upon the ground that parol evidence, to vary the printed conditions of sale, was inadmissible. The objection was overruled, and several witnesses were called for the defence, who were in the habit of making similar purchases by auction to a great extent, and who stated that they had always been accustomed to inspect and measure such goods before paying over the purchase money, and that in no instance had permission to do so been refused. The conditions, however, under which the sales in question had taken place, were not produced; and it further appeared that the parties had frequently been permitted to take the goods to their own premises and there measure them, before payment.

In order to meet this evidence, several auctioneers were called on the part of the plaintiff, who denied the existence of any such custom or right as that set up by the defendant. They stated the usual course of business to be (except in the case of customers who were known to them, and who were often permitted to take away goods they had purchased, before payment, and even without making any deposit) that when the purchase money was paid over, a delivery order was given to the purchaser by the auctioneer or his clerk; that, upon the production of this order, the porter who had the custody of the goods, delivered them to the party producing it; and that, after the purchaser had thus obtained possession of the goods, it was customary to allow him, if he thought fit, to measure them upon the premises, within the period allowed for clearing away; and if any deficiency was then discovered, to return a corresponding portion of the purchase money. The printed conditions of another sale of goods by the piece were also produced, one of which conditions was, that if the quantity of any particular lot was not marked in the catalogue, the lot must be measured before the deposit was paid, in order to ascertain the amount of such deposit.

The learned judge left it to the jury to say whether any such custom of the trade existed as set up by the defendant; and if they should be of opinion that there was no such custom, he then directed them to find a verdict for the plaintiff. The jury, by their verdict, negatived the existence of the custom, and found for the plaintiff on all the issues, with 31l. 10s. damages.

Bompas Serjt., on a former day in this term (November 3d) obtained a rule nisi, pursuant to the leave reserved at the trial, to enter a verdict for the defendant on the issues raised by the third and fourth pleas; or, in the alternative, for a new trial, upon the ground that the verdict, negating the existence of the custom, was against the evidence.

Talfourd Serjt. (with whom were Crompton and Wordsworth) now (November 14th) shewed cause. There are two questions in this case. The first, which is independent of the evidence, except as regards the conditions of sale, is, whether the third and fourth pleas are supported by the existence of any implied conditions in law, such as are set up by the defendant, to be superadded to the printed [829] conditions; as to this point, the affirmative rests upon the defendant. The second question may be considered as branching into two—whether the parol evidence, as to the alleged usage in the trade, should have been admitted; and whether, such evidence having been admitted, the verdict was against the evidence.

First. No such conditions are implied by law in the present case as those which are set up in the third and fourth pleas. It is important to remember that the plaintiff is not the owner of the goods, but an auctioneer, employed to sell them, who stands in the relation of middle man between the two parties—the vendor and the purchaser. The goods are proved, after they had been lotted out, to have been on view before the sale. Each lot constitutes a single chattel, which is described as of a certain measurement. If, after a purchase, it turns out that any particular lot falls short of the alleged measurement, the purchaser may have his cross action. The deposit is paid on the estimate made of the contents of each lot. The purchaser, instead of paying the deposit, might pay the whole money and take away the goods at once; but, the sale taking place on a Thursday, he has a licence to leave them on the premises till the following Saturday. That, however, is merely for his convenience, and cannot vary the original contract. Suppose this were an ordinary sale of so many yards of mercery, with liberty to the purchaser to leave the goods on the premises of the vendor for a day, could it be said that when he came to take them away he might insist on

having a re-admeasurement of the articles? In that case no such condition would be implied by law; and the fact of the sale in this instance having been by auction makes no difference. In either case there would be an entire and complete contract, at a specific price. The plaintiff's clerk would be the agent of both [830] parties; *Bird v. Boulter* (4 B. & Ad. 443, 1 Nev. & M. 313). It will be argued that it would be hard that a party should not have an opportunity of examining the goods to see that they correspond with the description of them; but the vendor must deliver the right quantity at his peril. In the case of the purchase of a quantity of plate, as of a specified weight, after the contract was complete all but the delivery, the purchaser would not be entitled to have the plate weighed at the time of its delivery. So in the case of the purchase of wine, it could not be contended that a purchaser would have a right to taste every bottle before he paid his money. In this case the property was, in fact, changed under the statute of frauds (b), by the payment of the deposit. The fourth condition of sale is express, that "the lots must be taken away with all faults, imperfections or errors of description, at the purchaser's expense, on Saturday the 5th instant after the sale, and the remainder of the purchase money to be paid before the delivery." There is also the memorandum, that "the stock had been measured (to the yard's end) and will be delivered with all faults and errors of description." The memorandum, it is true, also says that "all the small remnants must be cleared at the measure stated in the catalogue;" and it will probably be argued that the expression of the one excludes the other, and that therefore the other articles were to be subject to remeasurement; but the obvious meaning of this clause is, that the "small remnants" are to be cleared absolutely "at the measure stated"—without any return of a portion of the purchase money, which would be made in case of a deficiency being discovered after the delivery of the other articles.

[831] Secondly, as to the new trial. The terms of the contract being precise and unambiguous, parol evidence should not have been allowed, to explain or vary it. Lord Eldon, in *Anderson v. Pitcher* (2 B. & P. 164, 168), expressed a regret that parol evidence had ever been admitted where the contract was in writing, and that parties had not been left to express their own meaning by the terms of the instrument. But the courts undoubtedly will admit a parol explanation of the understanding upon which parties have contracted; as, for instance, to shew that the term "thousand," as applied to rabbits, meant in that part of the country where the contract was made, one hundred dozen; *Smith v. Wilson* (3 B. & Ad. 728). [Tindal C. J. In the same way as evidence would be admissible to shew that the term "a hundred-weight" means "one hundred and twelve pounds weight" (c).] It is, in fact, in such a case, as though the term used were in a foreign language, which required translation and explanation. But in the present case the object of the evidence was to import a new term into the conditions. The evidence was, however, admitted, subject, of course, to a discussion in this court as to its admissibility. But even upon that evidence, the verdict must stand for the plaintiff. The defendant called several parties who were purchasers—not a single auctioneer—who spoke generally as to the existence of the custom; but in no instance were the conditions of sale produced; and the privilege which the witnesses had exercised of measuring the goods before payment, looked more like a permission granted them as a favour than the exercise of a right. The plaintiff, on the other hand, called several auctioneers, who, in fact, disproved the custom. They proved that, in many cases where the customers were known, the goods were allowed to be taken away, even without any deposit being paid; and the defendant might [832] as well set up that, as a custom of the trade, in contravention of the express conditions of sale.

Bompas and Channell Serjts. (with whom was Miller) in support of the rule. The third and fourth pleas may be supported on the broad rule of law, or upon the terms of the particular contract. A reasonable condition will always be implied in law; as in *Haynes v. Holiday* (7 Bingh. 587, 5 Moo. & P. 573), where the defendant had agreed to convey on board his ship a boat for the plaintiff of certain dimensions; the plaintiff presented a decked boat, within the size agreed upon; and it was held that evidence was properly received of a practice to take off the decks of such boats, when they

(b) No property is changed under or by the statute of frauds, though in some cases that statute prevents, and in others it forbears to prevent, a change of property.

(c) Vide per Littledale J., 3 B. & Ad. 732.

were stowed on board ships; and that the plaintiff having declined to permit his deck to be removed, could not sue the defendant for breach of agreement (see *Bottomley v. Forbes*, 5 N. C. 121, 6 Sc. 866). So, in the case of a bill of exchange, the pleadings always state that the bill became due at the time mentioned in the bill, without reference to the legal condition as to the three days of grace, which is imported into the contract (c). If a man buys a bin of wine, he has a right to see that it is the bin he has bought. If he buys woollen goods, he has a right to see that the goods delivered are not linen. So, in the case proved at the trial, where the measurement of certain lots was not mentioned, the law would imply a condition that the lot should be measured before the party could be called on to pay. [Tindal C. J. In that contract there would be nothing to exclude the implied condition; the question is, whether in this case there is not something.] In *Lorymer v. Smith* (1 B. & C. 1, 2 D. & R. 23), it was decided that the buyer of a parcel of wheat, by sample, has a right to inspect the [833] whole in bulk, at any proper and convenient time; and if the seller refuses to shew it, the buyer may rescind the contract. [Maule J. It did not appear there that the wheat was bought by individual samples.] Abbott J., in giving his judgment in that case, says, "It appears that, by the usage of the place, the buyer had a right to inspect the wheat in bulk; which is so reasonable, that, without any such usage, the law would give him that right." It might have been argued there, as it has been in this case, that the seller took the risk that the wheat delivered was according to the sample. *Hove v. Palmer* (3 B. & Ald. 321), was decided upon the same principle. The defendant may take his stand upon the fourth plea, by which his right to measure the goods is claimed, in order to ascertain the quantity, before payment. Now, it is admitted that where a party buys by measure, he has a right to measure at some time; the only question is at what time. [Maule J. It is only admitted as proved at the trial. Talfourd Serjt. It is only admitted on the part of the plaintiff, that the defendant, in case of deficiency, would have a ground of cross action, not that he would have a right to make any deduction in the payment. Maule J. If a lot, purporting to consist of twenty yards were sold at a fixed price (b), and it turned out that the lot contained only nineteen yards and a half, it does not seem to follow, as a matter of law, that the purchaser might deduct the value of the half yard.] The purchaser buys by the yard, and he has a right to see he has the quantity described. Then the statement in the memorandum that "all the small remnants must be cleared at the measure stated in the catalogue," obviously means that the measure stated in the catalogue was not to be taken as conclusive in other instances. *Expressio unius est exclusio alterius*. Suppose a sale by [834] private contract of so many yards of any article; and the contract, in terms, gave liberty to the purchaser to inspect the goods to ascertain their quality, but was silent as to measuring them; and an earnest was paid, and the goods were to be taken away at a later time; would it not be a good plea to an action for non-payment of the residue of the purchase-money, that the defendant was ready and willing to pay such residue, if he had been allowed to measure and ascertain the quantity? [Tindal C. J. The contest is, whether the party has a right of inspection, before or after delivery of the goods. The payment is to be before delivery.] The term cleared in the memorandum must refer to paying and taking away. Inspection is not the same as delivery. A party would have a right to inspect before bidding; that would not be a delivery. The term delivery in the fourth condition is synonymous with taking away; and that condition means that there must be payment before the goods are delivered to be taken away; but that does not exclude the previous right of inspection. There may be a delivery to inspect; quite distinct from a delivery to take away. In the former case no property would pass. If a man goes into a shop and asks to look at an article, and the shopkeeper delivers it to him to look at, and he runs off with it, that would be a felony. [Tindal C. J. There is no doubt of that.] Or if a party bids at an auction, without any intention to pay, and the thing he has bid for is delivered to him and he takes it away, it is submitted that also would be a felony. [Tindal C. J. Perhaps it would; but that does not appear to advance the argument.] It shews that the phrase "delivery" may be used in different senses. The general rule is,

(c) In pleading a bill is stated to become due "according to its tenor and effect." Supposing a precise day to be mentioned, it would be the last day of grace.

(b) Not at a fixed rate but at an entire price,—per aversionem.

that upon the sale of a chattel, the property vests in the vendee; but he cannot take away the article purchased without payment, the vendor having a lien upon it. That rule does not apply where credit is given. In this [835] case the residue of the price is to be paid at a future day; but the words "the remainder to be paid before delivery" are introduced into the condition to preserve the vendor's lien; as it would otherwise be a case of credit. The argument on the other side would make the word "delivery" mean only a qualified delivery. The payment of the "residue" presupposes a computation of the quantity. If an application to inspect the goods were made at an unreasonable time or in an improper manner, it might be objectionable; but no such matter is set up. In the present case a vendee could not take away the goods before Saturday the 5th of June. The words of the condition are, that "the lots must be taken away on Saturday," not "on or before." A purchaser could not have sued for non-delivery before the Saturday.

With regard to the second point, as to the new trial, the verdict was certainly against the evidence. The auctioneers were, of course, anxious to cut down their own responsibility. They admitted that sometimes parties were allowed to measure; and no one instance of refusal was proved. A party is not to pay for more than is actually delivered to him; and there is nothing unreasonable in a custom of trade that a purchaser shall be entitled to ascertain before delivery what quantity is to be delivered to him, rather than that he shall be driven to his cross action.

TINDAL C. J. This is a rule obtained by the defendant, calling on the plaintiff to shew cause why a verdict should not be entered for him, the defendant, or why there should not be a new trial. It is the case of a sale of goods by auction; and the first part of the rule is grounded upon two conditions, which are set forth in the third and fourth pleas, and which, it is insisted on the part of the defendant, are implied by law, in addition to the printed conditions under which the [836] sale took place. It is said that in the case of a sale under such circumstances as the present, the law will imply a right on the part of the purchaser, before payment of the purchase money, to inspect and to measure the articles bought, in order to enable him to see whether they conform with the description of them given in the printed catalogue of sale.

The first question is, whether in a sale by auction circumstanced as this case is, the law will imply such conditions or either of them; and I think it will not. The stress of the case is, whether the purchaser has the right to inspect and measure the goods before payment of the money; for it is not denied that he may do so before he takes them away and, if the measurement should turn out to be short, that he would be entitled to a deduction from the purchase money. An argument has been raised on the part of the defendant, upon the cases of *Hove v. Palmer* and *Lorymer v. Smith*, that by law a purchaser may rescind the contract if he is not permitted to inspect the commodity he has purchased; but in both of those cases the purchase was by sample, and the commodity was in bulk, and therefore it was held, that the purchaser had a right to see that the bulk corresponded with the sample. But the present is not the case of the purchase of an uncertain quantity or of a certain quantity out of an uncertain bulk, but it is the purchase of a certain thing, which the purchaser has a right and power to inspect before the sale. There is also the circumstance of the measurement being made in the first instance, not by the seller himself, but by a third party, the auctioneer, who stands as a middle man between the parties; which constitutes a material difference between such a case as the present and that of a sale in a shop. If the law is called upon to impose a condition in such a case, it will look to the inconvenience of a rule sought to be introduced; and it will not impose a condition where the [837] preponderance of inconvenience would be against it. It appears that in this sale there were 488 lots sold; and it certainly would seem that the inconvenience would be greater if there were to be established a right on the part of each purchaser to measure any lot before payment of the purchase money. The purchasers may be unknown persons, and the stake is much greater on the part of the auctioneer who is a known person of responsibility; and it is not likely that any thing more than a small quantity will be in dispute between the parties. Upon principle, therefore, I am of opinion, that in a sale of this sort, no such conditions are to be imported as those set up by the defendant.

In this case too there are printed conditions of sale, and it appears to me that the conditions sought to be imported would materially vary those that are printed.

By these it is stipulated that a deposit is to be made in the first instance, and that the remainder of the purchase money is to be paid "before the delivery" of the goods; that is, according to the evidence, before the delivery order is given and the goods are handed over to the purchaser. That the term "delivery" in the fourth condition does not mean the same as "taking away," clearly appears by the following paragraph of the same condition which stipulates that "warehouse room will be charged on all lots left uncleared after the time specified, until such lots are taken away, or resold." There are therefore three things to be done; the payment of the remainder of the price, the delivery of the article, and the clearing or taking it away—which are each distinct and separate; and I can readily understand that the auctioneer may have intended by this contract to avoid frivolous objections and the inconvenience that would ensue from a different course.

As to the motion for a new trial, it appears that there was evidence on both sides. The witnesses called for the [838] defendant state that on the occasion of different purchases at sales by auction, they have inspected the goods, they have bought, before payment of the price; but they do not produce the conditions of sale under which such purchases were made; and it may have been a mere favour to them that they were permitted to make the inspection. Upon the whole therefore I am opinion that this rule must be discharged.

COLTMAN J. This is the case of a sale by an auctioneer, an intermediate person between the seller and the purchaser. The purchaser has the property vested in him by the sale; and looking at the fourth of the conditions under which this sale took place and the memorandum at the head of the catalogue, I understand that the purchaser must take the goods notwithstanding any "faults, imperfections or errors of description." Now the expression "faults" may, I think refer to the quantity, as well as to the quality of the article purchased. At one time I entertained some doubt whether it would refer to quantity; but, coupled with the memorandum, I think it must be taken to refer to quantity as well as quality. And unless there is something amounting to fraud, I think the purchaser is bound by the terms of these conditions. It is stated in the fourth condition, that the remainder of the purchase money is to be paid before the delivery; and in the memorandum, that all small remnants must be cleared, that is, be taken away, at the measure stated in the catalogue. This does not shew when the final adjustment is to take place; but the term "before delivery" does not mean the same as "on delivery." It would seem rather to point out that the payment is to be made before the commencement of the act by which the goods are to be handed over to the purchaser. I agree that the weight of convenience is in favour of this view.

[839] Upon the other point it seems the evidence was fairly before the jury, whose disposition possibly would be rather adverse to the conditions than favourable to them; and, the sum recovered being so small, I concur that there should be no new trial.

ERSKINE J. I am of the same opinion, and think the verdict ought not to be disturbed. The sale in this case was conducted as usual in auctions, by lots; each lot was numbered; and in the catalogue the measurement was stated. The defendant before or at the time of the sale, had an opportunity of inspecting the articles put up for sale, and of ascertaining what was contained in any particular lot for which he might intend to bid. He then purchased a number of lots at so much per yard, of a certain quantity, according to the statement in the catalogue. The plaintiff in his declaration sets out the conditions of the sale as they were printed in the catalogue, as forming the contract between him and the defendant; but the defendant says there was another implied condition on which the sale was conducted, namely, that a purchaser should have an opportunity of inspecting and measuring the lots he had purchased before the payment of the price; and we are asked to import this condition into the contract of sale, as being implied by law. Now certainly there would be nothing directly inconsistent with the contract of sale by auction, that a party should have an opportunity of inspecting and measuring the goods he had purchased before payment of the purchase money; but we must have something more than this, and must look at the printed conditions under which the contract took place. The fifth condition I think shews that "clearing" means taking away. The fourth seems studiously to avoid the use of the word "clearing." There are then, as observed by my lord, three acts, payment, delivery and clearing. The [840] plaintiff contends

that the payment must precede the delivery, and that no inspection or measurement can take place before payment; although he admits, that there may be an inspection and measurement before the clearing. The defendant on the other hand insists that the inspection and measurement are to take place before the payment. It is evident from the printed stipulation which comes after the conditions of sale, that the purchaser is not to be bound by the measure stated in the catalogue, inasmuch as that stipulation applies only to small remnants; but this brings us back again to the question, whether the purchaser has a right to have the quantity ascertained before the delivery; and I think he has no such right. The convenience of the respective parties would certainly seem to be that the measurement should take place after the delivery.

As to the other branch of the rule relating to a new trial, I agree as to the effect of the evidence.

MAULE J. I also am of opinion that this rule should be discharged. This is the case of a sale by auction of certain articles numbered in a catalogue, and described as being of a certain kind and quantity. The bidding is of so much money for so many yards as described in the catalogue. The sale takes place under printed conditions; but it is said that there is a further condition implied, namely, that the purchaser has a right to see whether the article purchased corresponds with the description in the catalogue, in order that he may have the opportunity of raising an objection in case of any non-conformity. The defendant does not contend for a right to refuse the article, but merely for the right to measure it, in order to claim compensation in case of any deficiency in the specified length. Now the express contract is, that the goods are to be paid for before delivery; but even if that were not expressed [841] in the contract, I should think that, if a person buys an article at an ascertained price, the payment of the price and delivery of the article should be contemporaneous, and that the purchaser is not entitled to delivery, without payment. According to the ordinary understanding of the English language, as soon as an article is put into the hands of a party that is a delivery to him; the lien of the vendor is then parted with and the vendee is in possession; if the lien still continued, how could it be enforced? It must be either by forcibly taking the article from the vendee, or by imprisoning him with the article in his possession; either of which would be a very inconvenient course. The memorandum at the head of the catalogue clearly points out a difference between ordinary lots and small remnants. Now there can be no doubt that the putting of one of these remnants into the hands of a vendee would be a delivery; then ought it not to be so as to a whole piece? Can a party have a right to take away the one and not the other? I own this does not appear to me to be a question as to a right to measure the article after delivery—because then the purchaser has in fact a right to do any thing he pleases with it—he may cut it up or burn it, if he be so minded—it is his own property. The purchaser is under an obligation to clear the goods on a certain day; but, he is admitted to object to there being short quantity after delivery and before clearing, so as to have a deduction allowed; but this is by the custom of the trade; if the deficiency is discovered after clearance, it would seem he is not entitled to the deduction. And, as an error in the measurement may be accidental, this appears to be a reasonable way of conducting the business. The inconvenience that has been pointed out would be a good reason for not importing a rule, which, though not absolutely inconsistent, is cer-[842]-tainly very little in accordance, with the condition as to payment taking place before delivery.

With regard to that part of the motion which prays for a new trial, it rather seems that the result of the evidence is, that the auctioneer may generally insist on having the money before the delivery of the goods. At any rate I cannot see that the verdict was contrary to the evidence.

Rule discharged.

DOE DEM. JONES v. ROE. Nov. 16, 1842.

A notice in ejectment, entitled in C. P. to appear in Q. B., is not sufficient.

Talfourd Serjt. applied for a rule nisi for judgment against the casual ejector. The notice at the foot of the declaration was entitled in this court, but the notice was to appear in the court of Queen's Bench. The service was upon the daughter of the

tenant, and she pointed out the mistake at the time. It appeared that the declaration had come to her father's possession.

Per curiam. Rule refused.

[843] DOE DEM. STORY v. ROE. Nov. 16, 1842.

Service of a declaration or ejectment upon a person found upon the premises, but not shewn to be resident there,—held to be insufficient.

Channell Serjt. moved for judgment against the casual ejector. From the affidavits it appeared that the premises in question were held by one Benjamin Purser as tenant to the lessor of the plaintiff under an agreement, and the tenancy was put an end to by a notice given by the tenant to quit at Lady-day last. Purser went to reside in Ireland, and he informed the lessor of the plaintiff by letter, that he had left the keys with one of his men, with directions to take them to him to enable him to possess himself of the premises. On applying for possession at the expiration of the notice, the lessor of the plaintiff was referred by the tenants in possession to one William Fryer, who claimed to be the landlord of the premises. On the 1st of November instant a clerk to the attorney of the lessor of the plaintiff went to the houses for the purpose (as his affidavit stated) of serving the declarations in ejectment upon "the tenants in possession, whose names were, as the deponent was informed and verily believed, William Banks and Joseph Banks;" the affidavit further stated that the deponent found the outer doors fastened, and, on his knocking thereat, was answered by "two women" from the second floor windows of the said houses, who refused to open the doors, but referred the deponent to William Fryer; that the deponent called again, with the same result, and, after nailing a copy of the declaration and notice to each of the outer doors, and explaining the same and the reason of his so nailing them to the doors, in the presence and hearing of "the said two women" and other persons then and there assembled, the deponent proceeded to the residence of William [844] Fryer, to whom he delivered and explained another copy of the declaration and notice, and who threatened to have the deponent locked up if he annoyed his tenants.

TINDAL C. J. The service may be good as against Fryer, but not as against the others, for the women are not shewn to be part of the family. The affidavit is altogether very loose.

Per curiam. Rule granted as against Fryer; refused as against the other parties.

TEBBS v. BARRON. Nov. 16, 1842.

Writ of summons in assumpsit indorsed for 150l.; particulars for the same amount.

Damages in declaration laid at 10l. only. Verdict for 150l. The court refused to amend the issue and the record by increasing the damages laid in the declaration to 150l., but granted a new trial on payment of costs, with liberty to the plaintiff to amend.

Talfourd Serjt. on a former day in this term (November 3d), obtained a rule nisi to amend the issue and the record by increasing the damages laid in the declaration from 10l. to 150l., or for a new trial. The action was brought to recover a compensation for services; the writ was indorsed for 150l., and the particulars claimed that sum, but, by a clerical error, the damages at the end of the declaration (which was in assumpsit), were laid at 10l. The plaintiff had recovered a verdict for 150l. The learned serjeant cited *Tomlinson v. Blacksmith* (7 T. R. 132).

Bompas Serjt now shewed cause. The amendment prayed for certainly cannot be granted in the present [845] stage of the proceedings. In *Cleely v. Morris* (2 W. Bla. 1300), where a jury on a writ of inquiry had assessed more damages than were laid in the declaration, and the judgment was entered accordingly, the court of King's Bench would not allow the record to be amended by taking judgment for only the amount of damages in the declaration, or by suffering the plaintiff to enter a remittitur for the surplus (b). But on the authority of *Tomlinson v. Blacksmith*, the rule for a

(b) The reporter states, as the reason why the court refused the motion, as

new trial cannot be resisted, with power to the plaintiff to amend the declaration, but it must be upon payment of costs. In the report of that case nothing is said about costs; but upon a search at the rule office, it appears the rule was so drawn up (c). In *Wright v. Lainson* (2 M. & W. 739), where a wrong plea had been pleaded, the court would only grant a new trial with liberty to amend, on payment of costs. [Maule J. suggested that the damages might be reduced; but the learned serjeant said he would prefer having a new trial.]

Talfourd Serjt., in support of the rule. *Tomlinson v. Blacksmith* was an action for unliquidated damages on a special contract. Here, by reason of the particulars of demand, the defendant could not have doubted what sum the plaintiff claimed.

TINDAL C. J. The defendant on the other hand may have known he could not be called upon to pay more [846] than the 10l. We shall adopt the rule in *Tomlinson v. Blacksmith* as a precedent. The plaintiff may take a rule for a new trial, on payment of costs, with power to amend his declaration by enlarging the amount of damages.

Per curiam. Rule absolute accordingly.

LAWRENCE PHILLIPS AND ANOTHER v. AFLALO. Nov. 16, 1842.

[S. C. 12 L. J. C. P. 49.]

B. being indebted to A. in a large sum of money, signed a document in these terms :—“I engage to ship for your account at M., in any vessel you may engage, &c., from forty to sixty tons Morocco produce, on the following terms, &c. And I also engage that the above shall be shipped by my agent there, within thirty to fifty days from the time of the said vessel being ready to take in her cargo, &c. I do further engage to ship produce on similar terms to the above, to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel.” A. sent out a vessel, and received the goods first mentioned.—In an action to recover the residue of the debt, held that the agreement could not be set up as an answer, as it was optional on the part of A., whether he would send out a second vessel; and therefore that it did not support a plea, alleging an agreement on the part of A. to send out a second vessel, and receive the goods in liquidation of the debt.

Assumpsit. The first count was upon a bill of exchange for 875l. at six months, drawn by the plaintiffs upon and accepted by the defendants. The second count was upon a similar bill at nine months. The third upon a bill for 1250l. at fourteen months, between the same parties. There were also counts for goods sold and delivered, for money lent, money paid, interest, and upon an account stated.

Pleas: first, as to the first, second and third counts, and as to a certain sum to wit, the sum of 4010l. 7s. 4d. parcel of the monies in the fourth and subsequent counts of the declaration mentioned, actionem non, because that heretofore, and after the making and the acceptance by [847] him of the said several bills of exchange, and after the said sum of 4010l. 7s. 4d. parcel, &c., became due from him to the plaintiff, to wit on the 19th of May 1837, it was proposed and agreed by and between the defendant and the plaintiffs, that the defendant should ship for the account of the plaintiffs in certain parts beyond the seas, to wit at Mogadore, in any vessel the plaintiffs might engage in part, or dispatch for that purpose, as might best suit their convenience, from forty to sixty tons of Morocco produce which should be ready for shipment on the following terms free on board, videlicet, wool at 12½\$ (dollars) per quintal of 100 pounds, Mogadore weight and sheep skins at 6½\$ (dollars) per dozen of twelve skins. And the defendant did then engage and agree to and with the plaintiffs, that the above mentioned articles should be shipped by his agent at Mogadore

follows:—“It being out of time, and the plaintiff having acted oppressively in suing out execution and taking the defendant's books (who was a gentleman at the bar), in a very insolent and invidious manner. The judgment was consequently reversed in error.” As to entering a remittitur under such circumstances, see *Pickwood v. Wright*, 1 H. Bla. 643; *Usher v. Danseu*, 4 M. & S. 94. See also *Klos v. Dodd*, 4 Dougl. P. C. 67.

(c) The learned serjeant produced an office copy of the rule, in the terms stated.

aforsaid, within from thirty to fifty days from the time of the said vessel being ready to take in her cargo; that the defendant's account with the plaintiffs should be credited with the amount of invoice on the date of the bill of lading, at the exchange of 4s. 3d. English per dollar; any other goods that might be shipped with the above mentioned, should be for the account and at the risk of the shippers; and it was also then further agreed by and between the plaintiffs and the defendant, that the defendant should ship, for the account of the plaintiffs, produce on similar terms to those above mentioned, to the amount of what the defendant might remain indebted to the plaintiffs, after the first shipment, as above, within six months from the sailing of the first vessel. And the plaintiffs then, in consideration of the said agreement on the part of the defendant to be by him performed and fulfilled, agreed with the defendant, that they, the plaintiffs, would accept, receive and take payment of the said three several bills of exchange, and the sums of money thereby secured and due and owing thereon to the plaintiffs, in [848] the said first, second and third counts, &c., and of the said sum of 4010l. 7s. 4d. parcel, &c., in the introductory part of this plea mentioned; and that the same might be liquidated and paid to them by the said shipments so agreed to be made by the defendant as aforesaid. Averment: that the defendant from the time of making the said agreement in manner and form aforesaid, and thence continually hitherto, hath been ready and willing to perform and fulfil the same in all things on his part and behalf to be performed and fulfilled; and to ship such produce as aforesaid upon the terms and in the manner aforesaid. And that the defendant, confiding in the said agreement of the plaintiffs, afterwards, and within a reasonable and proper time and without delay, to wit on the said 19th day of May, did purchase and provide at Mogadore aforesaid, the said produce, that is to say, sixty tons of Morocco produce, ready for shipment, on the terms and conditions in the said agreement mentioned; and that pursuant to his said agreement, his agent there, to wit, at Mogadore, was at all times after the making of the said agreement, ready and willing to ship the said sixty tons of Morocco produce on board any vessel engaged by the plaintiffs, or despatched by them for that purpose, at Mogadore, within from thirty to fifty days, from the time of any vessel engaged or despatched by the plaintiffs for that purpose being ready to take in her cargo, according to his said agreement; and further that from the time of making the said agreement thence hitherto, he, the defendant, has been always ready and willing to ship produce on similar terms to the above to the amount of what the defendant remained indebted to the plaintiffs after the first shipment as above, within six months from the sailing of the first vessel: and that the defendant relying on the said agreement of the plaintiffs, did afterwards, to wit, on the said 19th day of May, and on divers days, &c., lay out and [849] expend divers large sums of money, to wit, 2000l., and purchased and provided sixty tons of Morocco produce ready to be shipped for the account of the plaintiffs according to the said agreement, and divers, to wit, 5000 other tons of produce as aforesaid, on similar terms to the above, to liquidate and pay the amount or balance of what he was indebted to the plaintiffs, after shipment of the said sixty tons, to wit, 8000l., and was ready and willing to ship the same, according to the said agreement and terms in that behalf mentioned and specified; which said produce of sixty tons, so provided by the defendant, as aforesaid, and the said other tons, to wit, 5000 tons, of produce, were at the time they were so provided and are of greater value than the monies in which the defendant was indebted to the plaintiffs, at the time of the commencement of this suit, and of the sums in the introductory part of this plea mentioned, to wit of the value of 10,000l., ready to be shipped to and for the plaintiffs, as aforesaid. And the defendant, according to his said agreement, had and provided the said divers, to wit, sixty tons and the said others, to wit, 5000 other tons, as aforesaid, ready to be delivered, according to the said agreement in that behalf made as aforesaid; of all which several premises the plaintiffs during all that time from the time of the making of the said agreement had notice; yet that, although the plaintiffs, in pursuance of the said contract and agreement, engaged and despatched a certain vessel called the "Ruth" to receive on board thereof, forty tons of Morocco produce aforesaid, of the value of a large sum of money, to wit, 1385l. 7s. 4d., and although the defendant did then, that is to say on the 1st day of January in the year of our Lord 1838, put on board of the said ship or vessel, the "Ruth" divers, to wit, forty tons of Mogadore produce aforesaid, to wit, wool and sheep skins, according to the said agreement, within thirty to fifty days from the time [850] of the said vessel being

ready to take in her cargo, at Mogadore aforesaid, according to the said agreement and the terms and conditions thereof, as agreed upon as aforesaid; and although the plaintiffs afterwards, to wit on the day and year aforesaid, and before the commencement of this suit, had and received the forty tons of Morocco produce, so shipped as aforesaid, and upon the terms and conditions of the said agreement so entered into by the plaintiffs and defendant as aforesaid, nevertheless the plaintiffs did not, nor would, engage or despatch any vessel as aforesaid, for the residue of the said sixty tons or any of the said other produce, or any vessel whatever, for the residue of the said produce so provided as aforesaid; but have during all that time wholly neglected and refused, and still neglect and refuse so to do. Verification, and prayer of judgment.

Secondly, as to the residue of the moneys and causes of in the fourth action and subsequent counts, non assumpsit.

Thirdly, as to the sum of 647l. 6s. 11d. parcel of the money in the declaration mentioned, payment. Verification, and prayer of judgment.

Replication to the first plea; that it was not proposed and agreed by and between the defendant and the plaintiffs, that the defendant should ship for the account of the plaintiffs in certain parts beyond the seas in any vessel the plaintiffs might engage in part, or despatch, for that purpose, as might best suit their convenience, from forty to sixty tons of Morocco produce, which should be ready for shipment on the said terms in the plea mentioned; and the defendant did not then agree with the plaintiffs that the said articles should be shipped as in the said plea mentioned; and that the defendant's account with the plaintiffs should be credited with the amount of invoice on the date of the bill of lading, as in the said plea mentioned, and that any other goods which might be shipped should be for the account [851] and at the risk of the shippers; and it was not then further agreed by and between the plaintiffs and the defendant that the defendant should ship, for the account of the plaintiffs, produce on similar terms to those above mentioned to the amount of what the defendant might remain indebted to the plaintiffs, after the first shipment as above, within the said time in the said plea mentioned; and the plaintiffs did not agree to and with the defendant that they, the plaintiffs, would accept, receive and take payment of the said three several bills of exchange, and the sums of money thereby secured and due and owing thereon to the plaintiffs, in the said first, second and third counts of the declaration mentioned, and of the said sums of 4010l. 7s. 4d. parcel, &c. in the introductory part of the said first plea mentioned; and that the same should be liquidated and paid to them by the said shipments, modo et formâ; concluding to the country, upon which issue was joined. Issue was also joined upon the plea of non assumpsit as to the residue, and upon a replication traversing the plea of payment.

At the trial before Tindal C. J. and a full special jury, at the sittings for London after last term, the defendant began; and it appeared from the evidence which was chiefly documentary, that the plaintiffs, who were merchants in London, had for a long period been engaged in extensive merchantile transactions with the defendant, who also resided in London, but had connections in Morocco. The result of these transactions was, that in the early part of 1837 the defendant was indebted to the plaintiffs to the amount of 7010l. 7s. 4d.; and on the 4th of that month, the defendant having been pressed by the plaintiffs for a settlement of their account, he sent them a letter, accompanying certain papers and accounts, wherein was the following passage:

"Mr. Aflalo loses no time in writing on this subject, to [852] shew how anxious he is to meet Messrs. Phillips' wishes, and after mature consideration, thinks it better to be indebted to his relations on the other side than to Messrs. Phillips; to effect which he is willing to put from forty to sixty tons of wool or sheepskins, or saltpetre, at the present market price at Mogadore, free on board any vessel they may bargain for part of, from America, and which could remain there for that purpose from thirty to fifty days. On arranging accounts after the shipment, if any balance should remain due to Messrs. Phillips, Mr. Aflalo pledges himself to ship further to that amount on similar terms; but if, on consideration, they should think proper to make fresh arrangements, and to send two or three vessels to bring cargoes similar to the before mentioned, Mr. Aflalo will be happy to forward their views, and has no doubt that it would be to their mutual advantage."

A document in the form of a letter was subsequently drawn up by the defendant

on the basis of the proposal contained in the letter of the 4th of May. This document was sent to the plaintiffs, one of whom made some verbal alterations in it, and it was then returned to the defendant, who made out a fresh copy, embodying the alterations, and signed and sent it to the plaintiffs. This document was as follow :—

“49 Great Prescott Street,
“19th May 1837.

“Messrs. Jonas Phillips & Sons.

“Gentlemen,—I do hereby engage to ship to your account at Mogadore in any vessel you may engage in part, or despatch, for that purpose, as may best suit your convenience, from forty to sixty tons Morocco produce, which may be ready for shipment, on the following terms; free on board 12½ per quintal of 100 pounds Mogadore weight, and sheep-skins at 6½ per dozen of twelve skins; and I also engage that the above shall be shipped by [353] my agent there within from thirty to fifty days from the time of the said vessel being ready to take in her cargo; my account with your house to be credited with the amount of invoice on the date of the bill of lading, at the exchange of 4s. 3d. English per dollar. Any other goods that may be shipped with the above to be for the account and risk of the shippers.

“I do further engage to ship produce on similar terms to the above to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel.”

(Signed) “J. AFLALO.”

This was enclosed in the following letter;

“Mr. Aflalo presents his compliments to Messrs. Jonas Phillips and Sons, and has the pleasure to inclose the contract agreed upon: the letter of introduction to Messrs. A. Courcoss and Co., of Mogadore, shall be handed on Monday.

“49 Great Prescott Street, 19th May 1837.”

A considerable body of further correspondence was given in evidence; but as the only point in the case turned upon the construction of the first document, dated the 19th of May, it is not necessary to set out any other portions.

On the part of the plaintiffs it was contended, that the document of the 19th of May was only a proposal by the defendant, and that there was no evidence to affect the plaintiffs with the adoption of the whole of such proposal, or any thing to shew a contract binding on them further than as regarded the cargo sent by the “Ruth”: and also, that the question turning upon the construction of a written document, it was one of law and not of fact for the jury. On the other hand it was argued that the contract was entire, and having been adopted and partly acted upon, it could not now be repudiated.

[354] The Lord Chief Justice told the jury that the question for them would be, whether the agreement of the 19th of May was, as the defendant alleged, to extend to, and cover, the whole of the demand which was then due from him; or whether, as the plaintiffs contended, it was only an agreement on their part that they would take the cargo to be brought from Mogadore by the “Ruth”; that that part of the stipulation was to be satisfied by the defendant, and they were to stand as before as to the residue of their demand. The jury interrupted his lordship in his summing up, and said that they would not trouble him as they found for the full contract. His lordship, however, considered it expedient to read the agreement to them, and to offer some observations upon it; and having done so the jury found a verdict for the defendant generally. Some discussion ensued; during which the counsel for the plaintiffs observed that the first plea was bad, and requested that the jury might be directed to find damages on the first issue, in order that judgment might be given for the plaintiffs non obstante veredicto. This was objected to on the part of the defendant; and his lordship said, he never knew any judge direct the jury to give conditional damages on such a suggestion. The verdict was ultimately entered for the defendant on the first issue, and for the plaintiffs on the other issues; leave being reserved to the plaintiffs to move to enter a verdict for themselves on the first issue; or if the plea should be held by the court to be bad, to enter a verdict for damages to the amount admitted by the pleas to be due.

Sir T. Wilde, Serjt., on a former day in this term (November 3d), obtained a rule

nisi accordingly, and for judgment for the plaintiffs, non obstante veredicto; or for a new trial, [855] upon the ground that it ought not to have been taken as an admitted fact at the trial, that the defendants had provided any cargo, although that fact was alleged in the first plea, and not denied by the replication. Upon this point he cited *Bingham v. Stanley* (1 Gale & Dav. 237), *Smith v. Martin* (9 M. & W. 304. See also ante, vol. iii. p. 463, n.). He contended that the plea was bad, as amounting at the most to a plea of accord with part satisfaction; but that it was not even so pleaded. It was no more than one contract set up in satisfaction of the breach of another contract; no time even being fixed for the performance of the new contract.

Channell Serjt. (with whom was Hoggins) now shewed cause. He argued, that the fact of the contract having been partly performed by both parties, must be taken to be admitted on the record. (The argument upon this point is not reported, as the judgment of the court turned entirely upon the construction of the agreement.) Upon this latter point the argument was as follows:—

The first issue was expressly upon the fact, whether or not the agreement, as alleged in the first plea, was entered into between the parties. The jury had found the affirmative of that issue; and there was sufficient evidence to support that verdict. The plaintiffs' case was, that they had assented to the first part of what they term the defendant's proposal, but not to the other part. But the whole was one proposal; and if it was accepted at all, it was accepted in toto, and amounted to one entire contract. [Coltman J. There may be a contract binding on one party and not on the other; as in the case of a guarantee, which is of this nature; "if you will supply goods to a third person, I will see that you are paid" In such case it is optional, whether the party will supply the goods. Maule J. The question [856] is, whether the true construction of the letter of the 19th of May is not as follows; "I owe you money. I am willing to pay you in goods. If you will send out ships, I will send home goods to the amount of my debt." It would not, in that case, be binding on the creditor to send out any ship. The letter could not be considered a liquidation of the debt.] The whole case was before the jury, and they found that there was a contract, and that such contract was entire. [Maule J. The question is, whether it is not for the court to say whether or not there was a contract. If it was for the jury, they have certainly found for the defendant.] Even if this were a unilateral agreement, still if the situation of the defendant might be altered thereby, the rules of justice require that both parties should be bound. If the goods had risen in the market, the defendant had tendered the money, the plaintiffs might have compelled the delivery of the goods. An agreement may be set up as amounting to accord and satisfaction, without shewing that such agreement was executed. Where a new agreement is entered into, giving an additional remedy to the plaintiff, although it be not performed, the original right of action is gone; as where the situation of the defendant is altered, or the liability of a third party is introduced. The offer of the defendant, in this case, was accepted by the plaintiffs. [Maule J. That is, it was accepted in the terms of the offer. How does this case differ from that of *Wray v. Milestone* (5 M. & W. 21)? There the plaintiff and defendant, having been partners in certain transactions, settled a general account, which shewed a balance against the defendant; and it was held to be no answer to an action founded on such account, that after the account was settled, the plaintiff had assented to a proposal of the defendant, that he should [857] take out the balance in butcher's meat (a).] There was no stipulation in that case, that the meat should be supplied on particular terms; but here, particular goods were to be shipped at a particular port, at certain specified prices, by which the defendant was bound

TINDAL C. J. The question in this case is, whether the contract set out in the plea was proved by the defendant. The alleged contract is contained in a letter of the 19th May, from the defendant to the plaintiffs; it is, therefore, for the court to say whether or not such contract is proved. The portion of the letter as to which the parties are at variance, is the latter part, and is in these words: "I do further engage to ship produce on similar terms to the above, to the amount of what I may remain indebted to you after the first shipment as above, within six months from the sailing of the first vessel." Now the question is, whether this is a contract on the part of the plaintiffs; whether they can demand payment on the original terms of the

(a) And see *Collingbourne v. Mantell*, 5 M. & W. 289.

dealing between the parties, or whether the plaintiffs are bound to receive payment by taking goods. It appears to me that the letter amounts to nothing more than a declaration on the part of the defendant that he was willing, if the plaintiffs sent out ships, to ship goods by them, and that there was nothing compulsory on the plaintiffs to accept that mode of payment. I think, therefore, the verdict should be entered for the plaintiffs on the first issue.

COLTMAN J. I am of the same opinion. This being the case of a written contract, it is for the court to say what construction it ought to bear. It appears to me to be an engagement on the part of the defendant, entered into [858] with the consent of both parties, that if the plaintiffs would send a ship to Mogadore, the defendant would send certain goods in liquidation of his debt; and if any balance then remained due, then if another ship were sent, other goods should be sent to cover such balance. The only question is, whether the plaintiffs, having sent one ship, were bound to send another, and were prevented from exercising their option a second time in that respect. And I am of opinion they were not so bound; and that the plea was not proved.

ERSKINE J. I am of the same opinion. (His Lordship having read the first plea, continued.) Taking this plea in substance to allege a contract, that the debt should be liquidated in the particular way there mentioned and no other, the question is whether that plea is proved. It is said that, on the 19th of May, the contract was proposed by the defendant and accepted by the plaintiffs. Now there seems to be no doubt, that the terms of a contract were settled between the parties. They were reduced into writing, alterations were made by the plaintiffs, and the contract was copied out again, was signed by the defendant and remained in the plaintiffs' possession. And it may also be taken as clear, that there was nothing in the subsequent correspondence or conduct of the parties to vary the terms. Considering, therefore, the paper of the 19th of May as the contract between the parties, it is for the court to say what is its legal effect. And it appears clear to me, that it was not a positive contract on the part of the plaintiffs to take a shipment of goods in liquidation of the defendant's debt, and to relinquish all right to insist upon payment in the ordinary way, but that it was an engagement on the part of the defendant, that if the plaintiffs would send out a ship or ships, he would send goods to the amount of the debt. And the defendant [859] may have had good reasons for making such an arrangement, as thereby he put off the time of payment, and he may be supposed to have been better acquainted than the plaintiffs with the state of the Mogadore market. At any rate, it was optional with the plaintiffs whether they would enforce the bargain.

MAULE J. I also think that the verdict should be entered for the plaintiffs upon the issue raised by the first plea, there being no evidence to support that issue. It is said, that plea is proved by the contract entered into between the parties on the 19th of May. That contract is in writing; and the general rule is, that the construction of a written contract is for the court, except where technical terms are introduced. I think the proper construction of the document in question is very clear. It is an engagement by the defendant, but not by the plaintiffs. It does not contain any limitation as to the time of the first shipment, but it does as to the second, which the defendant undertook should take place within six months after the first. I think this was a unilateral contract,—that if the plaintiffs would be at the trouble and expense of sending out a ship, the defendant would ship the goods. If the defendant's construction be correct, the plaintiffs would become the purchasers of the goods, and would part with their remedy upon the bills. If that had been so, the bills ought to have been given up. It appears to me that this case is very like that of a person who deals in certain goods, and being pressed by a creditor for payment of his account, says, "I have no money to spare, but I will give you goods in payment, at such a price, if you will send for them." Suppose the creditor sent for goods, to a certain amount, that would not release the debtor from the residue of the original debt. The probable reason why the prices were mentioned in this case, is [860] to induce the plaintiffs not to insist upon immediate payment. Upon the whole, I think there was no evidence to support the first issue, and that the verdict must be entered thereon for the plaintiffs.

Rule absolute to enter the verdict for the plaintiffs on the first issue; damages, 593*l.* 7*s.* 1*d.*

Channell Serjt. afterwards submitted, that if the rule were made absolute in the above form, the defendant would have no means of going to a court of error.

MAULE J. It is clear the defendant owes the amount, and the only question is how he shall pay it.

The learned serjeant therefore, took nothing.

ARNOLD v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF POOLE
Nov. 22, 1842.

[S. C. 5 Scott, N. R. 741 ; 2 D. N. S. 574 ; 12 L. J. C. P. 97 ; 7 Jur. 653. Followed, *Ecclesiastical Commissioners v. Merral*, 1869, L. R. 4 Ex. 168. Applied, *Dyle v. St. Pancras Guardians*, 1872, 27 L. T. 346. See, *Lawford v. Billericay Rural Council*, [1903] 1 K. B. 786.]

No municipal corporation (but that of London) can appoint an attorney except under the corporate seal.—Therefore an attorney who has been appointed by the mayor and town council to conduct suits, but not under seal, cannot recover his costs against the corporation.—But if he has claims in respect of costs against a corporation, some of which he can enforce, and some of which he cannot, by reason of the want of a valid appointment, and money is paid to him generally on account, he may appropriate such payments to the latter claims.

Debt. The first count of the declaration was for 3811l. 2s., for work, labour, &c. by the plaintiff, done and performed as the attorney and solicitor of the defendants. The second was for 3000l., for money paid. The third was for 100l. claimed to be due to the plaintiff as salary as town clerk, and for services as such town clerk performed by him upon the employment and at the [361] request of the defendants. The fourth was for 3811l. 2s., upon an account stated.

The defendants pleaded, first, as to all except 100l., never indebted ; secondly, no signed bill delivered before action brought ; thirdly, as to all except 100l., payment ; fourthly, as to 500l., parcel, &c., except the sum of 100l., a set-off ; fifthly, as to 100l., payment into court.

The cause came on for trial before Coleridge J., at the Dorchester summer assizes in 1840, when a verdict was entered for the plaintiff by consent, damages 500l., debt 10,622l. 4s., costs 40s., subject to the award of a barrister, to whom the cause and all matters in difference comprised in the bills of costs were referred, and who was to direct whether the verdict so entered for the plaintiff should stand ; and if to stand, for what amount of damages, or whether a verdict should be entered for the defendant, or a nonsuit be entered : and it was ordered that the said arbitrator, if he thought fit, was to state facts and make an interlocutory award or awards, at the request of either party, for the purpose of taking the opinion of the court on any point, and to have the same powers as a judge at nisi prius : the parties to the said cause thereby agreeing to be bound and concluded by such award as the arbitrator should make of and concerning the premises referred to him, &c.

On the 7th June 1841, the arbitrator made an award, which, after reciting the order of nisi prius, (which had been made a rule of court,) proceeded as follows :—

“I do award and order, that the verdict found for the plaintiff be set aside, and instead thereof I do direct, as to the issue joined upon the plea of the defendants by them first pleaded, that a verdict be entered upon that issue for the plaintiff, damages 1s., debt 718l. 9s. 7d., subject to the opinion of the court upon the points hereinafter reserved ; the amount of debt, for which it [362] is so entered, to be increased or reduced by such sum or sums as are hereinafter specified : and, as to the issue joined upon the replication of the plaintiff to the plea of the defendants by them secondly pleaded, I do direct a verdict to be entered for the plaintiff : and, as to the issues severally joined upon the replication of the plaintiff to the pleas of the defendants by them thirdly and fourthly pleaded, I do direct a verdict to be entered for the plaintiff upon the same : and I hereby state the following facts to be submitted for the opinion of the court :—

“The action was brought by the plaintiff, an attorney, and town-clerk and clerk of the peace of the borough of Poole, to recover the amount of several bills. The action was commenced in June 1840. The claim of the plaintiff consisted of charges and disbursements for business done by him as an attorney in divers suits and other

matters, at various times, from the year 1836 until the year 1840, and also for business done by, and fees and salary due to, him as such town-clerk and clerk of the peace. The plaintiff was appointed town clerk and clerk of the peace under the seal of the corporate body in January 1836, at an annual salary of 100*l.* for his ordinary business; and was town-clerk of the borough during all the time when the business for which the action was brought was done.

"The borough of Poole is an ancient body corporate, and one of the boroughs regulated by and included in Schedule A. of the statute 5 & 6 W. 4, c. 76.

"The charges were contained in ten separate bills, and were for business done and disbursements made under the following circumstances:—

"The bill No. 1 was headed 'Bill of costs on opposing a bill in both houses of parliament for setting aside the municipal election of Poole, on the alleged grounds of fraud, and disbursements in relation thereto.' The [863] amount of this bill was 159*l.* 1*s.* 4*d.*; and it contained no taxable items. No signed bill containing the particulars of this demand had been delivered to the defendants before the commencement of the action.

"In the year 1836 a select committee of the House of Commons was appointed, on the petition of certain inhabitants of Poole, to inquire into the circumstances relating to the then last municipal election of councillors and other corporate officers of the borough of Poole. And afterwards, on the report of the said committee, a bill was introduced into the House of Commons for the purpose of avoiding the said election on the ground of fraud and illegal practices. This bill passed the House of Commons, and was subsequently rejected in the House of Lords. The charges contained in No. 1 were for disbursements made and business done by the plaintiff, in opposing the motion for the appointment of the said select committee, and the bill so introduced into the House of Commons. The plaintiff had received no authority under the seal of the corporation to take any proceedings in the above matter. The propriety of such proceedings had not been proposed or considered at any regular meeting of the town council, nor had any meeting of the town council been summoned for that purpose. There was no memorandum or resolution in the minute book of the town council authorising any of these proceedings. The plaintiff had received orders from the mayor for the time being, and from other members of the town council, to take all necessary steps to oppose the measures in parliament. Several meetings were held at the town-clerk's office, where the mayor and the minority in number of the town council attended and instructed the plaintiff to oppose the said bill in parliament; but the members of the town council generally had not been summoned to [864] attend such meeting, nor did they attend. The members summoned were those only who were known to be favourable to an opposition to the bill. The charges were for business done between February and the 2d of August 1836.

"On the 3d of August 1836, the following resolutions were passed at a quarterly meeting of the town council, and entered in the minute book:—

"Resolved unanimously, that the thanks of this meeting be presented to the Right Hon. Lord Lyndhurst, Lord Redesdale, and the other noble peers, for their powerful efforts in rejecting the unconstitutional bill attempted to be passed for the destruction of this council.

"Resolved unanimously, that the thanks of this meeting be presented to the Right Hon. C. W. Wynn, the Hon. Mr. Law, Mr. Serjeant Goulburn, Mr. Serjeant Jackson, Horace Twiss Esq., W. Winthrop Præd Esq., — Trevor Esq., and the other members of the Honourable House of Commons, who so nobly opposed the unconstitutional bill, brought in and supported through the House of Commons by Mr. Poulter of Shaftesbury, for the destruction of this council.

"Resolved unanimously, that the mayor be requested to forward a copy of the above resolutions to each of the noble lords and honourable members, under the seal of this council.'

"The bill No. 2 was headed 'Bill of costs incurred in opposing a rule for a mandamus as to the inspection of voting papers.' The amount of these charges was 14*l.* 11*s.* 10*d.*

"After the annual municipal election in 1835, the voting papers for that year were deposited with the plaintiff as town-clerk. A complaint was made as to the mode in which the town-clerk allowed the burgesses to inspect the voting papers, and a rule was obtained in the court of Queen's Bench, calling on the plaintiff to [865] shew

cause why a mandamus should not issue commanding him to permit certain burgesses to inspect the voting papers. The rule was subsequently discharged by arrangement (a). The plaintiff had received no authority under the seal of the corporation to take any steps in the matter, nor was there any entry or resolution in the minute book of the town council directing the plaintiff to take any proceedings. He had received orders from the then mayor to oppose the rule, and the costs were incurred in opposing it. The business was done between January and May 1836.

"The following resolutions and orders were passed at meetings, and entered in the minute book, of the town council:—

"29th March 1837. Resolved unanimously, that a finance committee be appointed for the purpose of examining all accounts and claims upon the council, and reporting thereon.

"6th February 1839. Resolved, that the report of the finance committee, as now read, be received and adopted.'

"1st May 1839. At a quarterly meeting of the council of this borough, it is ordered, that the bills of the town-clerk, amounting to 1000l. 13s. 5d., be taxed.

"It is ordered, that the sum of 500l. be paid to the town clerk by the treasurer on account of his bill delivered.'

"7th August 1839. Resolved, that the sum of 150l. on account of the cheque of 500l., dated the 1st May last, be paid by the treasurer to the town-clerk.'

"The report of the finance committee, above referred to, was as follows:—

"28th January 1839. The committee having examined the outstanding accounts due by the council for [866] the year ending 9th of November 1838, finding the following orders on the treasurer outstanding, viz.

"The clerk, for sundry law bills, 1000l. 13s. 5d.

"The committee offer no observations on the bills delivered in by the town-clerk, and recommend the same to the consideration of the council.'

"The above bill of 141l. 11s. 10d. was included in the bills amounting to 1000l. 13s. 5d. mentioned in the above report, and had been duly delivered to the defendants, signed by the plaintiff as required by the statute, on or before the 28th of January 1839. The other bills delivered, to which the above report refers, were bills Nos. 3, 4, 5, 6, and 7, hereinafter mentioned. An order for the payment of 500l., on account of the bills so delivered, was given to the plaintiff; and at the time of the bringing of this action 350l. out of the 500l. so ordered had been paid to the plaintiff by the treasurer of the borough.

"The bill No. 3 was headed 'Costs and expenses incurred in the matter of the municipal charities in the borough of Poole.' A signed bill of these costs had been duly delivered to the defendants, on or before the 28th of January 1839.

"An application had been made to the court of Chancery, on the petition of certain councillors of the borough of Poole, to appoint trustees of the corporation charity estates; and a counter-petition had been presented by three councillors of the borough, praying that they might be admitted to take part in the proceedings, which had been referred to a master. The whole amount of the bill of costs of the counter-petitioners was 184l. 6s. An order of the court of Chancery was made, whereby it was ordered that the costs both of the petitioners and counter-petitioners should be taxed and paid out of the charity funds. The taxed costs of the counter-petitioners amounted to 101l. 18s. 11d., of which [867] the plaintiff had received 55l. before the commencement of this action. The claim in this action was for 82l. 7s. 1d., the residue of the above bill of costs. The business was done between September 1836 and January 1837.

"There was no authority given to the plaintiff under the seal of the corporation: but the following resolution was passed at a meeting, and entered in the minute-book, of the town council:—

"7th September 1836. Resolved unanimously, that Mr. Thomas Arnold, the town-clerk of this borough, be authorised to take such steps as may be advised by counsel with reference to a petition to the Lord Chancellor by George Lockyer Parrott and William Green, two of the members of this council, for the appointment of trustees of several of the charities in Poole, without previously conferring with this council thereon; and that the town clerk be also authorised to take such other steps as may be advised for continuing the appointment of trustees of the said charities in

(a) See *Rex v. Arnold*, 4 A. & E. 657, 6 N. & M. 152.

the council of this borough, in conformity with the intention of the several donors thereof.

“Resolved unanimously, that the petition now produced by the town-clerk, and read to this meeting, be adopted on the part of this council, and the common seal of the borough affixed thereto.

“The petition referred to in the above last-mentioned resolution, was the counter-petition to which the bill of costs refers.

“The bill No. 4 was a bill of costs incurred in a suit in Chancery between the attorney-general at the relation of the Honourable W. F. S. Ponsonby and others, and the mayor, aldermen, and burgesses of the borough of Poole, Robert Henning Parr, and Thomas Arnold.

“The object of the suit was to call in question the right of the said Robert Henning Parr to certain com-[868]-pensation which had been granted him on his removal from certain borough offices, and to cancel a bond given by the corporation of Poole as a security for such compensation, on the ground that the compensation was illegal, and the bond fraudulent and void. A charge of fraud was made in the information filed in this suit against the corporation. The amount of the claim was 347l. 19s. 3d., and was for business done between the 13th of November 1837, and November 1838. A signed bill of these costs had been duly delivered before the commencement of the action.

“The bill No. 8 was a bill of costs in the last-mentioned suit for business done from November 1838, to September 1839. A signed bill of these costs had been duly delivered before the commencement of this action. The amount of this bill was 454l. 6s. 6d.

“The plaintiff had received no authority under the seal of the corporation to take the proceedings in this suit; but the following resolutions were passed at meetings, and entered in the minute book of the town council:—

“17th November 1837. The mayor and town-clerk having been served with a Chancery subpoena commanding them within eight days to appear to an information filed by Her Majesty's attorney-general at the relation of the Honorable W. F. S. Ponsonby and others.—Resolved unanimously, that the town-clerk be authorised to enter an appearance for the council and himself to such information, and to obtain an office-copy thereof; and he is also authorised to retain counsel, and take such steps as may be necessary in defence of this council and himself, and for answering such information.’

“7th February 1838. Resolved, that the instructions given by the mayor to the town-clerk on an appeal to the Lord Chancellor against the judgment of the Master of the Rolls in the case of the attorney-general [869] on the relation of the Hon. W. F. S. Ponsonby and others against the corporation of Poole, be confirmed.’

“24th November 1838. Resolved, that the town-clerk do suspend proceedings in the cause of *The Attorney-General v. The Corporation of Poole*, till further instructed by the council: and that his bills in the above suit be made up to this date, and referred to the finance committee for their report at the next meeting of this council.’

“6th February 1839. Resolved, that the report of the finance committee, as now read, be received and adopted.

“Resolved, that the town-clerk be authorised to prepare the necessary instructions for answering, by the corporation and himself, the information, as amended, filed against the corporation by the attorney-general on the relation of the Hon. W. F. S. Ponsonby and others.’

“22d February 1839. Resolved, that the town-clerk be directed to forward the several minutes and answers prepared this day to the several queries of the amended information filed by the attorney-general, on the relation of the Hon. W. F. S. Ponsonby against this corporation, with such other instructions and documents referred to as he shall consider to apply to the effectually answering the said bill, for counsel to draw the answer in the usual way.

“Resolved, that the sum of 100l. be voted to the town-clerk to enable him to meet the expenses to be incurred in preparing the above answer, and defending the said information.’

“1st April 1839. Resolved, that the draft answer of the corporation, as now read to the council, be approved and filed as the answer of the corporation to the original and amended information filed against them by the attorney-general, at the

relation of the Hon. W. F. S. Ponsonby, and others; and that the mayor be authorised to affix the seal of the corporation of the said borough thereto on being engrossed.

“10th September 1839. The draft of the further answer, and of the answer to the supplemental bill of *The Attorney-General v. This Corporation*, was read and explained at this meeting, preparatory to the same being ingrossed.

“6th May 1840. Resolved, that the report of the finance committee now read be received.”

“The report referred to was as follows:—

“5th May 1840. The committee also beg to report that the following bills have been delivered in by the town-clerk, amounting to the sum of 1547l. 5s. 6d.; and your committee, finding that they have been frequently laid before the council, recommend that some decisive steps be taken for disbursing the same.”

“Amongst the bills so referred to were the above-mentioned bills (No. 4) of 347l. 19s. 3d. and (No. 8) of 454l. 6s. 6d. The 100l. voted to the plaintiff by the above resolution was paid to him. The above information had been filed in the court of the Master of the Rolls; and an appeal was had from his judgment thereon to the Lord Chancellor. The suit is not determined, but is still pending, on appeal to the House of Lords. The plaintiff is still the solicitor in the suit. It was not proved that he had given any notice to the defendants of an intention not to go on with the suit.

“The bill No. 5 was a bill of costs in defending an action at law brought in December, 1837, by Robert Henning Parr against the corporation of Poole, to recover an instalment and interest due on a bond given by the corporation to the said Robert Henning Parr, to secure certain compensation granted to him on his removal from certain borough offices. The attorney on the record on behalf of the corporation was Mr. Weller, who was the town agent of Mr. Arnold, the town-clerk. The [871] plaintiff had received no authority under the seal of the corporation to defend the action; but the following resolutions were passed at a meeting and entered in the minute book of the town council.

“30th December 1837. The mayor having been served with a writ issued out of Her Majesty’s court of Common Pleas by R. H. Parr against the mayor, aldermen and burgesses of the borough, claiming the sum of 1350l., being the first instalment due to the said R. H. Parr, on a bond executed by the council, dated the 29th November 1836, for compensation, with interest thereon, and the town-clerk having entered an appearance for this council, at the request of the mayor—

“Resolved, that the same be hereby confirmed.”

“A signed bill of these costs was delivered in January 1839, and was one of those included in the report of the finance committee of the 6th February 1839. The amount was 65l. 8s. and was for business done between December 1837, and March 1838.

“The bills No. 6 and No. 9 were for business done at the sessions. The bills No. 7 and No. 10 were for general business as town-clerk. These bills Nos. 6, 7, 9 and 10, had been signed and duly delivered before the commencement of this action. The plaintiff had frequently received orders from the town council, by means of resolutions, to act as their attorney in taking proceedings to recover all arrears of rent, to obtain possession of corporation property, and the like; and the finance committee had often called the attention of the town council to the bills delivered in by the town clerk, and had reported that the town-clerk had made considerable advances on account of the council.

“As to the bill, No. 1, I find, that upon the facts above stated, there was no sufficient evidence of a retainer of the plaintiff by the defendants, and of a right [872] of action, so as to enable the plaintiff to maintain this action in respect thereof against them.

“And, as to the bills, Nos. 2, 3, 4, 5 and 8, I find that the above facts do not furnish evidence of a retainer of the plaintiff by the defendants, and of a right of action in respect of the matters contained in the last-mentioned bills, so as to enable the plaintiff to maintain this action in respect of the same, or either of them, against the defendants.

“And as to the bills, Nos. 6, 7, 9 and 10, I find that, after allowing all just deductions and payments, there is due and owing from the defendants to the plaintiff in respect thereof the sum of 718l. 9s. 7d., which sum of 718l. 9s. 7d. is the debt for which I have directed the verdict to be entered as above mentioned.

"And as to the sum of 350l. paid to the plaintiff in pursuance of the resolution of the 1st of May 1839, on account of the bills, Nos. 2, 3, 4, 5, 6 and 7, I find that the plaintiff applied part of that sum in satisfaction of the bills, Nos. 2, 3 and 6, amounting in the whole to 203l. 6s. 10d. and the residue of the said sum amounting to 66l. 13s. 2d., in part satisfaction of the bill, No. 7: and I have, in estimating the debt, for which I have directed the verdict to be entered, so appropriated the said sum of 350l.

"And I do hereby submit the following questions for the opinion of the court.

"First—whether the facts above stated furnish sufficient evidence of a retainer of the plaintiff to enable him to maintain this action in respect of the charges contained in the bill, No. 1, against the defendants.

"Secondly—whether in the absence of any authority under the seal of the corporation, the above facts furnish evidence of a valid contract or retainer binding the corporation, so as to enable the plaintiff to [873] maintain this action for the whole or either of the bills, Nos. 2, 3, 4, 5 and 8, against the defendants.

"Thirdly—whether the charges in the bills, Nos. 1, 2, 3, 4, 5 and 8, were for matters concerning which the corporation could enter into a valid contract, or give a retainer binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants.

"Fourthly—whether the plaintiff had any right of action against the defendants to recover the charges contained in the bills, Nos. 4 and 8, the suit to which they refer being undetermined.

"Fifthly—whether the plaintiff had a right to appropriate the payment of two sums, videlicet, of 141l. 11s. 10d., and of 82l. 7s. 1d., part of the said sum of 350l., to the bills No. 2 and No. 3 respectively.'

"If the court shall be of opinion, that the facts above stated furnish sufficient evidence of a retainer of the plaintiff, and of a right of action, so as to enable him to maintain this action in respect of the charges contained in the bill, No. 1, against the defendants, and that the said bill was for matters concerning which the corporation could, by such retainer, bind the funds of the corporation, I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of the said bill, No. 1.

"If the court shall be of opinion, that the facts above stated, in the absence of any authority, given to the plaintiff under the seal of the corporation, to do the work and business contained in the bills, Nos. 2 and 3, do not furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said bills, or either of them, so as to enable the plaintiff to maintain this action, in respect of such matters, against the defendants, and the plaintiff had [874] no right to appropriate the several sums of 141l. 11s. 10d. and of 82l. 7s. 1d. to the payment of the same, or either of them, then I do direct the said sums of 141l. 11s. 10d. and 82l. 7s. 1d., or such of them as the court shall be of opinion the plaintiff had no right to appropriate, to be deducted from the debt for which I have directed the verdict to be entered.

"If the court shall be of opinion, that, in the absence of any authority given to the plaintiff under the seal of the corporation to do the work contained in the bill, No. 5, the facts above stated furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said bill, and that the same was for matters concerning which the town council had power to make a valid contract, or to give a retainer binding the corporation, then I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of the said last-mentioned bill.

"If the court shall be of opinion that the facts above stated, in the absence of any authority given to the plaintiff, under the seal of the corporation, to do the work contained in the bills, Nos. 4 and 8, furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said last-mentioned bills, or either of them, and that the same were for matters concerning which the town council had power to make a valid contract, or give a retainer, binding the corporation, and also that the plaintiff had a right of action to recover the same, or either of them, notwithstanding the suit to which they refer had not been determined, then I direct the debt for which I have ordered the verdict to be entered, to be increased by the amount of such bill or bills, deducting therefrom the sum of 100l.

paid to the plaintiff in pursuance of [875] the resolution above-mentioned on account of the said bills."

The case was argued in last Easter term.

Bompas Serjt. (with whom was Barstow) for the plaintiff. The principal question in this case is, whether or not a corporation can appoint an attorney to act for them otherwise than under their common seal. Secondly, it is a question, whether, under the circumstances disclosed in the award, there has not been substantially an appointment under seal. And, lastly, whether, supposing there was not a valid retainer of the plaintiff as to some of the services performed by him, he was at liberty to appropriate payments, that were made to him generally, to the costs of the proceedings in which he had not been properly retained.

With regard to the first question, it is to be observed, that no point can be made in favour of the defendants, grounded on any distinction between executory and executed contracts. The work has been *bonâ fide* done by the plaintiff; and in most of the instances he is shewn to have been employed to do the particular work either by the mayor, as the head of the corporation, or by the body, pursuant to resolutions passed by them; and in all the cases the corporation recognised and sanctioned the employment. The question is, whether, under these circumstances, a narrow technical rule is to stand in the way of the plaintiff's right to recover for his services? The general rule undoubtedly is, that a corporation can only act by deed under their common seal (Bro. Abr. Corporations et Capacities, pl. 34). That rule however has been much broken in upon by modern authorities; and even in the older cases, at a time when the rule was more strictly adhered to, it was considered that a corporation might do certain acts [876] and make certain appointments, such as of a servant, cook, butler, &c., without deed; Bro. Abr. Corporations et Capacities, 47 (a), 49 (b), 50 (c), 56 (d); Com. Dig. [877] Franchises (F. 13); Vin. Abr., Corporations, (K.); Bac. Abr.

(a) "Debt. Townsend J. A dean and chapter may retain and assign a bailiff, receiver, or other servant without writing. Brian C. J. of C. P., *contrâ*; and that he could not be a servant without writing, nor demand his salary without writing; but they may charge a man for his occupation without deed, as a guardian in socage, bailiff of the king, and receiver of his own head, and such like, and he was positive (precise) in this. 4 H. 7, 6."

(b) "Townsend J. C. P. A corporation may have ploughmen and servants of husbandry, butlers, cooks, and such like, without retainer by deed; and a servant may justify by the command of a body politic without having a deed of command. Brian C. J. C. P. *contrâ*. And that they can do nothing without writing. Vavisor K. S. In the time of Edw. 4, it was agreed that a corporation cannot assign auditors without writing. And Brian was of opinion, that a bailiff (ought) to be charged as here, by reason of his occupation. 4 H. 7, 17."

(c) "Trespas. The defendant said, that it was the freehold of the president and scholars of C., and he, as servant to them, and by their command, entered, &c. Keble, Serjt. He cannot be retained with the corporation without specialty; nor make a feoffment without specialty. Hussey C. J. of K. B. (in the year book, 'Non, par Dieu'). They cannot be disseisors without an agreement by deed, nor enter on the land without a command given by deed. Wood K. S. As to small things, there is no need for a writing; as for lighting candles, making hay or fire, nor for putting cattle out of their land. Oxenbridge apprehended to the contrary: for these things belong to a servant to do without command; but entering and such like ought to be by deed. And Fairfax J. K. B. agreed as to small things; but that a corporation could not have a servant but by deed. And Tremaille agreed with Wood as to small things. Nevertheless, in the same place, the last folio in the same year, it was agreed that a corporation could not vest in them, or divest out of them, any freehold by any person without authority given by deed. Nevertheless several *e contrâ* as to the small things above-mentioned, by reason of the usage and of the great trouble that it would be to the contrary; but not by the law: *ideo quære*. 7 H. 7, 9."

(d) "Debt upon arrears of account, by the mayor and commonalty of S. against the executors of T. P. their receiver: and they counted that auditors were assigned by the aforesaid mayor and commonalty." — "and by Littleton, The opinion of all the justices of both benches is, that an assignment of auditors by a corporation is good without deed; and the same of a justification by their command; and the same of a

Corporations, (E.) 3. [Tindal C. J. The principle to be collected from the old cases appears to be, that an appointment under seal was not necessary in the case of officers or servants required to perform acts of trifling import or of immediate necessity. If cattle were damage feasant, and it were necessary to appoint a bailiff under the corporate seal in order to distrain them, the cattle might escape while the deed was preparing.] It is submitted that cannot be the only reason; for in such a case the appointment might, if it were necessary, have been made out after the act was done, so long as it was in existence at the time of pleading. There may be many cases where the presence of an attorney at the time the act is done may be most important, and where there would be neither time nor opportunity to execute a deed for the purpose of retaining him. The only object for which a seal can be required is to testify the fact of the appointment—and in this case that has been done sufficiently by the resolutions of the body. A seal is by no means a protection against an improper appointment—for a seal may be affixed by some subordinate officer, without the assent of the body. In *Roe dem. The Dean and Chapter of Rochester v. Pierce* (2 Campb. 96) a notice to quit, given by a person acting as steward of a corporation, was held sufficient, without evidence that he had an authority under seal from the corporation for that purpose. A corporation, it is true, can only appear by attorney; case of *Sutton's Hospital* (b); but in London an attorney for the cor[878]-poration is appointed every year in open court without seal. [Tindal C. J. That is matter of record; *Mayor of Thetford's case* (a). It has been held that a stranger may receive a deed to the use of a corporation, without a letter of attorney from them to receive it; *Cooper v. Gooderich* (Cro. Eliz. 862). Formerly it was thought that a corporation could not be sued for a tort: but that doctrine has been overruled; *Yarborough v. The Bank of England* (16 East, 6); and it has been decided that tort will lie against a corporation even for the act of their agent, though not appointed under seal; *Smith v. The Birmingham and Staffordshire Gas Light Company* (d). It has also been held that a corporation aggregate, strictly partaking of the corporate character, may sue in assumpsit upon an executed consideration; *The Barber Surgeons v. Pelson* (2 Lev. 252), or in debt for use and occupation; *The Dean and Chapter of Rochester v. Pierce* (1 Campb. 466); *The Mayor and Burgesses of Stafford v. Till* (4 Bingh. 75, 12 B. Moo. 260); and if such actions are maintainable, the remedy must be mutual (i). In *The East London Waterworks Company v. Bailey* (4 Bingh. 283, 12 B. Moo. 532) it was held that assumpsit would not lie by a corporation upon an executory contract not under seal. The applicability of that doctrine to a manufacturing or trading corporation was, however, questioned in *Dunstan v. The Imperial Gas Light Company* (3 B. & Ad. 125); and it was at length established [879] that it did not apply in such cases; *Beverley v. The Lincoln Gas Light and Coke Company* (6 A. & E. 829, 2 N. & P. 283); *Church v. The Imperial Gas Light and Coke Company* (ibid. 846, 3 ibid. 35).

The Mayor of Ludlow v. Charlton (6 M. & W. 815) will probably be relied upon by the other side, where it was held that a municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal. But the contract in that case was one relating to land, and involved a specific outlay of the corporation property. In *Stevenson v. The Corporation of Berwick* (1 Q. B. Rep. 154, 4 P. & D. 546), which, like the present case, was an action for work and labour by an attorney against a corporation, the objection was not taken. Suppose an attorney, not appointed by deed, had recovered judgment at the suit of the corporation, and had received the fruits of

command by a convent, in the time of vacation, to saw their trees and other necessaries. 12 E. 4, 9, 10."

(b) 10 Co. Rep. 22, 32 b. See also Bro. Abr. Corporations et Capacities, pl. 28, (citing 19 H. 6, 80), Co Litt. 66 b., Com. Dig. Pleader (2 B. 2), and see *infra*, p. 897, n. (d).

(a) 1 Salk. 192, 3 Salk. 103, Holt, 171, S. C. per nom. *Rex v. Chalica, Mayor of Thetford*, 2 Ld. Raym. 848, vide *infra*, p. 897 (d).

(d) 1 A. & E. 526, 3 N. & M. 771. And see *Maund v. The Monmouthshire Canal Company*, ante, p. 452; S. C. 5 Scott, N. R. 457, and cases there cited.

(i) See the judgment in *Beverley v. The Lincoln Gas Light and Coke Company*, 6 A. & E. 829, 841, 2 N. & P. 283, 291.

such judgment, would the fact of his not having been appointed by deed have protected him from liability to be sued for money had and received?

By sect. 76 of the municipal corporation act (5 & 6 W. 4, c. 76) the town council are to appoint a certain number of their own body a watch-committee; and such committee are to appoint constables for the borough. It never could have been intended that such appointments were necessarily to be under the seal of the corporation. If an action were brought against such a constable for an act done by him in the execution of his duty, might not the corporation employ an attorney to defend him; and must the retainer in that case be under seal? [Erskine J. The question would be, could the attorney maintain an action against the corporation unless he were appointed by deed; and that is very like the pre-[880]-sent question. Crosswell J. By sections 95 and 96 the council are empowered to renew and grant leases; it could hardly be contended that they could do so except under seal.] That would stand upon a very different footing. There are some instances in which perhaps it might be required that the council should contract under seal; as, for example, where they contract for committing prisoners to the gaol of another borough, which by sect. 115 they are empowered to do "in the name of the body corporate." By sect. 58 the council have power to appoint a town-clerk, treasurer, and other officers: the town-clerk may be, and probably would be, an attorney, but the act does not require the appointment to be under seal. [Tindal C. J. An attorney acting in any individual suit would hardly be considered as an officer of the corporation.] The town council would appear to have the right of making any appointments necessary to carry out the purposes of this act. [Coltman J. Is there any part of the act by which a power is given to any person or persons to affix the corporate seal?] There is no clause to that effect.

With regard to the particular bills in question. As to No. 1 (supra, p. 862) it must be admitted that there was no retainer by the corporation in respect of the business included therein, and no subsequent recognition by them of the employment of the plaintiff. [Tindal C. J. As to that bill, the plaintiff must look for payment to those who employed him.]

The bill No. 2 (supra, p. 864) relates to the costs of opposing a rule for a mandamus. It appears that a question had arisen as to the right of the burgesses to inspect the voting papers; the plaintiff, as town-clerk, had refused to allow the inspection; a rule nisi had been obtained for a mandamus directing the plaintiff to allow such inspection, [881]-tion, and this rule was opposed under the direction of the mayor, and the opposition was afterwards recognised by the town council: the argument on that case is reported in *Rez v. Arnold* (4 A. & E. 657, 6 N. & M. 152). [Coltman J. This bill is for business done in his office of town-clerk.]

No. 3 (supra, p. 866) refers to costs incurred relating to the municipal charities of the borough. A petition having been presented to the Lord Chancellor, as to the appointment of trustees, under sect. 71 of the 5 & 6 W. 4, c. 76, a counter-petition was presented, the management of which was entrusted to the plaintiff by a resolution of the town council; and this counter-petition it appears was under seal. [Coltman J. It does not expressly appear from the award that the counter-petition was under seal; but only that a resolution was passed that the common seal should be affixed thereto.] It may fairly be inferred that the seal was affixed, in pursuance of the resolution; and it is clear that it was presented and proceeded in, by the authority of the corporation. This would amount, at any rate, to a recognition, by the town council, of the employment of the plaintiff. Besides, he would, in this instance, appear as their attorney on record; and the case would therefore fall within the principle of *The Mayor of Thetford's case* (c) before mentioned, where it was laid down that a mayor and corporation may do an act by record, though it be not under seal; and they may appoint an attorney in the same way; as the city of London does every year. It may be said, that is by custom; but it shews that [882] such a custom in a corporation is good. [Tindal C. J. I think you can hardly derive any argument from that. It is an isolated case. It has

(c) In that case the return to a mandamus directed to the corporation of Thetford, was objected to, as not being under their common seal, or under the hand of the mayor. Precedents having been searched for, many such returns were found, and the court held the return was sufficient, the act being on record; vide post, pp. 896, 897, in the judgment of the court.

been done from the earliest times, and is a solemn proceeding in the courts at Westminster. The lord mayor comes to the bar of this court attended by the late lord mayor, several members of the corporation, and the recorder, as the mouthpiece of the corporation; the appointment of the attorney is read and is entered on record on the prayer of the recorder (a)¹. This proceeding has been sanctioned by ancient custom. It may rather be said—*Exceptio probat regulam*. Cresswell J. Could any other corporation come to the court and ask them to do the same thing? Coltman J. In *The Mayor of Thelford's case* the question was not with regard to the corporation of London, but to another corporation.] The case of London was there referred to as affording a good argument applicable to other corporations, that they might do certain acts by record. It may be that London is so high a corporation that they do formally every year what other corporations do only when necessary. The corporation of London appoints a common serjeant every year (*Serviens ad Legem*, 241). Other corporations also may surely employ counsel, but is it necessary they should do so [883] under seal? [Tindal C. J. A counsel could not maintain an action against them (a)². Erskine J. An attorney duly appointed under seal would have the power to retain counsel.] In the same way it may be said that the mayor, being appointed the head of the corporation, may retain either counsel or attorney. In *Hartwell v. The Thames Haven Dock and Railway Company* (tried before Maule J., at Guildhall, on Saturday, 30th of April, 1842), where the plaintiff, the proprietor of a weekly publication, brought an action against the company, for advertisements inserted in the publication, an objection was raised that it was not shewn the authority to insert them was under seal; but the learned judge overruled the objection. [Tindal C. J. That would come within the exception that a trading corporation may do things necessary for the trade, without giving an authority under seal.] That doctrine has grown up merely from the inconvenience of adhering to the established rule, and not from any impossibility of doing so in the particular cases. There can be no doubt that attorneys do usually act for corporations, without having any appointment under seal. In actions by or against corporations the court never requires it to be shewn that the attorney on the record was appointed under seal.

The bills, Nos. 4 and 8 (*supra*, pp. 867, 868), arise out of the same proceeding, viz., the suit in Chancery; *The Attorney-General v. The Corporation of Poole* (2 Keen, 190: S. C. on appeal, 4 Mylne & Cr. 17). The question there was, as to the right of Mr. Parr, the plaintiff's predecessor in the office of town-clerk, to recover a compensation secured to him by a bond, which it was alleged was fraudulent. In this instance there was not only a thorough recognition by the town council of [884] the plaintiff's employment, but an express authority and direction to him in the fullest terms to appear in the suit for the corporation, embodied in a resolution of the council. And they afterwards voted him the sum of 100l. on account of his expenses in that suit. The resolution authorizing the mayor to affix the corporate seal to the answer, amounted to a recognition in pais of the plaintiff's employment.

The bill, No. 5 (supra, p. 870), was in respect of an action brought by Mr. Parr on the same bond. The attorney on the record in that action was not the plaintiff, but his London agent. In this case the plaintiff had entered an appearance at the request of the mayor, and the act was confirmed by an express resolution of the council. These are the only bills in dispute.

(a)¹ "The lord mayor's warrant" is in the following form :—

"Michaelmas term, in the year of the reign of the Queen Victoria.

"London (to wit). The mayor, commonalty, and citizens of London, appoint Henry Belward Esq.* to challenge, prosecute, and defend all the liberties, privileges, and franchises of the said city."

This warrant, engrossed on parchment, is handed to the recorder, who reads it aloud; it is then handed back to one of the masters, who also reads it aloud. The recorder then prays that the warrant may be entered of record; which the Lord Chief Justice orders to be done.

(c) Counsel cannot maintain any action for fees, and they cannot sue a corporation for a salary pro consilio impendendo or for a retainer, unless the salary or retainer be granted by deed.

* The senior master ; formerly the senior prothonotary.

The expenses in question were all such as the corporation were justified in incurring and in paying out of the corporation funds; *The Attorney-General v. The Mayor, &c. of Norwich* (2 Mylne & Cr. 408), *Reg. v. The Mayor, &c. of Bridgewater* (10 A. & E. 281), *Reg. v. Paramore* (id. 286), *Holdsworth v. The Mayor, &c. of Dartmouth* (11 A. & E. 490, 3 P. & D. 308).

Another question arises as to the bills, Nos. 4 and 8, namely, whether the plaintiff can now have a right to recover in respect of a suit which is not yet terminated. It was formerly considered to be the rule that when an attorney once appeared, or undertook to be attorney for another he should not be permitted to withdraw himself; but that it was his duty to proceed in the suit, although his client neglected to bring him money; *Tidd's Prac.* 26 (9th edit.). But the rule is now settled on the more equitable footing,—that he may abandon the conduct of the suit, and recover his costs up to that time; [885] *Rousson v. Earle* (Moo. & M. 538), *Van Sandau v. Browne* (9 Bingh. 402, 2 Moo. & Sc. 543), *Lawrence v. Polls* (c).

As to the question of appropriation. Money had been paid to the plaintiff on account generally; and the receiver has a right to appropriate a payment to any items of his demand which are due to him in equity and conscience, so long as such appropriation is not inconsistent with any directions given by the party making the payment; *Mills v. Fowkes* (d).

Channell Serjt., (with whom was Bere), for the defendants. The plaintiff's claim arises out of ten different bills of costs. The arbitrator has made his award in favour of the defendants except as to Nos. 6, 7, 9, and 10. The plaintiff requires the court to come to a different conclusion as to those bills from that at which the arbitrator has arrived. The defendants on the other hand say, that the amount of the verdict ought to be reduced by appropriating the sums that have been paid,—and which the plaintiff has improperly appropriated to Nos. 2 and 3,—to the further reduction of the four first-mentioned bills. The arbitrator was empowered to make interlocutory awards; and the one under consideration is final only as to the cause of action, and not as to all matters in difference. Suppose, then, the court should be of opinion that the action cannot be maintained in respect of the charges in Nos. 4 and 8, by reason of there having been no notice of the plaintiff's intention to discontinue his conduct of the suit, he would still have it in his power to give such notice hereafter, and would not be concluded from recovering upon that ground.

[886] The bill No. 1 has been abandoned. With regard to the others in dispute, the arbitrator has expressly found that there was no retainer of, or contract with, the plaintiff under the seal of the corporation. And the first question is, whether in the absence of such a retainer or contract, the plaintiff is entitled to recover.

It is not necessary to consider the old authorities, which are uniform in establishing the rule, that a corporation cannot contract except under seal. Upon that rule two exceptions have been grafted, within one or the other of which it is imperative upon the plaintiff to bring his case. The first exception—which appears to be almost coeval with the rule—is, that in some trifling matters a corporation may make certain appointments without deed. The exception is thus stated in *Bac. Abr. Corporations* (E.) 3. "But a corporation may employ one in ordinary services without deed, as a butler, cook," &c.; and then it is added, "but not to appear for them in an assize, or any other act which concerns their interest or title" (a), which latter sentence is an authority against the plaintiff in the present case. The second exception is the creation of modern times, and refers only to trading corporations, which have been brought into life, for the specific purpose of some particular trade. This exception was not thoroughly admitted in *The East London Water Works Company v. Bailey* (4 Bingh. 283, 12 B. Moo. 532); but that case was distinctly overruled, and the exception in question firmly established, by the subsequent cases of *Beverley v. The Lincoln Gas Light and Coke Company* (6 ibid. 829, 2 ibid. 283), *Church v. The Imperial Gas Light and Coke Company* (ibid. 846, 3 ibid. 35); in which cases the distinction as to executory and executed [887] contracts, was overruled with respect to such trading companies. In all these modern cases the ancient rule is laid

(c) 6 C. & P. 428. See also ante, vol. iii. p. 484, n., and cases there cited.

(d) 5 N. C. 455, 7 Scott, 444. See also *Williams v. Griffith*, 5 M. & W. 300.

(a) Citing 1 Vent. 47; *Horn v. Ivy*, 1 Mod. 18, S. C. See also the case of *Assize of fresh Force* brought in London, *Panel v. Moor, &c.*, Plowd. 91.

down, and the new principle adopted is clearly mentioned as an exception to that rule. It is quite an error, therefore, to suppose that the old rule has been abrogated. It was recognised and acted upon in this court in *Gibson v. The East India Company* (5 N. C. 262, 7 Scott, 74); where it was held that the retiring pension of a military officer of the East India Company, granted by the company, but not by deed, did not upon his bankruptcy pass to his assignees, as it could not have been enforced by the officer against the company. The previous cases of *Beverley v. The Lincoln Gas Light and Coke Company*, and *Church v. The Imperial Gas Light and Coke Company* were there brought under the review of the court; and the doctrine thereby established was upheld; but on the same ground, of its being an exception to the general rule. The rule was again recognised by the court of Exchequer in *Mayor, &c. of Ludlow v. Charlton* (6 M. & W. 815), which has been referred to by the other side. That case was not decided on the narrow ground that the contract related to land; but upon the general application of the old rule. In delivering the judgment of the court, Rolfe B. says, "Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts, entered into by corporations, to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to [888] bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation, knows that he is liable to be bound in his corporate character, by such an act; and persons dealing with the corporation know, that by such an act, the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerous attended is, after all, not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating, as valid, contracts made with particular members and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience." The rule for the necessity of a seal has been carried so far, that in *Yarborough v. The Bank of England* (16 East, 6), it was held, in an action of trover against a corporation, that the court would, after verdict for the plaintiffs, presume that an authority to do the wrongful act complained of had been given under seal.

The present case falls within neither of the exceptions mentioned. The municipal corporation of Poole is obviously not a trading corporation; and the appointment of an attorney cannot be considered as a trifling matter.

It is said that a corporation may appoint an attorney by matter of record, as in the instance of the city of [889] London. But that example, as has been observed by the court, does not advance the argument; for that is one of the particular privileges of that city, like that of certifying their customs by their recorder, a privilege which other corporations have not; *Day v. Savadge* (Hob. 85 (87)). The recorder's certificate (b) is in the nature of a writ (c), and if it be false, no action will lie against the recorder, as he is but the mouthpiece of the corporation, but the action must be brought against the mayor and aldermen; *Bac. Abr. Customs of London* (citing Hobart, ut supra). [Tindal C. J. In the old forms of appearance by attorney it was not stated that he was appointed by deed, even when the action was against a corporation.] The appearance is only recorded by the attorney for a particular purpose. If an attorney, without authority acts for another, he may be punishable, but the court do not require him to shew his authority. But when he sues for costs, he is then bound to shew a retainer. It is said to have been suggested by Lord Tenterden, that an attorney ought always to have a retainer in writing (e); but at all events he is bound to shew some retainer

(b) See *Crosby v. Hetherington*, post.

(c) Rather of a return.

(e) In *Owen v. Ord*, 3 C. & P. 349. See also 1 Lill. Prac. Reg. 134, 137.

to entitle him to recover; and the question here is, whether there can be any retainer by a corporation, otherwise than by deed. And certainly if any one appointment more than another requires to be under the corporate seal, it would appear to be that of an attorney, who has of necessity so much authority delegated to him.

With regard to the bill No. 2, the arbitrator has found that there was no retainer, and that the plaintiff had no right of action in respect thereof; but the question is left for the court to decide, whether the town council could bind the corporation funds by the resolutions that are set out in the award. Assuming the necessity of an appointment under seal, there was clearly no valid contract. There was not even a resolution by the council previously to the work being done in respect of which the charges are made. The resolutions are merely as to the payment of the plaintiff's bill. The sixty-ninth section of the 5 & 6 W. 4, c. 76, points out the manner in which meetings of the town council are to be summoned; and unless that course was followed, a resolution passed at a meeting would be of no avail. [Tindal C. J. Where the arbitrator says it was resolved by the town council, must we not take it that they were properly summoned (a)?] Admitting that to be so, still there is no resolution in this particular instance, authorising the employment of the plaintiff. There is only an order from the mayor in the first instance, and the subsequent resolution as to the payment, which is relied upon as a ratification. As town-clerk, the plaintiff had the custody of the voting papers, and it was his duty to permit any burgess to inspect them, on payment of 1s. for every search, under sect. 35 of the 5 & 6 W. 4, c. 76. A mandamus was moved for to compel the plaintiff to permit an inspection of these papers; the costs were incurred in opposing that rule; but the plaintiff was bound to defend himself and pay the costs out of his own pocket, especially as he had a salary allowed him as town-clerk. An overseer is in certain cases bound to produce the poor-rate (see *Wethered v. Calcutt*, ante, 566); and a mandamus would lie against him if he neglected his duty in doing so; but could he charge upon the poor-rate his expenses of opposing the rule? The plaintiff, therefore, having no legal claim to these costs, and the corporation being under no legal liability to pay them, the subsequent resolution to [891] pay him is of no value. [Cresswell J. Does it not admit that if there could be a binding retainer there has been one?] It is submitted that such is not its effect. The plaintiff in fact was acting as his own client and his own attorney. The supposed ratification by the town council could not create a liability that did not exist previously.

As to the bill No. 3, the plaintiff has already received the costs as taxed between attorney and client; and there is nothing to shew a contract to pay him any further costs.

As to Nos. 4 and 8, it may be admitted, that as far as the town council can, by their resolutions, bind the corporation, the corporation would be bound in respect of the charges in these two bills. But the question would still remain as to the right of the plaintiff to recover, the suit not being determined. There is no doubt that an attorney is not compelled, in all cases, to conduct a suit or action to its end, and that he may put himself in a position to recover his costs pending the suit. But the general contract arising out of his retainer is, to conduct the suit to the end; and he can only vary that contract by giving a regular notice of his intention not to continue to act as attorney. That principle is laid down in *Harris v. Osbourn* (2 C. & M. 629, 4 Tyrwh. 445), and indeed in the cases cited upon this point on the other side.

In No. 5 there was a resolution of the town council previous to the employment of the plaintiff; but that, for the reasons before stated, it is submitted does not amount to a valid retainer.

As to the reduction of the verdict:—that turns on the right of the plaintiff to appropriate the money he has received to the payment of the bills Nos. 2 and 3. But if those bills are not recoverable, the plaintiff has no such right. A party can only appropriate a pay-[892]-ment where a legal liability to make the payment exists on the part of the debtor, or at least has at some time existed; *Wright v. Laing* (3 B. & C. 165, 4 D. & R. 783).

Bompas Serjt., in reply. The distinction between trading corporations and others does not appear to be well founded. *The Mayor of Stafford v. Till* was the case of a municipal corporation. There may be a good reason why an act relating to the lands

(a) Or that all were present; in which case the summons would be immaterial.

of corporations should require the solemnity of a seal, as was the case in *The Mayor of Ludlow v. Charlton*. So as to what is said in Bac. Abr. Corporations (E) 3 as to authorising a party to appear for them in an assize. But it is nowhere said that they cannot, except under seal, appoint an attorney to appear for them in an action. It is stated in Tidd's Practice (p. 84, 6th edit.) that attorneys were anciently appointed in court, when actually present; but that they are now usually appointed out of court by warrant (vide infra, p. 897, n. (c)), which should regularly be in writing; but an authority by parol is sufficient to support a payment. *Gibson v. The East India Company* was decided upon the ground that the pension was in the nature of half pay. From the case of *Rex v. Arnold* it appears that it was the duty of the plaintiff to refuse the inspection of the papers; and surely he ought to be paid for resisting the mandamus, especially as the town council resolved that it should be resisted. As to the plaintiff's right to recover his expenses before the termination of the proceedings in Chancery, no injury can arise to the defendants from the demand; although the suit is going on, the bill has been called for by the defendants. In *Wadsworth v. Marshall* (2 C. & J. 665) it was held that an attorney who has undertaken a cause is not bound to proceed without adequate [893] advances from time to time by his client, for expenses out of pocket; and therefore that the court would not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supplied him with sufficient funds to pay the expenses out of pocket thereby incurred. [Erskine J. The distinction made in that case seems to be, that an attorney may say he will not go on with a suit without funds to meet expenses out of pocket; not that he can demand payment for his services.]

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was an action of debt brought by an attorney who was town-clerk and clerk of the peace of the borough of Poole, to recover from the corporation of the mayor, aldermen, and burgesses of Poole, the amount of ten several bills of costs, numbered from 1 to 10.

By an order of nisi prius the cause was referred to an arbitrator, who found, as to all the bills except those numbered 6, 7, 9 and 10, that the plaintiff had no retainer under the common seal of the corporation, and decided that he could not recover. As to the bills numbered 6, 7, 9 and 10, he found that the business therein mentioned was done by the plaintiff in his capacity of town clerk and clerk of the peace, and directed that a verdict should be entered in his favour for the sum of 718l. 9s. 7d., which he found to be due in respect of those bills. He also found, that after all the bills had been delivered, money was paid on account, generally, by the corporation, and that the plaintiff had applied a portion of it to the bills numbered 2 and 3; and he stated specially the facts upon which his award proceeded, and submitted for the opinion of the court the following questions:—First, whether the facts [894] stated in the award, furnished sufficient evidence of a retainer of the plaintiff, so as to enable him to maintain this action in respect of the charges contained in the bill No. 1 against the defendants. Secondly, whether, in the absence of any authority under the seal of the corporation, the facts stated furnished evidence of a valid contract or retainer, binding the corporation, so as to enable the plaintiff to maintain this action for the whole, or any, of the bills No. 2, 3, 4, 5 and 8, against the defendants. Thirdly, whether the charges in the bills No. 1, 2, 3, 4, 5 and 8 were matters for concerning which the corporation could enter into a valid contract or give a retainer binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants. Fourthly, whether the plaintiff had any right of action against the defendants to recover the charges contained in the bills Nos. 4 and 8, the suit to which they refer being undetermined. Fifthly, whether the plaintiff had a right to appropriate the payment of two sums, viz. 141l. 11s. 10d. and 82l. 7s. 1d., part of the said sum of 350l., to the bills No. 2 and No. 3 respectively. Of these questions, however, it is only necessary to determine those relating to the sufficiency of the retainer, and the application of the money paid on account.

The case was elaborately argued in last Easter term, when it was conceded, and rightly conceded, that, in respect of the bill No. 1, amounting to 1591l. 1s. 4d., the action was not maintainable, there being no sufficient evidence of a retainer of the plaintiff by the corporation. But, as to the residue of the bills disallowed by the arbitrator, it was contended, that the facts appearing on the face of the award were

sufficient to prove a valid retainer, although not under the seal of the corporation; and several instances were pointed out in [895] which it has been held that corporations aggregate, having a head, may, by parol, appoint servants for the performance of certain acts in their behalf. But the acts which may be so done have always been considered as exceptions out of the general rule of law, and relate either to trivial matters of frequent occurrence, or such as from their nature do not admit of delay. Cases were also cited in which actions founded on simple contracts have been maintained by and against corporations aggregate. These instances are, for the most part, modern, and relate to corporations established for particular purposes, and where the making of such contracts was essential for carrying those very purposes into execution. For some time it was considered that such actions could be maintained on executed contracts only: but in *Church v. The Imperial Gas Light and Coke Company* (6 A. & E. 846, 3 N. & P. 35), the same principle was extended to actions on executory contracts. These two classes of cases, viz. those relating to the appointment of servants by corporations aggregate, and those founded on simple contracts entered into by trading companies, and the principle upon which they may be supported, were lately considered by the court of Exchequer in *The Mayor, &c. of Ludlow v. Charlton* (6 M. & W. 815); and it was held by that court that a municipal corporation was not bound by a contract to pay money, although the consideration had been executed, such contract not being made under their common seal. That case appears to us to be a direct authority in favour of the present defendants; for the appointment of an attorney to conduct important suits affecting the rights and property of the corporation, cannot be considered a trifling matter; nor is it of such frequent occurrence, or of such immediate urgency, as to render it convenient to post-[896]-pone it until the seal of the corporation can be affixed to the retainer. Still less can it be said that the retainer of an attorney falls within the principle of the decisions relating to contracts made by corporations established for trading purposes.

But another class of cases was cited at the bar, in which corporations aggregate have been allowed to maintain actions on simple contracts not falling within either of the principles considered in *The Mayor, &c. of Ludlow v. Charlton*; such as *The Barber Surgeons of London v. Pelson* (2 Lev. 252), which was an action of assumpsit for money forfeited by a by-law; and *The Dean and Chapter of Rochester v. Pierce* (1 Campb. 466), which was assumpsit for use and occupation: and it was contended that all contracts to be binding must be mutual, and that therefore, where corporations may sue upon simple contracts, it follows as a legal consequence they may also be sued. But we think the proposition as to the necessary mutuality of contracts was stated too broadly, and that it must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise. The cases last cited do not therefore shew that corporations may be sued on parol contracts.

It was argued for the plaintiff, that, if municipal corporations cannot make contracts in general, yet they may nevertheless make a valid appointment of an attorney, without seal; and the annual appointment of an attorney by the corporation of London was referred to. But that appointment is recorded; and in *The Mayor of Thetford's case* (1 Salk. 192, 3 Salk. 103, 2 Lord Raym. 848, Lord Holt, 171), Holt C. J., explained the ground upon which such appointment is binding. He there said, and the rest of the court concurred with him, "that, though a corporation cannot do an act in pais [897] without their common seal, yet they may do an act upon record: and that is the case of the city of London every year, who appoint an attorney by warrant of attorney in this court without either sealing or signing; and the reason is, because they are estopped by the record to say it is not their act" (1 Salk. 192).

It appears to us, therefore, that none of the cases or arguments brought before us are sufficient to establish a right of action in the plaintiff to recover the amount of the bills which the arbitrator disallowed, and that the law laid down by the court of Exchequer in *The Mayor, &c. of Ludlow v. Charlton* must govern this case.

With respect to the appropriation of a portion of the money received by the plaintiff to the discharge of the bills No. 2 and 3, it appears to us, that, although the plaintiff could not have maintained an action to recover the amount of those bills, yet, as the money was paid generally on account of all the bills after these two bills were delivered, the appropriation of the money made by him at the time cannot now be questioned. The claim of the plaintiff on these two bills was a just and equitable claim, although from the absence of a contract under seal, it could not be made the

subject of an action in a court of law. The case, therefore, is not like that of *Wright v. Laing* (3 B. & C. 165, 4 D. & R. 783), where there were two contracts, the one lawful, the other forbidden by law, and where no specific appropriation had been made at the time of payment (c).

The result is, that the verdict must be entered according to the direction of the arbitrator.

Rule accordingly (d).

[898] FITT AND ANOTHER v. CASSANET. Nov. 24, 1842.

[S. C. 5 Scott, N. R. 902; 12 L. J. C. P. 70; 6 Jur. 1125.]

A. agreed to purchase thirteen tons of palm oil scrapings from B. by sample, in the bulk, at 8l. per ton. A. paid a deposit of 22l., and B. delivered part of the article. A. then gave notice that the quality of the oil delivered did not correspond with the sample, and required B. to fetch away what had been delivered, and to repay the 22l. B. resold the residue, but it was not shewn at what time such resale took place.—Held, that A. could not recover the deposit as money had and received, unless there was fraud in the contract, or there had been an agreement between the parties to rescind such contract.—Quære, whether he might have recovered if the re-sale by B. had been before the notice by A.

Assumpsit, for money had and received. Plea: non assumpsit.

At the trial before Lord Abinger C. B. at the last assizes for Surrey, it appeared that the action was brought to recover the sum of 22l. which had been paid by the plaintiffs, who were oil and tallow merchants, to the defendant, as a deposit upon the purchase of thirteen tons of fat and palm oil scrapings, at 8l. per ton. Before the contract was entered into, a sample of the article had been sent to the plaintiffs. Wishing to see the bulk, they sent their foreman, who inspected and sampled it; and one of the plaintiffs afterwards did so himself. This was in the month of November. They then agreed to take it at the price above mentioned. They paid the 22l. on account, and five tons were delivered to them; one ton at one time, and the remaining four at another. After the second delivery the plaintiffs complained to the de-[899]-fendant that the article delivered did not correspond with the samples; that there was a quantity of rubbish at the bottom of the casks; and on the 3d of December they gave the defendant notice to take away the casks that had been delivered, and to repay the 22l. Some evidence was given on the part of the plaintiffs in order to shew that the defendant agreed to rescind the contract, and only required time to pay back the money. It was proved that the defendant had sold the remaining casks to a third party at 8l. 10s. per ton; but it did not appear at what time this resale took place.

The Lord Chief Baron directed the jury, that if a contract was entered into it could not be rescinded, unless by consent of both the parties, except in a case of fraud; and he left it to them to say; first, whether there had been any fraud in the sale on the part of the defendant; and secondly, whether there had been an agreement to rescind the contract. The jury negatived both points and returned a verdict for the defendant.

(c) A. does two acts of service for B., one at B.'s request, the other without any provable request. Quære, whether A. can appropriate a general payment made by B. to a claim set up by A. in respect of the latter act.

(d) In Com. Dig. Pleader (2 B. 2) it is said, "that the corporation must appear by an [898] attorney, appointed under their common seal;" citing Bro. Abr. Corporations et Capacities, 28. The placitum in Brooke, referred to by Comyns, does not bear out the latter statement; but in tit. Garrantie d'Attorney, 36, it is said "Per Choke justice, a corporation cannot appear but by attorney by deed under their common seal, and otherwise the warrant (of attorney) is void; quod non negatur: ideo quære the usage thereof at this day;" citing 21 E. 4, 13. And again, in tit. Corporations, 63. "Choke J. Warrant of attorney of a corporation shall be by their common seal, and otherwise it is void;" citing 21 E. 4, 7, 12, 27, 67. See also *Rex v. The City of Chester*, Skin. 154.

Channell Serjt., on a former day (Nov. 5) in this term obtained a rule nisi for a new trial on the ground of misdirection. He submitted that the defendant, having by selling the residue of the article, put it out of his power to perform the contract, the plaintiffs were entitled to consider it as rescinded; and that they were not precluded from doing so by having received and retained a portion of the article, as they had given the defendant notice as soon as they discovered that it did not correspond with the sample. He cited *Grounsell v. Lamb* (1 M. & W. 352).

Sir Thomas Wilde Serjt. (with whom was G. Taylor) now shewed cause. The plaintiffs have already received 40l. worth of the oil; they have paid 22l., and remain, [900] therefore, debtors to the defendant in the sum of 18l. on account of what they have actually received and retained. They have refused to receive the residue. What then was the defendant to do? He sells the residue—(for the fair inference is, that such sale was after the plaintiffs' notice that they would not receive the residue)—intending probably to charge the plaintiffs with the difference that might arise in the amount on such resale. But it turned out that the difference was in favour of the defendant: as upon the re-sale the oil fetched 10s. a ton more than it had been sold for to the plaintiffs. That fact negatives all fraud in the original contract. The re-sale, under such circumstances, does not amount to a rescinding of the contract by the defendant. If there has been a breach of contract on his part, the plaintiffs may sue on such breach, but clearly they cannot recover in the present form of action. [Tindal C. J. Non constat here that the plaintiffs have not used the oil they received.] The plaintiffs now wish to present their case as if they were desirous to complete the contract, but the defendant would not do so.

If the goods had been re-sold for less than the original price, the defendant would undoubtedly have been entitled to sue the plaintiffs for damages on the contract; but no damage arose, as the goods sold for more than the plaintiffs agreed to take them for. [Tindal C. J. There are some cases in which the goods must be re-sold, as where they are perishable.] *Grounsell v. Lamb* is very distinguishable from the present case. That was an action to recover the price of a cutting machine manufactured by the plaintiff for the defendant, and it was held, that the defendant might shew, under the general issue that the machine was sold under a condition, that if it did not answer its purpose, nothing should be paid for it, and that in fact it turned out to be useless: and under these circumstances it was [901] also held, that although the defendant was not proved to have returned the article, still the plaintiff was not entitled to damages on the quantum valebat, without shewing some new contract to be implied from the defendant's dealing with the article. The present is the case of a sale of a commodity in bulk with a part delivery, and no such condition therefore can be implied.

Channell Serjt. (with whom was Bovill) in support of the rule. In December the defendant had notice to take away the oil that had been delivered. The defendant sold the residue, and thereby shewed that he considered the contract was rescinded. [Tindal C. J. There is no date to shew whether the re-sale was before or after the plaintiffs' notice. If it was before, the plaintiffs are bound to shew that.] If the contract was not rescinded, the plaintiffs might have brought an action for its non-completion. [Tindal C. J. Perhaps they would have found it difficult to prove that they were ready and willing "to pay the price of the goods." Maule J. You say that even though there was a dissent on the part of the plaintiffs, yet the defendant, by selling the goods to a third party, has entitled the plaintiffs to treat the contract as rescinded.] That is the argument. If the resale had been after action brought, it would have been wholly immaterial; it must, therefore, be taken to have been before. [Maule J. The plaintiffs could only have been in the right in giving notice to the defendant to take the goods back, on the ground that there had been fraud in the original contract; but fraud has been negatived. The plaintiffs therefore had no right to give that notice, and can derive no right by insisting on the defendant's doing that which he was not bound to do.] It was not necessary to give any notice, except for the purpose of shewing non-acceptance of the goods. The plaintiffs are entitled to recover the money which has [902] been paid as a deposit upon a contract which the defendants have not performed, and are not in a situation to perform. [Coltman J. Might not the defendant sue upon the original contract, and allege, and prove, his readiness and willingness to fulfil the same, but that he had been discharged from so doing by the plaintiffs?] That would depend upon the period when he re-sold the

goods. If he had done so before he received the plaintiffs' notice, he clearly would not have been in a situation to prove that allegation. *Grounsell v. Lamb* is an authority to shew that the mere retention of goods by the vendee, does not entitle the vendor to sue, either on the original contract, or on an implied new contract, unless it appears that he has made use of the goods. [Sir T. Wilde Serjt. In that case it was part of the contract that if the article sold was of no use to the vendee, it should not be paid for; and it turned out to be useless.] In *Shipton v. Casson* (5 B. & C. 378, 8 D. & R. 130), A. contracted to sell and deliver to B. a large quantity of bark. He delivered a small part only, and failed to complete his contract. B. never returned the part delivered; and it was held that A. was entitled to set-off the value of that part against a demand which B. had against him. There the vendee elected to retain the part which had been delivered to him. The same principle was established in *Ozendale v. Wetherell* (b). [Coltman J. Is it not incumbent on the plaintiffs to shew that no action could be maintained against them?]

TINDAL C. J. I think that the verdict which has been found for the defendant in this case ought not to be disturbed. Two points were left by the Lord Chief Baron to the jury—first, whether there was any fraud [903] on the part of the defendant in the original contract—and, secondly, whether there was any subsequent agreement between the parties to rescind their contract. The jury have found in the negative on both those points; and the evidence appears to have been fully sufficient to warrant their finding. But there a third circumstance is alleged upon the part of the plaintiffs as entitling them to recover: namely, that the defendant resold part of the palm oil scrapings—the subject matter of the original contract;—and it is argued, that as he has thereby incapacitated himself from performing the original contract, the law will not allow him to retain the money which was paid to him on account thereof. But assuming that to be so, it is necessary for the plaintiffs to shew when the re-sale took place. If it was after the plaintiffs had signified that they would not receive the rest of the goods, it certainly was not necessary for the defendant to keep them for an unlimited time. When a contract is rescinded, both parties are to be put in the same condition they were in before the contract was entered into. The time of the re-sale, however, in this case is left a perfect blank. An inference is sought to be raised by my brother Channell, that the re-sale was before the plaintiffs' notice that they would not receive the residue. But there is no evidence of that fact; and it behoved the plaintiffs, who relied on it, to establish it. I own I should rather infer that the determination of the plaintiffs not to receive the residue, was the first in order of time. Otherwise it is not easy to see why the defendant should subject himself to the liability of an action by the re-sale of the residue. The fair inference seems to me to be, that the plaintiffs were the first to repudiate the further performance of the contract, and then the conduct of the defendant would be consistent with what the law would allow. It is difficult to see how an action for money had and received could be [904] maintained by the plaintiffs unless they were in a situation to recover upon the original contract. The action for money had and received would be a compendious form of recovering back the deposit, but it would stand upon the same footing as the right to sue on the contract. But in order to recover upon that, the plaintiffs must have averred that they were ready and willing to perform their part of the contract, and in the proof of that allegation they must have failed.

COLTMAN J. If it had been proved that the re-sale by the defendant took place before the notice by the plaintiffs in December, I should have thought there was some weight in the arguments which have been urged on their behalf; because the defendant would have been disabled from suing upon the contract, which was an entire one. And in that case the fact of part of the goods being in the possession of the plaintiffs, would not, according to the decisions, have operated to prevent their recovering in this form of action. But as there was no evidence of the time when the re-sale took place, I think there is no pretence to set aside the verdict, and that the rule must be discharged.

ERSKINE J. I am of the same opinion. The plaintiffs say that the money which they seek to recover in this action was paid upon a contract, which has since been rescinded. They put their case on three grounds: first, that there was fraud in the original contract on the part of the defendant, which authorised the plaintiffs to rescind

(b) 9 B. & C. 386, 4 M. & R. 429. See also *Richardson v. Dunn*, 2 Q. B. 218.

it; secondly, that there was an agreement between them and the defendant that it should be rescinded; and, thirdly, that the conduct of the defendant in having re-sold the residue of the goods, authorised the plaintiffs to consider the contract as rescinded. The verdict negatives the fraud and the agreement to re-[905]-scind. To entitle the plaintiffs to recover on the last ground, they should have shewn that the resale by the defendant took place before the refusal on their part to complete the contract. But there was no evidence to that effect. I agree, therefore, that the rule must be discharged.

MAULE J. I am of the same opinion. In order to entitle the plaintiffs to maintain any action against the defendant, it is necessary that he should be in the wrong. It is incumbent on the plaintiffs to shew that. Now it is quite consistent with the evidence in the case and the finding of the jury, that the oil delivered was of the quality which the plaintiffs were bound to receive; and that the defendant re-sold the residue after the plaintiffs had refused to receive it. If that is the state of the case the defendant has done nothing but what he had a right to do. Without considering whether a special action would not be necessary for the breach of contract, if the defendant were in the wrong, or whether an action for money had and received would be maintainable, I think the evidence does not shew that the defendant has done any thing wrong, and therefore that no action will lie against him on the part of the plaintiffs, and consequently the present action for money had and received cannot be maintained.

Rule discharged.

[906] ANONYMOUS. Nov. 25, 1842.

The court will not, on the last day of term, grant a rule nisi for the plaintiff to bring in the record, in order to enter a suggestion to entitle the defendant to double costs.

Bompas Serjt. moved for a rule calling upon the plaintiff to bring in the record in order that a suggestion might be entered, to entitle the defendant to double costs.

TINDAL C. J. The rule would be a rule nisi, and this is the last day of term.

Per curiam. Rule refused.

BRISTOWE v. NEEDHAM. Nov. 25, 1842.

The plaintiff having an unsatisfied judgment to a large amount against the defendant, the latter obtained a rule nisi for security for costs in a subsequent cause, upon the ground that the plaintiff lived out of the jurisdiction. The court discharged the rule, upon the plaintiff's undertaking that the judgment should be set off against any costs to which the defendant might become entitled.

Channell Serjt., on a former day in this term, had obtained a rule nisi calling upon the plaintiff to shew cause why he should not find security for costs, on the ground that he was resident in Jersey out of the jurisdiction of the court.

Sir Thomas Wilde Serjt., now shewed cause, upon an affidavit which stated that the plaintiff had an unsatisfied judgment against the defendant for 22,000*l.*, which the learned serjeant submitted was a sufficient answer to the application.

[907] TINDAL C. J. The better course will be that the present rule should be discharged, upon the plaintiff undertaking to allow the judgment to be set off against any costs to which the defendant may become entitled.

Per curiam. Rule discharged accordingly.

CAUTY v. GYLL. Nov. 25, 1842.

Where money paid into court is taken out in satisfaction of part only of the plaintiff's demand,—there being other issues upon which the parties are proceeding to trial—the plaintiff is not entitled to tax his costs under R. T. T. 1 Viet.

Debt. The declaration contained five counts, claiming 5000*l.* in each; the first for money lent, the second, for money paid; and the third, fourth and fifth, upon accounts stated.

Pleas: First, except as to 30l. parcel, &c. never indebted. Secondly, as to the third count, except as to 30l., that the account was stated concerning moneys exceeding 10l. lost at gaming, contrary to the statute, &c. Thirdly, as to the third, fourth, and fifth counts, except as to 30l., that the statement of the accounts was obtained by fraud. Fourthly and fifth, to the fourth and fifth counts respectively, the same as the second plea. Sixthly, as to the 30l. payment into court. Issue was joined upon the first five pleas, and as to the sixth plea, the plaintiff took the 30l. out of court in full satisfaction of all the causes of action as to the said 30l. parcel, &c.

The plaintiff's attorney at the time of delivering the issues also delivered his bill of costs comprising the whole costs of the suit, including that of the replication, with a notice of taxation on the following day. The costs were taxed accordingly, no one attending on the part of the defendant. A summons was subsequently [908] taken out, calling upon the plaintiff to shew cause at chambers, why the master's allocatur should not be set aside, or why the taxation should not be reviewed, or why all proceedings on the allocatur should not be stayed till after the trial of the issues. Cresswell J., before whom the parties attended in pursuance of the summons, refused to make any order, but gave two days' time to the defendant to apply to the court.

Bompas Serjt. on a former day in this term, had obtained a rule nisi, accordingly, in the terms of the summons.

Channell Serjt. now shewed cause. The question is, whether in this stage of the cause the plaintiff is entitled to what may be termed an interlocutory taxation of his costs. It is submitted that he is so under the rule of Trinity Term, 1 Vict.(a); by which it is ordered, that "the plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action, in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs so taxed; or the plaintiff may reply, 'that he has sustained damages,' (or, 'that the defendant was, and is indebted to him,' as the case may be,) 'to a greater amount than the said sum;' and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit." The present case falls clearly within the first branch of this rule, which branch has no necessary connection with the latter. If the parties go on to trial, and [909] the defendant should succeed upon the issues, he will then have his remedy for his costs; but the plaintiff seems to be entitled to his costs up to the present time. [Maule J. This appears like the case of a tender as to part of the demand; in which case, if the plaintiff takes the money out of court, and yet goes on to trial, he has never been considered as entitled to his costs until the trial is at an end.]

TINDAL C. J. I think the meaning of the rule must be that the plaintiff shall be entitled to tax his costs only where the money is accepted in satisfaction of the whole demand; and not where there are other issues upon which the parties are proceeding to trial.

Per curiam. Rule absolute.

HAMLET v. BREEDON AND SIX OTHERS. Nov. 25, 1842.

In trespass against several defendants, one defendant, who alone has demanded a declaration, which has not been delivered, is not entitled to sign judgment of non pros. for all the defendants.

This was an action of trespass against seven defendants. The writ of summons issued on the 15th of June 1841; all the defendants were served by the 24th of that month, and appearances were entered for them by the 28th. No further steps were taken till the 3d of June in this year, when a declaration was demanded on behalf of the defendant Breedon, who had appeared by a separate attorney. On the 8th the plaintiff obtained an order for four days' time to declare against Breedon; and on the 13th obtained a rule for further time until the first day of this term. On the 7th of November, judgment of non pros. was signed, on behalf of all the defendants, by the attorney who appeared for Breedon.

(a) Substituted for the 19th rule (Pleading) H. T. 4 Will. 4.

[910] Sir T. Wilde Serjt., on a former day in this term, upon an affidavit of the foregoing facts, had obtained a rule nisi to set aside the judgment of non pros. for irregularity, on the ground that as there had been a demand of declaration on the part of one defendant alone, the plaintiff was only in default in respect of that particular defendant, and that such default did not authorise a judgment of non pros. on behalf of all the defendants.

Bompas Serjt. now shewed cause. The judgment was perfectly regular. The rule is thus laid down in Archbold's Practice (page 892, 4th edit.). "If the action lie against several defendants, the plaintiffs may be non-processed by any one, if all have appeared; but if all have not appeared, then those, or any of those, who have appeared, cannot non-pros the plaintiff, even in trespass." In *Philpot v. Muller* (1 Dougl. 169, n.) Buller J. said there was a difference between a nolle prosequi, and a judgment of non pros.; for that by the latter, the plaintiff is put out of court as to all the defendants. The judgment of non pros. must be signed for all the defendants; *Pryce v. Foulkes* (4 Burr. 2418). In that case there being seven defendants, they signed seven distinct judgments of non pros. which were set aside as irregular (see also *Powell v. White*, 1 Dougl. 169). [Maule J. The objection here is, that all the defendants were not entitled to non-pros the plaintiff. If they had been so entitled, perhaps one might have signed judgment for all. There has only been a demand of declaration by one defendant; the plaintiff may still declare against the others.] It is submitted that upon the authorities the defendants cannot sign several judgments of non pros. [Maule J. That [911] must be where they are all entitled to judgment, and choose to avail themselves of their right. In Archbold's Practice, it is further said, after the rule that has been cited, "unless the plaintiff have actually declared against some of them, or have taken out a rule for time to declare against some of them, in which case the others may sign judgment of non pros." *Roe v. Cock* (2 T. R. 257) is cited as an authority for that position. There the plaintiff had joined two persons in a latitat, and had sued one only: and it was held that the other might sign judgment of non pros. The plaintiff had, in effect, severed the action, and it was the same as if he had brought two separate actions. Here, the action is joint. The latitat was not properly the commencement of the action, as the writ of summons now is. It was a mere process to bring the parties into court; and bringing two parties jointly into court, would not be the same as jointly suing them. [Maule J. Upon Breedon alone demanding a declaration, might not the plaintiff have declared against him alone?] Having joined all the defendants in the same writ, he could not proceed against one only. He might have declared against them all, notwithstanding the demand for a declaration was by one only. [Tindal C. J. The real difficulty appears to be this. One defendant out of seven has signed a general judgment of non pros. when the other six were not entitled to it. What authority had he to put the other defendants in a different position?] The argument is, that he was entitled to sign for all. [Tindal C. J. In the cases referred to it appears that all the defendants had the right. The right of one appears to be coupled with a condition—that the others are entitled.] If all the defendants have appeared they are all entitled. [Maule J. Suppose all have appeared, and one of them [912] wants to non-pros the plaintiff, and the others want to go on with the action, could the one in that case sign for all?] It is submitted that he could. If one defendant sign non pros. in one week, and another in another, that would be bad. [Maule J. If there can be only one judgment of non pros. that would be so.] There is no difference in this respect between a nonsuit and a non pros. One defendant may have a nonsuit as to all. In *Allington v. Vavasor* (2 Salk. 455) it was held that in trespass against four, there can be but one nonsuit for want of declaring. It is there called a nonsuit instead of a non pros.(b). In *Murphy v. Donlan* (5 B. & C. 178. *Murphy v. Tomlan*, 7 D. & R. 619) it was held, that after judgment by default against one of two defendants, the plaintiff upon the trial of an issue by the other defendant, might elect to be nonsuited. [Maule J. That is, as to the defendant who had pleaded. Abbott C. J. there expressly says, "there is no

(b) Non pros. (non prosecutus est breve), is the law Latin term, and nonsuit the law French term, to denote that the plaintiff has made default in prosecuting his action. The latter term is now used with reference merely to such an abandonment taking place at the trial; but this is a modern distinction.

inconsistency in allowing a plaintiff to be nonsuited, as to the defendant who has pleaded, although the other defendant may have suffered judgment by default." Tindal C. J. It is a nonsuit quâ the one who goes before the jury. If there can be a nonsuit as to one defendant, why should there not be a non pros. also? Erskine J. *Murphy v. Donlan* was a case ex contractu. Maule J. There are cases in which an action lies against one only, or against several. There are others where the action must be brought against several. In the former, if more than one defendant are joined in the action, why should there not be a nonsuit or non pros. as to one, and the case proceed as to the others?]

In *Palmer v. Feistel* (2 Dowl. P. C. 507) it was held, that in an action against several defendants, a judgment of non pros. can-[913]-not be signed until all have appeared. A plaintiff cannot now include four persons in a writ of summons, and sue only two. [Tindal C. J. Is that so? Coltman J. By the rule M. T. 3 W. 4, No. 1, it is ordered "that every writ of summons, &c. shall contain the names of all the defendants, if more than one, in the action, and shall not contain the name or names of any defendant or defendants in more actions than one." But it does not state that a plaintiff shall not declare against fewer than he has summoned. Erskine J. Suppose a summons against three, and an appearance by all, and a declaration against two only, would the third be entitled to sign a judgment of non pros. as to all? Probably he would. But the whole proceedings would be irregular. A discontinuance as to one would clearly be a discontinuance as to all. One defendant cannot demand a declaration and sign a judgment of non pros. and then another defendant make a separate demand and separately non pros. After the demand of declaration by one the plaintiff is bound to deliver the declaration against all. [Tindal C. J. The argument would be as strong if some of the defendants had not appeared.] There cannot be a non pros. until all have appeared. [Tindal C. J. The plaintiff need not declare till there has been a demand of declaration.] There has been a demand here by one defendant who is sued jointly with others. *Caldwell v. Blake* (a)¹ may be relied upon on the other side. That case is not very intelligible. It is stated that a motion was made to set aside the declaration for irregularity, and that the only process against the defendant was against two, of whom the defendant was one (b)¹. It was contended that the [914] declaration ought to correspond with the writ, and the rule of M. T. 3 W. 4 (which has been cited by the court in this case) was referred to. And Lord Abinger C. B. said: "Your objection at present is too early. You will be in time when the plaintiff has declared against the other" (a)². [Tindal C. J. The learned judge meant that there was no irregularity at that time, and that the defendant should wait to see if the plaintiff declared against the other defendant in another action, and then there would have been an irregularity (b)². The learned serjeant also referred to *Knowles v. Johnson* (2 Dowl. P. C. 653).

TINDAL C. J. If any distinct authority or precedent had been shewn that where one of several defendants was in a condition to non pros. the plaintiff, and the rest were not, the one might sign judgment for all, we must have yielded to it. But no case or reason has been adduced to shew that one defendant may put the others in a situation in which they could not place themselves. *Murphy v. Donlan* shews that a plaintiff may be nonsuited with respect to one defendant only; and I am unable to see why a defendant who has alone demanded a declaration should not be allowed to sign judgment of non pros. as against himself only. I am of opinion, therefore, that the present judgment is irregular, and must be set aside.

COLTMAN J. I am of the same opinion. If it could have been shewn that, where there was a writ of summons against several defendants, the plaintiff could not declare against some of them only, I should have thought the argument on the part of the defendants in this case would have been entitled to great consideration. [915] But the cases, as well as the language of the rule which has been referred to, shew that such is not the law. And I see no reason why a non pros. as to one of several

(a)¹ 3 Dowl. P. C. 656. S. C. per nom. *Caldwell v. Blake*, 2 C. M. & R. 249, 3 Tyrwh. 618.

(b)¹ "It appeared that the writ of summons was against two, whereas the declaration was against one only;" 2 C. M. & R. 249.

(a)² See *Palmer v. Beale*, 9 Dowl. P. C. 529.

(b)² See *Pepper v. Whalley*, 1 N. C. 71.

defendants should enure so as to put the case out of court as to all the rest. I think, therefore, the judgment in this case was irregularly signed.

ERSKINE J. Before the rule of M. T. 3 W. 4, a plaintiff might have issued a writ against four parties, and might have proceeded in one action against two of them, and in another against the other two; or he might have issued different writs against several defendants in the same action. But this has been altered by the rule in question. That rule however does not say that the writ of summons must be against all the defendants and no one else. And that explains the expression of Lord Abinger in *Coldwell v. Blake*. The practice in this respect is left as it was before the new rule, that a plaintiff may issue the writ against several, and may declare against some of them only. No authority has been cited to shew that, where one defendant is in a condition to non pros. the plaintiff, and the others are not, the one may not sign judgment as regards himself. I think he may do so; but not as regards the other defendants.

MAULE J. I also think this rule must be made absolute on the ground that one defendant is not entitled to sign a judgment of non pros. for all the other defendants, who are not themselves in a situation to non pros. the plaintiff. The plaintiff in this case is not bound, as the proceedings stand at present, to go on against all the defendants. One defendant has a just ground of complaint, inasmuch as having called upon the plaintiff to proceed against him, the plaintiff has not done so. That right of complaint is satisfied by his power to enter [916] a non pros. as regards himself. It is said the judgment must be as to all, even though the others are not in a situation to call for it. But there is no default on the part of the plaintiff except as against one, and he may take advantage of it. Suppose the others wished the cause to go on; it would be very strange that the plaintiff should be non-prossed as to those with respect to whom there had been no default.

Rule absolute.

JOHNSON AND ANOTHER, Assignees of Ridgway, a Bankrupt, v. SHAW.
Nov. 25, 1842.

[S. C. 12 L. J. C. P. 112.]

A. consigned goods to B., a factor, who sold them to C. B. having become bankrupt, his assignees sued C. for the price of the goods, which were also claimed by A. Held, that C. was entitled to the benefit of the interpleader act.

This was an action for goods sold and delivered by Ridgway before his bankruptcy. The goods were also claimed by one Renter, who had consigned them to Ridgway, as his factor.

Talfourd Serjt., on behalf of the defendant, having obtained a rule under the first section of the interpleader act (1 & 2 W. 4, c. 58).

Sir Thomas Wilde Serjt. now appeared for Renter, and contended that his client, as consignor of the goods to a factor, had a right to follow them; for never having been the property of the bankrupt, they would not pass to his assignees.

Channell Serjt., for the plaintiffs, argued that it was doubtful, upon the authority of *James v. Pritchard* (8 Dowl. P. C. 890), whether this case was within the interpleader act. The [917] plaintiff in that case having sold to the defendant a rick of hay belonging to a deceased person, and S. having afterwards taken out administration and claimed the price of the hay, it was held that the defendant could not be relieved under the act. Here, if the bankrupt had been the plaintiff and had sued the defendant, and Renter had put in his claim, the defendant would not have been entitled to an interpleader rule. [Tindal C. J. The whole question arises in consequence of the representative character of the plaintiffs.] In the case referred to the party claimed in a representative character. [Erskine J. In that case the plaintiff was seeking to enforce a contract made with himself; here, the contract was made with another party.]

TINDAL C. J. I think there should be an issue between the assignees and Renter to try whether at the time of the bankruptcy the latter was entitled to the goods or any part thereof.

Per curiam. Rule accordingly.

[918] WOOD v. HEATH. Nov. 25, 1842.

A gaoler has no right to apply for the discharge of a debtor in execution, under the stat. 48 G. 3, c. 123. Such an application can only be made on behalf of the debtor himself.

Channell Serjt. on a former day in this term had obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the marshal of the Queen's prison; the defendant having lain in prison twelve calendar months, next before the making the application, in execution on a judgment at the plaintiff's suit for a debt not exceeding 20l. The application was made under the statute 48 G. 3, c. 123, s. 1 (a), on behalf of the marshal.

[919] Dowling Serjt. now shewed cause. The application under the 48 G. 3, c. 123, can only be made on behalf of the prisoner. The words of the statute are express upon this point. There is no compulsory power either in that act or in the 1 & 2 Vict. c. 110, or in the act for consolidating prisons, 5 & 6 Vict. c. 22, by which a prisoner can be compelled to seek his discharge. The defendant is not even made a party to the present rule, which was served upon the plaintiff alone.

Channell Serjt. in support of the rule. It must be admitted that in all former cases the application for a discharge under the 48 G. 3, c. 123, appears to have been made on behalf of the defendant. But there seems no reason why it should not be

(a) "Whereas it might tend greatly to the relief of certain debtors in execution for small debts, and at the same time occasion no material prejudice to trade and public credit, if such debtors should, after a limited period of imprisonment, be allowed the benefit of a discharge therefrom, the creditors, at whose suit they were so in execution, being at the same time authorised to take out other writs of execution against the land and goods of such debtors, or to use other remedy for the satisfaction of their debts, as if the persons of such debtors had never been taken in execution; be it enacted, that from and after the passing of this act, all persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record for any debt or damages not exceeding the sum of 20l., exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, as hereinafter mentioned, shall and may, upon his, her, or their application for that purpose in term time, made to some one of His Majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution, by the rule or order of such court," &c. "Provided always, that for and notwithstanding the discharge of any debtor or debtors by virtue of this act, the judgment whereupon any such debtor or debtors was or were taken, or charged in execution, shall nevertheless continue and remain in full force to all intents and purposes, except as to the taking in execution the person or persons of such debtor or debtors thereupon, as is hereinafter provided; and that it shall and may be lawful for the creditor or creditors, at whose suit such debtor or debtors has been, was, or were so taken or charged in execution to take out all such execution or executions on every such judgment against the lands, tenements, hereditaments, goods, and chattels of any such debtor or debtors (other than and except the necessary wearing apparel, &c.), or to bring any such action or any such judgment against such debtor or debtors respectively, or to bring any such action, or use any such remedy for the recovery and satisfaction of his, her, or their demand, against any other person or persons liable to satisfy the same in such and the same manner, but in such and the same manner only, as such creditor or creditors otherwise could or might have done in case such debtor or debtors had never been taken or charged in execution upon such judgment: Provided always, that no debtor or debtors who shall be duly discharged in pursuance of this act, shall at any time afterwards be taken or charged in execution upon any judgment herein so as before declared, to continue and remain in full force, nor be arrested in any action to be brought on any such judgment; and that no proceeding whatsoever by scire facias, action, or otherwise, shall be maintained or had against the bail in any action upon the judgment, wherein the defendant or defendants shall have been charged in execution, and afterwards discharged by virtue of the provisions of this act."

made by the gaoler. The prisoner is receiving the prison allowance, and is a [920] charge upon the county; and it might give rise to a collusion between a prisoner and a plaintiff, if the former could not be discharged except upon his own application. The gaol too might be inconveniently crowded. Although the preamble of the statute speaks of "the relief of debtors," that is not the only object of the act. The words of the enactment are, that persons in execution under the circumstance there stated "shall and may" be discharged. In *Ex parte Chusan* (Chitt. Stat. 589, n.) the court of King's Bench held that this clause was compulsory on the court, and that they had no power to compel the defendant to assign his property. *Langdon v. Rossiter* (13 Price, 186), and *Wood v. Kelmerdine* (2 Y. & J. 10), are to the same effect. [Maule J. If the defendant is discharged has the plaintiff any remedy?] If he is discharged under this act the plaintiff may have an execution against the lands and goods of the debtor. [Maule J. Possibly a defendant may choose to stay in prison rather than have his goods taken in execution.]

TINDAL C. J. From the preamble of the statute it was obviously passed for the benefit and relief of debtors. And the enacting part says that persons in execution may be discharged "upon his, her, or their application;" which must mean upon their own application. If we were to hold that a party might be discharged upon the application of the marshal, we should in effect be giving him the power to change the plaintiff's remedy. A defendant in custody has the power to do so, but no one else. The words of the statute being so clear, the rule must be discharged with costs.

Per curiam. Rule discharged with costs.

[921] ALDRIDGE v. HOWARD. Nov. 8, 1842.

[S. C. 5 Scott, N. R. 623.]

Covenant against a lessee, upon a covenant whereby undertook to pay an additional rent of 100l. per acre for pasture land, which he should "ear, plough, break-up, dig, use, or convert to tillage or for brick earth, or for any other purpose whatever, the quarterly payment of such further rent to be made on the day, &c., which should first happen, next after such earing, ploughing, breaking up, digging or using, or converting to any other use than for meadow or pasture land." The breach assigned was, that the defendant had used and converted the land to the uses and purposes of a race-course and ground for training horses.—Quære, whether using the land as a race-course was a breach of the covenant?—The defendant having demurred generally to the declaration, the court advised him to amend, on the ground, that the question was rather one of fact for a jury than of law.—To a breach which alleged nonpayment of the rents reserved, the defendant pleaded, "as to so much of the declaration as related to the sum of 150l. parcel of the alleged arrears of rent in the declaration first mentioned," that after the same became due, and before the commencement of the action, the plaintiff took and distrained certain goods of J. S. being upon the demised premises, and sold them for a sum greater than the amount of the arrears of rent, and thereby satisfied and discharged the last-mentioned arrears: Held no answer.

Covenant. The declaration stated that one Busby before and at the time of the making of the indenture thereafter mentioned, was seised in his demesne as of fee, of and in the lands, &c. with the appurtenances thereafter mentioned to have been demised to the defendant; and the said Busby being so seised on the 7th of November 1833 by a certain indenture then made between the said Busby of the one part, and the defendant of the other part [profert of the counterpart], did demise unto the defendant certain lands with the appurtenances (habendum) unto the defendant, his executors, administrators, and assigns from the 29th of September then last past for the term of seven years then next ensuing, yielding and paying therefore during the said term to Busby, his heirs and assigns, the clear yearly rent of 180l., at or upon the four quarterly days therein mentioned, &c., by equal portions, clear of land tax, &c., the first payment thereof to be made on, &c.; and also yielding and paying unto Busby, his heirs and [922] assigns, at or upon the days and times aforesaid, over and above the said rent of 180l., the rent of 100l. per acre by the year, and so in proportion for any greater or less quantity than an acre of the pasture land thereby demised,

which the defendant, his executors, administrators, or assigns should at any time, during the term thereby granted, ear, plough, break up, dig, use, or convert to tillage, or for brick earth, or for any other purpose whatsoever, or should suffer to be so done; the first quarterly payment of such further rent to be made on the day of the payment of the first-named yearly rent which should first happen next after such earing, ploughing, breaking up, digging, using, or converting to any other use than for meadow or pasture land; and also yielding and paying unto Busby, his heirs or assigns at or upon the days or times therein above limited for payment of the said yearly rent of 180l., over and above the same rent, the sum of 50l. by the year, in case the defendant, his executors, administrators, or assigns should mow more than one crop in any one year of the said term without dunging the land so mown in a proper husbandlike manner, according to a covenant thereafter contained; the first quarterly payment thereof to begin and be made on the day of payment of the said yearly rent of 180l., which should happen next after such mowing and omission of dunging as aforesaid; and the defendant did thereby covenant, with Busby, his heirs and assigns, amongst other things, that he, the defendant, his executors, administrators, or assigns, should and would yearly during the said term thereby granted, well and truly pay, or cause to be paid, unto the said Busby, his heirs or assigns, the said yearly rent of 180l., and also the said several increased or contingent rents, if payable at the days and times thereinbefore limited and appointed for the payment thereof as aforesaid, according [923] to the respective reservations thereof, and the true intent and meaning of the said indenture; and also should [pay all taxes, &c.]; and also should and would at his and their own proper costs and charges from time to time, and at all times during the said term as occasion should require, repair, uphold, &c., the hedges, ditches, &c. belonging to the said lands and premises in, by, and with all and all manner of necessary reparations and amendments whatsoever; and should and would protect, preserve, and keep the quicksets and hedges of or belonging to the said demised lands and premises from spoil or hurt by great or small cattle, or otherwise; and should and would weed and take care of, by every means in his and their power the said quicksets and hedges, and make good the parts that should die or decay; and should and would use the said lands in all respects in a husbandlike manner, and well and sufficiently manure and keep the said lands and premises in good heart and condition, and lay and spread thereon sometime during the third and sixth years of the said term, at and after the rate of twelve cart-loads of good rotten dung per acre, and should give notice to the said Busby, his heirs or assigns, or their agent or steward in London, of their intention of so manuring the same seven days previous to the said manure being spread upon the said land; and also should and would, at the expiration of the said term, peaceably leave and yield up the said lands and premises so well and sufficiently sustained, amended, maintained, and kept trenched, scoured, and manured, unto the said Busby, his heirs or assigns, and leave the hedges, ditches, and fences in good state and condition as by the said indenture, reference being as by the said indenture, reference being thereunto had, would amongst other things more fully appear: by virtue of which said demise the defendant afterwards, to wit, on the day and [924] year first aforesaid, entered into and upon all and singular the said demised lands and premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid; and afterwards and during the said term and in the lifetime of the said Busby, to wit, on the 1st of January 1837, the defendant used and converted to and for other and different uses and purposes than for meadow or pasture land, to wit, the uses and purposes of a race-course and ground for training horses, divers portions of the said demised lands and premises being meadow and pasture land, to wit, four acres thereof, and kept and continued the same so used and converted as aforesaid for a long space of time, to wit, thence until and at the expiration of the said term; whereupon the defendant, under and by virtue of the said Busby, his heirs and assigns, upon and from the first day of payment of the said yearly rent, which happened next after his so using and converting the said portions of the said demised lands and premises as aforesaid, and thence during the remainder of the said term over and above the said rent of 180l., the said additional rent of 100l. for each and every acre of the said demised lands and premises so used and converted as aforesaid, and which said further rent amounted in the whole to a large sum in each and every year, to wit, the sum of 400l. The declaration—after alleging that the lessor, Busby, during the continuance of the term devised a portion of

the demised premises to one Aldridge in fee, and afterwards died seised of the reversion, and that upon the death of Aldridge intestate, and without issue, the plaintiff, as his eldest brother, and heir-at-law, became and was seised as of fee of and in the reversion of the said portion of the demised lands and premises, with the appurtenances so devised to the said Aldridge; and that the said Busby and Aldridge, [925] and the plaintiff respectively, at all times since the making of the said indenture hitherto, during the several periods in which they were respectively so seised as aforesaid, fulfilled and kept all things in the said indenture contained on their parts, respectively to be fulfilled and kept according to the tenor, &c. of the said indenture—averred, nevertheless, that after the making of the said indenture, and during the said term thereby granted as aforesaid, and after the said respective deaths of the said Busby and Aldridge, and whilst the plaintiff was so seised of the said reversion of and in the said parcels of the said demised lands and premises with the appurtenances as aforesaid, to wit, on the 29th of September 1840, a large sum of money, to wit, the sum of 405l. of the said yearly rent of 180l., and a further large sum of money, to wit, the sum of 900l. of the said additional rent of 100l. per acre so payable as aforesaid, in respect of the said portions of the said demised lands and premises so used and converted as aforesaid, for two years and one quarter of a year of the said term, ending on the day and year last aforesaid, and which had elapsed since the said respective deaths of the said Busby and Aldridge became and was due and in arrear in respect of the said demised lands and premises, with the appurtenances, under and by virtue of the said indenture; and although the plaintiff thereupon then became and was entitled to have and receive of and from the defendants, for and in respect of the said parcels of the said demised lands and premises, with the appurtenances, the reversion whereof had been so devised to the said Aldridge, and had so descended to and vested in the plaintiff, and whereof he was then so seised as aforesaid, a certain large sum of money, to wit, the sum of 300l. from and out of the said sum of 405l., and a further large sum, to wit, the sum of 600l. from and out of the said sum of 900l., as [926] the proper share of and apportionment of the said arrears of rent due and payable to the plaintiff in that behalf, whereof the defendant then had notice: yet the said defendant did not nor would pay to the plaintiff the said last-mentioned sums, or either of them, or any part thereof, but the defendant had hitherto wholly neglected and refused so to do, and the same were still wholly due in arrear and unpaid contrary to the tenor and effect of the said indenture, and of the said covenant of the defendant so in that behalf made as aforesaid: and the plaintiff said that after the making, &c., he the defendant did not nor would at his own proper costs and charges from time to time, and at all times as occasion required, repair, uphold, &c., the hedges, ditches, &c. belonging to the said parcels of the demised lands and premises, whereof the plaintiff had so become and was seised of the said reversion as aforesaid, in, by, and with all and all manner of necessary reparations and amendments whatsoever, and did not nor would at the expiration of the said term leave and yield up the same in such good state, order, and condition according to the form and effect of the said indenture in that behalf; but on the contrary thereof the defendant, while she was so possessed of the said demised lands and premises with the appurtenances as aforesaid, after the said deaths of the said Busby and Aldridge respectively, after the plaintiff so became seised of the said reversion of and in the said parcels as aforesaid, to wit, on the said 18th of August 1838, and thence until the expiration of the said term suffered and permitted the said hedges, ditches, &c. belonging to the said parcels of the said demised lands and premises of the reversion whereof the plaintiff had so become seised as aforesaid, to be and continue, and the same were for and during all that time, foul, miry, ruinous, broken down, and destroyed for want of necessary trenching, scouring, &c., and amending the same; and at the expiration of the said term the defendant left and yielded up the same in such bad order and condition as last aforesaid, contrary to the form and effect of the said indenture and of the said covenant of the defendant so in that behalf made as aforesaid: and the plaintiff further said that after the making, &c., he the defendant did not nor would protect, preserve, and keep the quicksets and hedges of and belonging to the said parcels of the said demised lands and premises of the reversion, whereof the plaintiff had so become and was seised as aforesaid from spoil and hurt, by great and small cattle and otherwise; and did not, nor would by every means in his the defendant's power, weed and take care of the said quicksets and hedges, and make good the parts thereof that

died away and decayed, and did not nor would at the expiration of the said term leave and yield up the said quicksets and hedges in such good order and condition, according to the form and effect of the said indenture in that behalf; but on the contrary thereof, the defendant, whilst he was so possessed of the said demised lands and premises with the appurtenances as aforesaid, after the said respective deaths of the said Busby and Aldridge, and after the plaintiff so became and was seised of the said reversion of and in the said parcels as aforesaid, to wit, on the said 18th of August 1838, and thence until the expiration of the said term, suffered and permitted divers large portions, to wit, fifty perches of the quicksets and fifty perches of the hedges of the same parcels respectively, to become and be, and the same during all the time last aforesaid were, greatly spoiled and hurt, full of weeds, disordered, dead, and decayed; and afterwards, at the expiration of the said term, the defendant left and yielded up the same in such bad order and condition as last aforesaid, contrary to [928] the form and effect of the said indenture, and of the said covenant of the defendant so in that behalf made as aforesaid: and the plaintiff further said, that after the making of the said indenture and during the continuance of the said term, and after the said respective deaths of the said Busby and Aldridge, and whilst the defendant was so possessed of the said demised lands and premises with the appurtenances as aforesaid, he the defendant did not nor would use the said parcels of the said demised lands and premises of the reversion, whereof the plaintiff had so become and was seised as aforesaid, in all respects in a good and husbandlike manner, nor well and sufficiently manure and keep the same in good heart and condition, nor lay and spread thereon during the sixth year of the said term (being a period after the plaintiff so became seised as aforesaid), at and after the rate of twelve cart loads of good rotten dung per acre, and did not, nor would at the expiration of the said term leave and yield up the same parcels in such good heart and condition, and so well and sufficiently manured as aforesaid, according to the form and effect of the said indenture; but on the contrary thereof the defendant, whilst he was so possessed of the said demised lands and premises with the appurtenances as aforesaid, and after the said respective deaths of the said Busby and Aldridge as aforesaid, and after the said plaintiff so became seised of the said reversion of and in the said parcels of the said demised lands and premises as aforesaid, to wit, on the said 18th of August 1838, and thence until the expiration of the said term, used the said parcels of the said demised lands and premises in a bad and negligent and unhusbandlike manner, and wholly omitted to manure the same, or to lay or spread thereon any good rotten dung, as well during the said sixth year of the said term as at other times after the plaintiff so became [929] seised as aforesaid; and the defendant afterwards, at the expiration of the said term left and yielded up the said parcels in such bad heart and condition, and in an unpressed and uncultivated and deteriorated state as aforesaid, contrary to the form and effect of the said indenture, and of the said covenant of the defendant so in that behalf made by the defendant as aforesaid. By reason whereof, and of the said parcels of the said demised lands and premises having been so left in such bad order, repair, and condition as aforesaid, the plaintiff had been hindered and prevented from letting or demising the same on such advantageous terms as he otherwise might and would have done, and the premises had become and were greatly deteriorated in value, and wholly useless and unproductive to the plaintiff, &c.

General demurrer to so much of the declaration as related to nonpayment of the said additional rent therein alleged to have become due and payable (a). Joinder.

Plea as to so much of the declaration as related to the sum of 150l., parcel of the said alleged arrears of rent in the declaration first mentioned, that after the same became due and before the commencement of the suit, to wit, on the 21st of June 1839, the plaintiffs took and distrained divers, to wit, five stacks of hay, and divers goods and chattels, to wit, of one Jackson, of great value, to wit, of the value of 300l. then being in and upon the said demised premises, to wit, in and upon the said parcels thereof to the reversion, whereof the plaintiff was so entitled as aforesaid, as and for a distress for the said arrears in the introductory part of the plea mentioned, and

(a) The point marked for argument on the part of the defendant was as follows:—
 “The matter of law intended to be argued is, that using the ground as a race-course and ground for training horses was not a breach of the covenant, and did not entitle the plaintiff to the additional rent.”

afterwards, to wit, on the 27th of June in the year afore-[930]-said, sold the same for a large sum of money greater than the amount of the said last-mentioned arrears and the costs of the said distress, to wit, the sum of 300*l.*, and thereby then satisfied and discharged the said last-mentioned arrears. Verification.

Replication to this plea, that the plaintiff did not by the distress in the said plea mentioned, satisfy and discharge the said arrears of rent in the introductory part of that plea mentioned, in manner and form as the defendant had in his said plea in that behalf alleged : concluding to the country.

Special demurrer to the replication, assigning for causes, that the same did not traverse any matter of fact stated in the plea, or confess and avoid the same, and improperly traversed and took issue upon an inference or conclusion of law only, resulting from the facts stated in the plea, namely, the conclusion of law from the facts therein stated, that thereby the rent was satisfied and discharged,—that such inference and conclusion of law was improperly involved and contained in the issue taken by the replication,—that if the replication took issue on any matter of fact stated in the plea therein alleged, and was therefore bad for duplicity and multifariousness,—that it was uncertain and ambiguous whether the replication was intended to traverse and put in issue the whole or any or either, and which, of the allegations contained in the plea and amounted to and was a negative pregnant, for that it was uncertain whether the plaintiff intended to deny the distress and admit the sale, or to admit the distress and deny the sale, or to admit both the distress and the sale, and merely to put in issue the amount for which the hay, goods, and chattels in the plea mentioned were sold by the plaintiff as alleged in the plea, or whether the replication intended to admit all the allegations stated in the [931] plea, except the allegation that the said arrears of rent were thereby satisfied and discharged—that the replication improperly referred matters to a jury that ought to be determined by the court, &c.

Shee Serjt. (with whom was Bovill) in support of the first demurrer. It is submitted that the declaration is insufficient; and this question depends on the construction of the covenant, and of the whole deed; for the intention of the parties with respect to the covenants is to be gathered from the whole instrument, reference being had to the object of the deed. The main object was to provide for the due cultivation of the land; and as pasture land is more valuable than arable to the lessor, the intention was that the pasture land should continue and be in the same state when the lease expired. Looking at this covenant with reference to the words immediately preceding it, nothing can be clearer than that no intention existed in the minds of the parties that the words “or any other purpose whatsoever,” should bear the extended signification now attempted to be given to them. [Tindal C. J. The plaintiff has alleged in distinct terms, that the defendant used and converted part of the lands demised to and for other and different purposes than for meadow or pasture land, to wit, the uses and purposes of a race-course and ground for training horses. Whether these purposes are other and different purposes than for meadow or pasture ground is a question of fact.] The plain meaning of the covenant was to prohibit the land from being put to uses by which it would cease to be pasture; but the mere using of pasture land for training horses is not at all incompatible with its continuing to be pasture. [Tindal C. J. If you are right, you are right on a matter of fact; for it is certainly more a ques-[932]-tion of fact than of law. You had better amend on the usual terms.]

Leave to amend on payment of costs.

Shee then proceeded to support the demurrer to the replication. There are two material allegations in the plea, which are neither traversed nor confessed and avoided by the replication. [Erskine J. What do you say to the plea? It is rather in mitigation of damages than in bar to the action.] It is not pleaded to the whole declaration, but only to 150*l.* parcel of the debt. Maule J. If you look at the plea you will see that it is not pleaded to 150*l.*, but “as to so much of the declaration as relates to 150*l.* parcel,” &c.] In *Wheeler v. Senior* (7 M. & W. 562, 9 Dowl. P. C. 270), a plea, which, so far as regards the covenant, was substantially the same as this, appears to have been held good. Here, the plea is good, if it is meant to apply only to so much of the rent, and not to so much of the rent and damages. [Tindal C. J. What answer is there to the damages which the plaintiff has sustained by the non-payment of the rent? Yet the plea extends to such damages.] To debt for rent a tender may be pleaded; *Johnson v. Clay* (7 Taunt. 486 1 J. B. Moore, 200). [Tindal C. J. Debt

stands on a very different footing from covenant. I do not see how you can get over the case of *Hare v. Savill* (1 Brownlow & G. 19, 2 Brownlow, 273, 1 Roll. Abr. 459, a. 45, 5 Vin. Abr. 263, pl. 7, 6 Vin. Abr. 461, pl. 15, S. C.). There "the plaintiffs made a lease for years to the defendant, rendering rent at two feasts, or within ten days after every of those, at the Temple Church, and the defendant covenanted to pay the rent according to the reservation; and for the non-payment of these the plaintiffs brought an action of covenant, to which the defendant pleads levied by distress, and upon this the [933] plaintiffs demurred; and adjudged with the plaintiffs accordingly, for that the defendant for his plea hath confessed that it was not paid according to the reservation, for the plaintiffs cannot distrain if it were not behind after the day." You can see whether you can amend.]

Leave to amend accordingly.

CROSBY v. HETHERINGTON. Nov. 8, 1842.

[S. C. 5 Scott, N. R. 637; 12 L. J. C. P. 261. Referred to, *Mayor of London v. Cox*, 1867, L. R. 2 H. L. 273.]

It must be stated in a plea of payment under a foreign attachment, that the garnishee was within the jurisdiction of the lord mayor's court at the time of the awarding of the attachment.—Semble, that it should be alleged that execution was had against the garnishee.—Upon a custom of the city of London being put in issue, the mayor and aldermen are commanded by certiorari,—reciting that it pertains to the recorder to try the truth of the issue and to certify the custom,—to certify whether there is such a custom as that alleged; and upon the recorder certifying in open court, the existence or non-existence of the custom pleaded, judgment is entered pursuant to such certificate.

Assumpsit, upon an agreement of reference, and upon an award made in pursuance thereof, in favour of the plaintiff for the sum of 434l. 3s. 2d.; with counts for money paid, and for money found to be due upon an account stated.

Plea,—as to the cause of action in the first count of the declaration alleged, so far as it relates to the sum of 347l. 7s. 2d. parcel of the same sum of 434l. 3s. 2d. therein mentioned and claimed—that the city of London is, and immemorially has been, an ancient city, and that there is, and immemorially has been, a custom therein, that if any person affirms, or has affirmed, a plaint in debt against another in the court of Her present Majesty or Her predecessors, holden or to be holden before the mayor and aldermen of the said city, for the time being, in the chamber of the Guildhall, within and according to the custom of the said city, and upon such plaint it is or has been commanded by the court to any of the serjeants-at-mace [934] and ministers of the said court, to summon such person named defendant in such plaint, to appear in the same court to answer the plaintiff in such plaint, and if it is or has been certified and returned by such serjeant-at-mace and minister of the court, that the defendant in such plaint has or has had nothing within the said city or the liberties thereof, whereby he can or could be summoned, nor is nor was to be found within the said city, and such defendant at that court being solemnly called makes or has made default, and in the same court it is or has been alleged by the plaintiff in the plaint, that any other person owes or has owed to any such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof; then at the petition of such plaintiff, it is and has been commanded by the court, to one of the serjeants-at-mace and a minister of the court, to attach such defendant in such plaint, by such sum of money so being in the hands or custody of such other person, so that such defendant appear at the then next court, to be holden before the said mayor and aldermen in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified; and then if such serjeants-at-mace and minister of the court return and certify to such court, such defendant to be attached by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint named appear at the same, or the then next court holden or to be holden to answer such plaintiff in the plea in such plaint specified; and if the defendant at that, and three other courts then next severally holden or to be holden before the mayor and aldermen of the said city in the Guildhall of the said city

being solemnly called, does not appear, but makes default, and such four defaults, according to the custom of the said city, are recorded against such de-[935]-fendant at such four courts, after such attachment made ; and if such plaintiff in such plaintiff named, at every of such four courts in his own person, or by his attorney, appears and offers himself against such defendant in the plea in such plaintiff specified, according to the custom of the said city, then, at the last of the said four courts, or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaintiff named made to the court, it is and has been used for the court to command such or any other serjeant-at-mace and minister of the court, to warn such other person, according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen, to shew if any thing he has or knows to say for himself, why such plaintiff in such plaintiff ought not to have execution of such sum so attached as aforesaid ; and if at such court such serjeant-at-mace returns and certifies such other person in whose hands such sum of money is or has been attached, to be warned according to such custom, to be and appear in the same court to shew such cause, and if such person so warned, being solemnly called at such court, does not appear or has not appeared, but makes or has made default, then it is, and from time immemorial it has been used and accustomed, for such court to award such plaintiff to have execution of such sum so attached, to satisfy such plaintiff the debt in such plaintiff specified, or so much thereof as such sum so attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaintiff named in the same court, according to such custom, to restore to such defendant such sum of money so attached if such defendant within a year and a day thence next ensuing, come, or has come into the court so holden, and disproves or avoids or has disproved or avoided such debt in such plaintiff men-[936]-tioned, according to the custom of the said city ; and that after such pledges found and execution had of such sum so in the hands and custody of such other person attached and defended, by the plaintiff in such plaintiff named, such other person in whose hands or custody such sum is or has been attached and defended, is or has been discharged against such defendant of the sum so attached and had in execution, and such defendant in such plaintiff named is or has been discharged against the said plaintiff of so much of his debt in such plaintiff demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such defendant ; and if such sum of money so attached and defended, and had in execution amounts not, nor has amounted, to the whole sum of the debt in and by the said plaintiff demanded by such plaintiff against such defendant, then such plaintiff by the custom of the said court is, and from time immemorial has been, used and accustomed to have process against such defendant according to such custom, for the residue of his debt by him in such plaintiff demanded : That the said custom and all other customs of the said city obtained and used in the said city during all the time aforesaid, were by authority of a parliament holden in the seventh year of the reign of His Majesty, Richard the Second, after the Conquest, late king of England ratified and confirmed to the then mayor and commonalty of the said city and their successors : That one Collins before the commencement of this action of the plaintiff against the defendant theretofore, to wit, on the 12th of November 1841, in his own proper person, came into the court of our sovereign lady, then holden before the mayor and aldermen of the city of London, in the chamber of the Guildhall of the said city, according to such custom, and then and there affirmed a certain plaintiff against the now [937] plaintiff Walter Crosby, in a plea of debt upon demand of 700l., and the said Collins then in the same court, according to such custom, found pledges to prosecute such plaintiff, to wit, John Doe and Richard Roe ; and then appeared in his stead G. T. R. Reynal his attorney against the said W. Crosby in the plea in the said plaintiff, according to such custom ; and by his said attorney the said Collins then prayed process to be thereupon made to him against the said W. Crosby, according to such custom ; and it was granted to him, &c. ; whereupon, at the petition of the said Collins made to such court by his said attorney ; and by virtue of such plaintiff, it was then commanded by the said court to C. Sewell, then being one of the serjeants-at-mace of such court, that he, according to such custom, should summon Crosby by good summoners, to appear at the same court so holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Collins in the plea in such plaintiff specified, and that Sewell should return and certify what he should do by virtue of

the said precept; and afterwards at the same court, the said Sewell, according to such custom, returned and certified to the same court, that Crosby had nothing within the said city or the liberties thereof, whereby he could be summoned, nor was he Crosby found within the same; and thereupon the said Crosby was then at the same court solemnly called and did not appear, but made default; and thereupon afterwards, and before the commencement of this action, to wit, on the day and year last mentioned, at the same court it was alleged by the said Collins by his said attorney, that Hetherington owed to Crosby 347l. 7s. 2d., in moneys numbered, as the proper moneys of Crosby, and then had and detained the same in his hands and custody; and thereupon the said Collins, by his said attorney, prayed process, according to such [938] custom, to attach Crosby by the said 347l. 7s. 2d., so being in the hands and custody of Hetherington, that Crosby might appear at the next such court before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Collins in the plea in such plaint specified; whereupon, at his said petition, it was then commanded by such court, before the commencement of this action to the said serjeant-at-mace and minister of such court, that he, according to such custom, should attach Crosby by the said 347l. 7s. 2d., so being in the hands and custody of Hetherington, and the same, in his hands and custody, defend and keep, according to such custom, so that the plaintiff might then appear at the then next such court to be holden before the said mayor and aldermen of the said city, in the Guildhall of the said city, to wit, on Saturday the 13th of November 1841, according to such custom, to answer the said Collins in the plea in his plaint specified, and that the serjeant-at-mace and minister of such court should then return and certify to such court what he should do by virtue of that precept; and the same day was given to the said Collins; and afterwards, to wit, on the said then next court holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on the said 13th day of November in the year last aforesaid, the said Collins by his said attorney appeared; and the said serjeant-at-mace returned and certified to the same court, that he by virtue of the said precept had thereupon, to wit, on the 12th of November in the year last aforesaid, between the hours of ten and eleven of the clock in the forenoon, attached Crosby by the said 347l. 7s. 2d., so being in the hands and custody of Hetherington, and the same had defended and kept in his hands and custody, according to such custom, so that Crosby might appear at the said court so holden on the said 13th [939] of November in the year last aforesaid, to answer the said Collins in the plea in his plaint specified; and thereupon Crosby at the same court was solemnly called and did not appear, but then made a first default, which said first default at the same court was recorded, according to such custom; and thereupon, according to such custom, a further day was then given by the same court to Crosby to appear at the then next such court to or before the mayor and aldermen of the said city on Monday the 15th of November, in the year last aforesaid, to answer the said Collins in the plea in his plaint specified; and the same day was by the same court given to the said Collins in such plea, according to such custom; at which next such court holden on the day and year last aforesaid, the said Collins appeared and offered himself against Crosby in the plea in his plaint specified, according to such custom; and thereupon at the same court Crosby was again solemnly called and did not appear, but then made a second default; which was recorded at the same court, according to such custom; and thereupon, according to such custom, a further day was then given by the same court to Crosby to appear at the then next such court before the mayor and aldermen of the said city of London, at the chamber of the Guildhall of the said city, on Tuesday the 16th of November, in the year last aforesaid, to answer the said Collins in the plea in his plaint specified; and the same day was by the same court given to the said Collins in such plea, according to such custom; at which said next such court holden on the day and year last mentioned, the said Collins appeared and offered himself against Crosby in the plea in his plaint specified, according to such custom, &c. The declaration then alleged a third and fourth default, and proceeded—and thereupon afterwards, and after four defaults had been recorded as aforesaid, at the same court against [940] Crosby in the plea aforesaid, according to such custom, the said Collins by his said attorney then at the same court prayed process, according to such custom, to warn Hetherington, the garnishee, to be and appear in such court, so as aforesaid to be holden, to shew cause why the said Collins should not have execution of the said 347l. 7s. 2d. so attached in his said hands and custody; whereupon

at such said court so holden as aforesaid, on the day and year last aforesaid, at the said petition of the said Collins made in such court, it was commanded by the same court to the said serjeant-at-mace, that he, according to such custom, should warn and make known to Hetherington to be and appear in such court to be so as aforesaid holden on Wednesday the 12th of January 1842, to shew cause why the said Collins should not have execution of the 347l. 7s. 2d. so attached in his hands and custody; and that the said serjeant-at-mace should then return and certify to the same court what he should do by virtue of such precept; and the same day was given by the same court to the said Collins to be there, according to such custom, &c.; at which said court so holden as aforesaid, to wit, on the said Wednesday the 12th of January 1842, the said Collins by his said attorney appeared, and the said serjeant-at-mace then returned and certified to the same court, that he, by virtue of such precept to him directed, and according to such custom, had warned and made known to Hetherington, the garnishee, to be and appear at the same court to shew such cause; and thereupon at the same court, Hetherington, the garnishee in such attachment, was solemnly called, according to such custom, and did not appear but made default; whereupon, according to such custom, it was considered by the same court that the said Collins should have execution of the said 347l. 7s. 2d. so attached, and that he should retain and hold the same in full satisfaction [941] of the like sum of 347l. 7s. 2d. parcel of the debt in the said plaint mentioned, by sufficient pledges to be found and given by the said Collins to the same court, according to such custom, to restore to Crosby the 347l. 7s. 2d. so attached, if Crosby within a year and a day thence next ensuing should come into the said court and disprove or avoid the same debt in the said plaint mentioned; whereupon the said Collins at the same court, according to such custom, found sufficient pledges, to wit, &c. &c. citizens of the said city, to restore to Crosby the said 347l. 7s. 2d. so attached, if Crosby within a year and a day thence next ensuing, should come into the same court, holden as aforesaid, and disprove or avoid the debt in the said plaint mentioned, according to such custom; and thereupon the said Collins then, to wit, at the same court had execution of the said 347l. 7s. 2d. according to the tenor of such judgment in that behalf given, as by the record and proceedings thereof remaining in the chamber of the Guildhall of the city of London aforesaid more fully appears. * * The declaration then alleged, that the said 347l. 7s. 2d. so attached, and of which the said Collins had execution by virtue of such judgment, were so attached before the commencement of this suit, and were part and parcel of the said sum of 434l. 3s. 2d. in the said first count mentioned, and not other or different; and that Crosby the now plaintiff, and Crosby in the plaint of the said Collins mentioned, were one and the same person, and not other or different, and that Hetherington the present defendant, and Hetherington, in the aforesaid judgment and proceedings mentioned, were one and the same person, and not other or different; and that the said judgment and execution are still in force, and not in the least by Collins or otherwise, disproved or avoided; and that the said 347l. 7s. 2d. parcel of the said sum of 434l. 3s. 2d., in which Hetherington was indebted to Crosby, as in [942] the introductory part of this plea mentioned, was the very same and identical sum of 347l. 7s. 2d. so attached and taken in execution by the said Collins, by virtue of the judgment aforesaid. Verification; with a prayer of judgment, if Crosby the now plaintiff ought further to maintain his action thereof, &c.

As to the residue of the causes of action in the declaration mentioned, Hetherington brought into court 86l. 16s., alleging that Crosby had not sustained damages to a greater amount than the said sum of 86l. 16s. in respect of the said residue of the causes of action in the declaration mentioned. Verification.

General demurrer to the first plea (a); and joinder.

As to the second plea, the plaintiff replied by taking the money out of court in satisfaction and discharge of the causes of action in the introductory part of that plea mentioned.

Channell Serjt. (with whom was Russell Gurney), in support of the demurrer. The first point is, whether the custom set up in the plea is good, which alleges a right to summon any other person as garnishee without averring such other person to reside,

(a) The point marked for argument was, "The plaintiff means to contend that the first plea is insufficient, for not stating that the garnishee resided within the jurisdiction of the Lord Mayor's Court."

or to be, within the jurisdiction of the lord mayor's court. *Blacquiére v. Hawkins* (1 Dougl. 378) shews that the courts will take judicial notice of such customs of the city of London, as have been once duly certified by the recorder. The question is what is the custom of London with respect to foreign attachments. It is said in a note to *Turbill's case* (1 Saund. 67), that "this custom was certified by Starkey, recorder of London to be, that if a plaintiff be affirmed in London before, &c. against any person, and be it returned nihil, [943] if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer, whether he be indebted in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt, and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other after execution sued out by the plaintiff. 22 Ed. 4, 30 b. 1 Roll. Abr. 554, pl. 4. Godb. 400, 401, pl. 483, *Hern v. Stubbs*. But if no execution be sued out, the plaintiff may go on with the suit below, and the defendant may sue his debtor notwithstanding the judgment; Dy. 83 a. (Dyer, 82 b.); so certified by Brooke, recorder, 7 Ed. 6." In 1 Rolle's Abridgment, Customs de London (K.), p. 554, pl. 3. 7 Viner's Abridgment, Customs of London (K.), pl. 3, the custom is thus stated (see *Bruce v. Waile*, ante, vol. i. 25). "If in bar of an action a foreign attachment is pleaded, that the custom is, that if any man brings his action against another for any debt, and upon a return made that he non est inventus and quod nihil unde, &c., and thereupon surmises that any other is indebted to the defendant in such a sum, and thereupon to pray process to attach the sum in his hands, and to defend ita quod, the defendant appears to answer the plaintiff, and the serjeant returns that he hath attached him to defend the sum in his hands, and the defendant does not appear at four courts after, &c., that judgment shall be to recover it in his hands, &c.; this is no good custom without a surmise that the stranger who is indebted to the plaintiff is within the jurisdiction of the court; and the return of the serjeant is not sufficient that he hath attached him to defend it in his hands, for perhaps the serjeant in-[944] tends that he may attach the debt in his hands, though he be not within the jurisdiction of the court, and his return shall not bind the party without an actual surmise thereof by the party himself. Trin. 11 Car. B. R. between *Sir Nicholas Halse and Walker*; adjudged upon a demurrer, where a foreign attachment in Exeter was pleaded, which was all one with the custom of London, and all customs there confirmed by parliament in the time of Queen Elizabeth." These authorities are supported by Com. Dig. Attachment (Foreign) (A.) (D.), Customs of London (N. 1). In *Tamm v. Williams* (2 Chitty's Rep. 438, 3 Dougl. 281), it was held that in a plea of foreign attachment, it must be stated that the garnishee is resident within the jurisdiction of the lord mayor's court; and in Manning's N. P. Digest, 350, it is said to have decided in a case of *Traub v. Schmidt*, that in order to give the lord mayor's court jurisdiction, it is not sufficient that the garnishee resides within the city, but the cause of action must also have accrued there (b). *Banks v. Self* (5 Taunt. 234, n.) will probably be cited on the other side. There the plea was the same as here, and, according to the marginal note, it was held not to be necessary to aver that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court. That proposition has no application to the present point, for a garnishee cannot dispute the debt in the court below; and it would appear that the objection now raised was not taken in that case. [Tindal C. J. referred to *Hucham v. Smith* (2 Campb. 19), as confirmatory of Channell's argument.]

[945] Another objection to the plea is, that the plea does not state with sufficient certainty that execution was actually executed against the defendant as garnishee, in the lord mayor's court. The question is, whether the plea avers more than judgment, and award of execution, or it shews that execution was executed. Upon this point

(b) There, the defendant in the foreign attachment having brought his scire facias to discharge himself, pleaded that the cause of action did not accrue within the jurisdiction. The plaintiff replied as to part, that the garnishee resided within the jurisdiction, which replication was on demurrer, held, by the recorder, to be bad; and a writ of error upon that judgment not having been prosecuted for nine months, was superseded at the instance of the defendant.

the learned serjeant cited *Robertson et Uzor v. Norrey King-at-Arms* (Dyer, 82 b.), *Wetter v. Rucker* (1 Brod. & B. 491. 4 J. B. Moore, 172), and *Magrath v. Hardy* (4 New Cases, 782; 6 Scott, 627).

Talfourd Serjt. (with whom was Cowling), contra. The first objection seems to be, not that the custom set out in the plea is bad, but that it differs from that certified by Starkey. It is submitted that such a certificate is only given with reference to the particular case, and to particular issues; see *Plummer v. Bentham* (1 Burr. 248); and is not a certificate for all time; of which the court will take judicial notice. [Tindal C. J. Though a custom be certified in a particular case, that does not make it less general when once certified.] In the certificate of the custom given by Brooke, recorder, in *Robertson et Uzor v. Norroy King-at-Arms*, no reference is made to the necessity of the garnishee residing in the city of London. [Manning Serjt., amicus curiæ, pointed out that Starkey, recorder, certified a different custom from that pleaded. Tindal C. J. The important point is that suggested by my brother Manning, that the custom as certified is different from that pleaded. The reason of the thing is in favour of the garnishee residing in London; otherwise one cannot see how the process of the court can be served.] The plea states that money was attached in the hands of the defendant as garnishee; he must therefore have been within the city when attached. It is necessary [946] that the debt should be attached, but it is not requisite that the garnishee should reside in London; for it will be sufficient if he is attached when within the city for a temporary purpose; and the words used by Starkey, "within the city," by no means imply that the party must be resident there. [Erskine J. Your plea does not state that the attachment was within the city.] According to the practice it can only take place within the city. Supposing the court, as matter of law, to take notice of the custom as certified, the decision in *Morris v. Ludlam* (2 H. Bl. 362) would appear to be wrong. It was there held, that if a plea of foreign attachment state, the custom to be, "that if any person be or hath been indebted to any other person within the said city, &c., it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city. According, however, to Starkey's certificate no such allegation is requisite. If the argument on the other side be correct, Starkey's certificate will have the force of an act of parliament. [Tindal C. J. It cannot be put higher than a private act; for it relates only to the city of London. The judges must take notice of it ex officio, in the same manner as they take notice of the custom of gavelkind. *Tamm v. Williams* (2 Chitt. Rep. 438. 3 Dougl. 281) and 1 Rolle's Abridgement, 554, pl. 4 (c), seem to be direct authorities that the plea ought to have stated that the garnishee was within the jurisdiction of the lord mayor's court. You had better amend.]

Leave to amend on the usual terms.

The plea was afterwards amended, by introducing at the * ante, p. 939, the following allegation. "And the defendant avers that the said serjeant had duly attached [947] the now plaintiff by the said money so being in the hands of the now defendant in manner as certified by the said serjeant, he the now defendant at the time of the said attachment being within the said city;" and this allegation at the * * ante, p. 941. "Which execution was on the day and year last aforesaid, duly sued out and executed, and the said Collins, on the same day and year, duly had and received the same sum of money of and from the now defendant, the garnishee, under and by virtue and in pursuance of the said judgment, award, and execution, according to the said custom."

To the plea so amended the following replication was pleaded:—"And the plaintiff says, as to the plea of the now defendant by him first above pleaded, that he the now plaintiff ought not, by reason of any thing in that plea alleged, to be barred from further maintaining his action in respect of the said sum of 347l. 7s. 4d. parcel, &c., because he says that there is not, nor has there immemorially been, in the said city of London, the said custom in the said first plea mentioned, in manner as in the said first plea is alleged; and this the plaintiff prays may be inquired of when and where, &c., as the court may consider. And the defendant doth the like, &c. And as to the plea of the defendant by him lastly above pleaded, the plaintiff accepts and takes out of court the said sum of 86l. 16s. in full satisfaction and discharge of the said

(c) Translated, 7 Vin. Abr. 232, pl. 4, referring to the certificate of Starkey, recorder, in 22 E. 4, fo. 30; as to which, see ante, vol. i. 39 (b), (c).

causes of action in the introductory part of the said last plea mentioned ; therefore, as to such last-mentioned causes of action the plaintiff is satisfied ; and he prays judgment for his costs and charges in his behalf, &c."

To this replication the following suggestion was added, which was entered pursuant to a rule which had been obtained by Channell Serjt. on the part of the plaintiff, in Hilary term, 1843 for a suggestion, and also for a writ to the mayor and aldermen commanding them to [948] certify as to the custom, which rule was, in the same term, made absolute by consent.

"And hereupon it is suggested, and manifestly appears to the court, that there is, and immemorially has been, in the said city of London, a certain custom therein used and approved of, that when any issue in any (a) court of our Lady the Queen, or Her predecessors, is or has been joined therein as aforesaid, upon any custom of the said city used and had, the mayor and aldermen of the said city have from time immemorial certified to, and informed, the said court and the judges thereof, and ought from time immemorial, and still ought so to certify and inform the said court and the judges thereof the said custom, and of and concerning the same, and by the learned recorder of the said city verbally : and the plaintiff prays a writ of our Lady the Queen to be directed to the mayor and aldermen of the said city, commanding them to certify to, and inform, the justices of Her Majesty of the Bench here, in manner aforesaid, whether there is, and immemorially has been, in the said city such custom as the defendant has above alleged : and because the defendant does not deny this, therefore the said writ is granted to the plaintiff, returnable, &c. The same day is given to the said parties at the same place."

In pursuance of the rule above set forth the following writ was issued.

"Victoria, &c. to the mayor and aldermen of Our city of London, greeting : Whereas a certain action hath been lately brought, and is now pending, in Our court of Common Pleas at Westminster, before Our justices there, between Walter Crosby, plaintiff, and William Hetherington, defendant, for the non-performance of certain promises by the said Crosby alleged to have been [949] made to him by the said Hetherington, in which action a certain issue hath arisen, and is joined, between the said parties, as We are informed, whether there is, and has immemorially been, in the said city of London a certain custom therein, that is to say, if any person affirms or has affirmed a plaint in debt against another in Our court, or the court of Our predecessors, holden or to be holden before the mayor and aldermen of the said city for the time being, in the chamber of the Guildhall, within, and according to the custom of, the said city, and upon such plaint it is, or has been, commanded by the court to any of the serjeants-at-mace and ministers of the said last-mentioned court, to summon such person named defendant in such plaint to appear in the same court to answer the plaintiff in such plaint ; and if it is, or has been, certified and returned by such serjeant-at-mace and minister of the court, that the defendant in such plaint has, or has had, nothing within the said city or the liberties thereof whereby he can or could be summoned, nor is nor was found within the said city, and such defendant at that court being solemnly called makes or has made default, and in the same court it is, or has been, alleged by the plaintiff in the plaint, that any other person owes or has owed to any such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof, then, at the petition of such plaintiff, it is, and has been, commanded by the court to one of the serjeants-at-mace and a minister of the court to attach the defendant in such plaint by such sum of money so being in the hands or custody of such other person, so that such defendant appear at the then next court to be holden before the said mayor and aldermen in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified ; and then, if such serjeant-at-mace and minister of the court returns and certifies to such court [950] such defendant to be attached by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint should appear at the same or the then next court holden or to be holden to answer such plaintiff in the plea in such plaint specified ; and if the defendant at that and three other courts then next severally holden, or to be holden, before the mayor and

(a) The language of the suggestion in Longo Quinto, fo. 30, is not less general, "en aucun lieu ou courts de Roy." It was there said (fo. 31) by Danby, Chief Justice of C. P., that the defendant might have traversed the suggestion.

aldermen of the said city, in the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults, according to the custom of the said city, are recorded against such defendant at such four courts after such attachment made; and if such plaintiff in such plaint named, at every of such four courts in his own person or by his attorney appears and offers himself against such defendant in the plea in such plaint specified, according to the custom of the said city, then at the last of the said four courts, or at any court holden, or to be holden, after such four defaults recorded at the petition of such plaintiff in such plaint named, made to the court, it is, and has been, used for the court to command such or any other serjeant-at-mace and minister of the court to warn such other person according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen, to shew if any thing he has, or knows to say for himself, why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant-at-mace returns, and certifies such other person in whose hands such sum of money is, or has been, attached, to be warned, according to such custom, to be and appear in the same court to shew such cause; and if such person so warned being solemnly called at such court does not appear, or has not appeared, but makes or has made default, then it is, and from time immemorial it has been, used and accustomed [951] for such court to award such plaintiff to have execution of such sum so attached, to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends, or has extended, to satisfy by sufficient pledges to be found and given by such plaintiff in such plaint named in the same court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant within a year and a day thence next ensuing come, or has come into the court so holden, and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that after such pledges found, and execution had of such sums so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is, or has been, attached, is, or has been, discharged against such defendant of the sum so attached and had in execution; and such defendant in such plaint is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such defendant; and if such sum of money so attached and defended and had in execution amount not, nor has amounted, to the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said court is, and from time immemorial has been, used and accustomed to have process against such defendant according to such custom, for the residue of his debt by him in such plaint demanded: and because it pertaineth to you, by the recorder of the said city, according to the custom of the said city, from time immemorial used and approved of therein, to try the truth of the aforesaid issue so joined between the said W. Crosby and W. Hetherington, and to certify the aforesaid custom [952] by word of mouth, and not otherwise, We command you, that you certify and make known in manner aforesaid to Our justices of the Bench at Westminster, on the 15th day of April next, whether there is, and immemorially has been, in the said city of London such custom as in the said issue is stated or not; and have there this writ. Witness, Sir Nicholas Conyngham Tindal, knt., at Westminster, the 31st day of January in the sixth year, &c."

The recorder (before whom the matter had been previously argued by Russell Gurney for the plaintiff, and Cowling for the defendant), on Wednesday the 10th of May 1843, appeared at the bar of the court, and Channell Serjt. having moved for the return of the writ, the recorder, at the desire of the Lord Chief Justice, read the writ and the following indorsement thereon: "The execution of this writ appears in a certain certificate of us the mayor and aldermen of the said city of London, made by the recorder of the said city at the day and place within contained, according to the custom of the said city, by word of mouth, as is within commanded."

The certificate or return to the certiorari, which the recorder also read, was as follows:—

"The answer of John Humphery, Esq., mayor, and of the aldermen of the said city.
"We the said mayor and aldermen of the said city, by the Honourable Charles

Ewan Law, recorder of the said city, by word of mouth of the said city, do, in obedience to the annexed writ, humbly certify that in the said city of London there is not now, nor has there immemorially been in the said city of London, such custom as in the said issue is stated."

This return was signed by the mayor and fifteen aldermen.

TINDAL C. J. The certiorari must be filed, and the return made recorded.

[953] Channell Serjt., in the course of the same day, moved that judgment be entered for the plaintiff.

Judgment for the plaintiff.

The rule afterwards drawn up was in the following terms:—"Upon reading a rule made on Monday the 30th day of January last, and the writ of certiorari issued between the said parties, and the mayor of the city of London, to wit, John Humphery, Esq., and the aldermen of the said city, by the Honourable Charles Ewan Law, recorder of the same city, having this day certified and made known to this court in pursuance of the said writ, by word of mouth (a), according to the custom of the said city, that there is not now, nor has there immemorially been, in the said city of London, such custom as in the issue joined between the parties in this cause is stated, and upon hearing counsel on behalf of the plaintiff, it is ordered that judgment be thereupon entered for the plaintiff; and it is further ordered that the said writ of certiorari, and the certificate of the said mayor and aldermen (b) in writing thereto annexed, be filed among the records of this court."

[954] EVANS AND OTHERS v. HUTTON AND OTHERS. Nov. 9, 1842.

[S. C. 5 Scott, N. R. 670; 2 D. N. S. 600; 12 L. J. C. P. 17; 6 Jur. 1042.]

In *assumpsit* upon an undertaking to carry goods in the defendants' ship to Canton, and to deliver them to the plaintiffs' agents at Canton, dangers and accidents of the seas and navigation excepted; the defendants pleaded—that they caused the ship to sail to Canton; that the ship arrived with the goods on board, near to the port of Canton; that certain persons then there being officers of our Lady the Queen, duly authorised on that behalf, and then exercising the powers of Her Majesty's government there, to wit, one C. Elliott then being chief superintendent of the trade of Her Majesty's subjects, to and from the dominions of the Emperor of China, according to the form of the statute in that case made and provided (3 & 4 W. 4, c. 93), and one Smith then being captain of Her Majesty's ship the "Volage," and then being the commanding officer of Her Majesty's naval forces there, did for divers good and sufficient and lawful causes and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants their master or mariners, or any of them done or committed, &c., forcibly interrupt the said ship being a British ship, and all other British ships from further proceeding on its and their said voyage to Canton, and did prohibit, prevent, and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them committed and by means of Her Majesty's naval forces then there being under their commands, and by the force and duress thereof, forcibly compel the said ship, and from thence continually had compelled the same, not to proceed to Canton, and thereby prevented and thenceforth always continually had prevented, and still did prevent, the defendants from delivering the goods at Canton:—Held, on special demurrer, that the plea was bad, for not sufficiently disclosing that Captains Elliott and Smith, as chief superintendent and commander of the naval forces in the Chinese seas, respectively, had authority to act in the manner alleged.

Assumpsit. The declaration stated that, in consideration that the plaintiffs, at

(a) So, by the custom of London, a record is to be certified *ore tenus*; Brownlow, *Brevia Judicialia*, 14, 16.

(b) This certificate, or return to the certiorari, is the certificate of the mayor and aldermen, not of the recorder, who acts merely as their mouth-piece, if the return be false, an action lies, not against the recorder, but against the mayor and aldermen; *Day v. Savadge*, Hob. 85, 87, Sir F. Moore, 871; *Appleloft v. Stoughton*, Sir W. Jones, 412, *ante*, 889; and see Pulling's Law, &c. of London, 2d ed. 4.

the request of the defendants, then shipped, in good order and condition, in and upon the ship called the "Manilla" then lying in the port of Liverpool, and bound for Canton, twenty bales and twenty-five cases of merchandize of the plaintiffs, of great value, to wit, of the value of 700l., to be carried and conveyed by the defendants therein from Liverpool aforesaid, to Canton aforesaid, for certain freight and reward to be paid by the plaintiffs to the defendants in that behalf, the defendants promised the plaintiffs to deliver, and cause to be delivered, the said goods in like good order and condition at the port of Canton aforesaid, all and every dangers and accidents of the seas and [955] navigation of what nature or kind soever excepted, unto certain persons, to wit, Eglentoun, M'Lean, and Co., or their assigns; that the defendants had and received the said goods on board the said ship for the purpose aforesaid, nevertheless, the defendants did not nor would deliver, or cause to be delivered, the said goods at the port of Canton to the said E., M. and Co., or to their assigns, or otherwise howsoever, although not prevented therefrom by any danger or accident of the seas or navigation, but, on the contrary thereof, wrongfully omitted and refused so to do: that the plaintiffs, by their agents duly authorised in that behalf, &c., sold the said goods at and for certain large prices, to wit, to the amount of 3000l.; and that, by reason of the non-delivery thereof by the defendants, they the plaintiff were unable to deliver the same to the said purchasers, and all the benefit and advantage of the same sale and the interest and profit or price thereof became and were wholly lost to the plaintiffs; that afterwards, to wit, on the 1st of March 1840, the defendants unloaded the said goods out of the said ship at a certain place far distant from Canton, to wit, at Manilla, and the plaintiffs became liable to pay and expend, and were forced and obliged to pay and expend, divers sums of money, amounting to a large sum of money, to wit 1000l., in and about defraying the expenses incurred in respect of the said goods at Manilla, and causing the same to be conveyed from thence to Canton; and that afterwards, to wit on the 1st of April in the year last aforesaid, the plaintiffs were forced and obliged to sell the said goods at a very reduced price from the price for which the same had been so previously sold, to wit, at 1000l. lower price and the plaintiffs had, by reason of the premises, been otherwise injured.

Eighth plea,—to the breach of promise first above assigned: that, after the making of the promises in the [956] declaration mentioned, and before any breach thereof, to wit, on the 6th of April 1839, being a reasonable time in that behalf, the defendants caused the said ship in the declaration mentioned, having the said goods of the plaintiffs so on board thereof, to sail and proceed, and the said ship then sailed and proceeded, on its voyage from Liverpool to Canton, in the dominions of the Emperor of China, being the port of Canton aforesaid; and in a reasonable time in that behalf, to wit, on the 29th of October 1839, the said ship with the said goods so on board thereof as aforesaid, arrived near to the said port of Canton, to wit, on the high seas there adjacent; that, after the said ship had so proceeded and arrived as aforesaid, to wit, on the day and year last aforesaid, certain persons then being officers of our Lady the Queen duly authorised in that behalf, and then exercising the powers of H. M.'s government there, to wit, one Charles Elliott then being chief superintendent of the trade of H. M.'s subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one Smith then being captain of H. M.'s ship the "Volage," and then being commanding officer of H. M.'s naval forces there, did, for divers good and sufficient and lawful causes and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful or improper act or behaviour of the defendants, their master or mariners or any of them, done or committed, or supposed or alleged to have been done or committed, forcibly interrupt the said ship, being a British ship, and all other British ships, from further proceeding on its and their said voyage to Canton; and did, to wit, then prohibit, prevent and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by the force and duress [957] thereof, forcibly compel the said ship, and from thence continually had compelled the said ship, not to proceed to Canton, and thereby prevented and thenceforth always hitherto have prevented, and still did prevent, the said defendants from delivering the said goods and merchandizes at Canton; and because of the said force and prevention of the said officers as aforesaid, and because of H. M.'s forces, and the restraint and duress and prevention thereof, the defendants could not,

time from the making of their said promise, hitherto deliver the said goods at port of Canton, wherefore they did not deliver the same at Canton, as on the said declaration mentioned. Verification.

Ninth plea—to the whole of the declaration—that, after the making of the promises, and before any breach thereof, to wit, on the 6th of April 1839, being a reasonable time in that behalf, the defendants caused the said ship, having the said goods so on board thereof, to sail and proceed; and the said ship then sailed and proceeded on its voyage from Liverpool to Canton, in the dominions of the Emperor of China, being the port of Canton in the declaration mentioned, and in a reasonable time in that behalf, to wit, on the 29th of October 1839, arrived near to the said port of Canton, to wit, on the high seas adjacent thereto; that, after the said ship had so proceeded and arrived as aforesaid, to wit, on the day and year last aforesaid, certain persons then being officers of our Lady the Queen duly authorised in that behalf, and then exercising the powers of H. M.'s government there, to wit, one Charles Elliott, then being chief superintendent of the trade of H. M.'s subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one ——— Smith, then being captain of H. M.'s ship "Volage," and then being commanding officer of H. M.'s naval forces there, for divers good and sufficient and lawful causes [958] and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their master or mariners or any of them, by them the defendants, their master or mariners or any of them, done or committed, or supposed or alleged to have been done or committed, did forcibly prevent, hinder, and restrain the said ship from further proceeding on its said voyage to Canton; and did, to wit, then forcibly prevent and hinder and restrain, and thenceforth always hitherto had prevented, hindered, and restrained, and did still prevent, hinder, and distrain upon the said ship, and all other British ships, from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by the force and duress thereof, forcibly compel the said ship, and from thence continually had constrained and compelled the said ship, not to proceed to Canton, and thereby prevented, and from thence hitherto continued and still continued to prevent, the defendants from delivering the said goods at Canton, wherefore the defendants never delivered the same goods or any of them at Canton, as is in and by the declaration in that behalf above alleged; that, before the defendants or their agents had received any notice of the promises, and before the said officers and forces had in any ways prevented the said ship from proceeding to Canton, the said ship proceeded on its voyage to Canton, to parts far distant from Liverpool, to wit, to the high seas near to Canton, on the day and year last aforesaid; that a certain place called Hong Kong was then a place of safety for the said ship and a place to which the said officers and forces did not prevent the said ship from proceeding, and a place near to Canton, and a place from which the said ship and the goods on board thereof might speedily have been conveyed to Canton of the [959] said officers and forces aforesaid, had at any time ceased to prevent the said ship from proceeding to Canton, and because of the premises, and because it was then a reasonable and discreet measure for the interests of the plaintiffs as owners of the said goods, and for the interests of those concerned in the said adventure, for the said ship and the cargo thereof to proceed to Hong Kong; and because to have proceeded to any other place than Hong Kong, would have been an unreasonable and indiscreet measure in that behalf, and injurious to the plaintiffs as such owners of the said goods, the defendants, by their servant and agent in that behalf, to wit, one William Pearson, then being the master of the said ship, and the servant and agent of the defendants duly authorised in that behalf, caused the said ship, with all reasonable dispatch, after the said ship was so prevented as in this plea mentioned, to proceed to Hong Kong, being the only safe and proper place in that behalf, to wit, on the 29th of October 1839; that the said W. Pearson did, whilst the said ship was at Hong Kong aforesaid, and in a reasonable time after the arrival of the ship there, to wit, on the day and year last aforesaid, give to the said E. M. and Co., the said persons in the said declaration named, notice of the said several premises, and did then offer the said E. M. and Co. to deliver the said goods to them there, and did then request them to accept and receive the said goods from him, and to give him, the said W. Pearson, orders what to do with the said goods; and that the said E.

M. and Co. then refused to receive the said goods, or to give any orders in respect thereof; that the said ship remained at Hong Kong a reasonable time in that behalf, to wit, until the said Charles Elliott, so being such chief superintendent as aforesaid, and the said ——— Smith so being such officer as aforesaid on the 1st of December 1839, required and ordered, and compelled, by means of H. M.'s [960] naval forces there, the said ship to depart from Hong Kong; that, because of the said requirement and orders being lawful requirement and orders in that behalf, and because of the said force and compulsion, the said ship, to wit, on the day and year last aforesaid, sailed from and left Hong Kong; that, after the said ship left Hong Kong as last aforesaid, the said W. Pearson, in a reasonable time in that behalf, to wit, on the day and year last aforesaid, gave notice to the said E. M. and Co. of the premises, and then requested them to receive the same goods, and to give orders concerning the said goods, and the said E. M. and Co. then wholly refused so to do; and because the neighbourhood of Canton and of Hong Kong was, then, and from thence continually had been and still was, dangerous for the said ship to remain in, on account of the perils of the seas and navigation, and of the enemies of our Lady the Queen then and there being; and because it was then expedient for the interests of the plaintiffs, that the said goods of the plaintiffs should be deposited in some place of safety; and because Manilla was a safe and convenient, the nearest and most convenient, place of deposit, and the only safe and convenient place of deposit within a reasonable distance from the said place where the said ship then was and from Canton; therefore, the said W. Pearson caused the said ship to sail, and the said ship then sailed, to Manilla for the purpose of there depositing the said goods as in this plea mentioned; and the said goods were, on the 5th of April 1840, unloaded from and out of the said ship at Manilla, and delivered at Manilla to certain persons there, to wait the orders of the plaintiffs to certain persons trading there, under the firm of Kerr, Murray and Co., then being the agents and correspondents of the plaintiffs at Manilla, duly authorised in that behalf, and being proper and reasonable persons in that behalf with whom [961] to leave and deposit, and to whom to trust the said goods, which was the same unloading in the declaration complained of, of all which premises the plaintiffs, in a reasonable time in that behalf, to wit, on the 1st of July 1840, had notice; that the acts of the defendants, and of the said W. Pearson so being such master as aforesaid, in respect of the said goods from the time of the making of the said promises, hitherto were and each of them was a reasonable and discreet act, and a reasonable and discreet act in that behalf, and were and each of them was truly and honestly, and discreetly, done by the defendants and the said W. Pearson as such master, with a reasonable, discreet, and honest view to the interests of the plaintiffs as such owners, and were and each of them was such acts and act as an honest and discreet person would, in the exercise of a sound discretion in that behalf, have done under the circumstances aforesaid, and such as it then became and was the duty of the defendants and of the said master under the circumstances aforesaid to do. Verification.

Special demurrer to the eighth plea—assigning for causes—that the authority of the officers, Elliott and Smith, to interrupt and prohibit, and prevent and discharge, the ship from proceeding to Canton, was not shewn or stated in the said eighth plea, as it ought to have been if any such authority existed—that no such authority was conferred upon them by common or statute law; and that, if they had any such authority, its nature, and how conferred upon them, ought to have been stated and shewn in the plea—that it was not shewn how or by what authority the officers exercised the powers of H. M.'s government, as it ought to have been if such authority was exercised—that H. M.'s government did not by law possess the powers in the eighth plea claimed on behalf of the officers—that the expression, "H. M.'s government," was insensible and [962] ambiguous, and had no known, definite, or understood meaning in the law—that it was not stated in the plea, as it ought to have been, what were the causes and reasons moving the officers to interrupt &c., the ship on her voyage—that any force and prevention of such officers, unless legal and authorised by law, constituted no excuse or defence to the breach of contracts complained of in the declaration, &c.—Joinder.

Special demurrer to the ninth plea, assigning the same causes of demurrer as to the eighth plea, and also that so much of the matter contained in the ninth plea, as was in addition to the matter stated in the eighth plea, was pleaded to damage only.

and was untechnical and improper, and inartificially pleaded, and rendered the last plea of a great and wholly unnecessary and improper length—that it consisted of matter upon which the plaintiffs could not take or offer any certain issue, &c.—Joinder.

Bompas Serjt. (with whom was Martin), in support of the demurrers. The main grounds of demurrer are applicable to both pleas. The contract entered into by the defendants is an absolute contract to deliver the goods at Canton. The bill of lading contains no exception as to the Queen's enemies, the only exception being of the dangers and accidents of the seas and navigation. It is submitted that the eighth and ninth pleas do not disclose any sufficient excuse for the nonperformance of the defendants' contract. One of the leading cases upon this subject is *Paradine v. Jane* (Aley, 27), where "the plaintiff declared in debt upon a lease for years, rendering rent at the four usual feasts; and for rent behind for three years ending at the feast of the Annunciation 21 Car., brought his action. The defendant [963] pleaded that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession, and him expelled and held out of possession from the 19th of July 18 Car., till the feast of the Annunciation 21 Car.; whereby he could not take the profits. Whereupon the plaintiff demurred. And it was resolved, "that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused; Dyer, 33 a. (*Anon.*), Inst. 53 a. (Co. Litt. 53 a.), 283 a. (Co. Litt. 283 a.), 12 H. 4, 6 (*The Abbott of Shirbourne's case*, M. 12 H. 4, fo. 5, 6, pl. 11). So, of an escape; Co. 4, 84 b. (*Luttrell's case*), 33 H. 6, 1 (*Jack Cade's case*, H. 33 H. 6, fo. 1, pl. 3). So, in 9 E. 3, 16, a supersedeas was awarded to the justices (*h*), that they should not proceed in a cessavit upon a cesser during the war. But when the party, by his own contract, [964] creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it; Dyer, 33 a., 40 E. 3, 6" (H. 40 Ed. 3, fo. 5 & 6, pl. 11).

That case has been repeatedly recognised and affirmed in more modern decisions. It is not necessary to contend, that if the delivery of the goods at Canton had become unlawful, the defendants would have been bound to perform their contract. It is sufficient to say, that neither of these pleas shews that the delivery of the goods at Canton had become unlawful. The pleas undoubtedly allege, that certain persons duly authorised, and exercising the powers of H. M.'s government at Canton, prevented the landing of the goods; but it ought to have been shewn what authority these persons had; for it is impossible to understand what is meant by the phrase "exercising the powers of H. M.'s government there." It may be admitted, that if there were any statute which empowered Captain Elliott or Captain Smith to restrain the vessel from proceeding to Canton, the court must take judicial notice of such statute. The

(*h*) But not acted upon. P. 9 Ed. 3, fo. 16, pl. 30, was a cessavit brought in the county of Northumberland. Parnell, the tenant's serjeant, pleaded to the jurisdiction,—"that the commonalty of the county had made their plaint and suggestion to King Edward, father of the now king, that the said county had been destroyed by the war of Scotland, so that the people could not take the profits of their lands, and that the lords had brought their writs of cessavit to recover the lands; wherefore the king (Edward II.) forbad that any writ of cessavit should be granted against the people of that county during the said war until otherwise commanded; and that the said late king had sent to this court his writ, commanding that if any such writ was sent before you here, you should surcease from holding that plea. And we say that the war still continues; wherefore we do not intend that you will hold this plea. Whereupon the writ was read, which was to the effect pleaded. And the writ was of the date of the twelfth year of the father of the now king, &c. Herle C. J. We have a command by the writ of the king that now is, to hold this plea. Therefore we will not surcease by reason of any writ sent to us by the king that is dead. Wherefore answer."

only act, however, at all bearing on the subject, is the 3 & 4 W. 4, c. 93, which authorises the Crown to appoint a superintendent at Canton. But the pleas contain no averment that Captain Elliott had been appointed chief superintendent under the act; and what authority [965] Captain Smith could have as commanding officer of H. M.'s naval force, does not appear; for there is no allegation of any embargo or blockade. Neither is any fact stated which would render it illegal for the ship to go to Canton. It was held in *Gosling v. Higgins* (1 Campb. 451), that if goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of the government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of government. So, in *Hill v. Idle* (4 Campb. 327), the consignee of a particular parcel of goods by a general ship, was held liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity of procuring an order from the Treasury to land the goods, which order the consignee used the utmost diligence to obtain. *Barker v. Hodgson* (3 M. & Sel. 267) is a stronger case. It was there held, that a charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. Lord Ellenborough says, "the question is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides; and this defendant, as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But, [966] if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, neither is the contract dissolved, nor is he excused for not performing it, but must answer in damages." It is laid down in *Abbott on Shipping*, 428, 5th ed. (7th ed. 597), citing *Blight v. Page* (3 B. & P. 295, n.), that "if a merchant hire a ship to go to a foreign port, and covenant to furnish a loading there, a prohibition by the government from that country to export the intended articles, neither dissolves the contract nor excuses a non-performance of it; for the laws of one nation do not give effect to the positive institutions of another inconsistent with its own." It is not sufficient for a defendant to shew that he has been prevented from performing his contract. He must go further, and establish that the parties who prevented him had a right to do so; and the authority of these parties ought to have been set out, in order to enable the court to judge whether it was legal.

The ninth plea attempts to justify the landing of the goods at Manilla. Admitting, for the sake of argument, that it was unlawful to go to Canton, the defendants had no right to discharge the goods at Manilla. If they were legally prevented from delivering their goods to the consignees at Canton they should have returned them to the plaintiff. For there is nothing in the plea to shew that the goods were landed at Manilla for the purpose of being afterwards conveyed to Canton. Moreover, the defendants should have kept the goods on board until they could proceed with them to Canton; for it is consistent with all that is stated, that the ship could have gone to Canton the next day; for there is no averment of any blockade, or of any war with China. In *Hadley v. Clarke* (8 T. R. 259), the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the [967] vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her, "until the further order of council;" and it was held that such embargo only suspended, but did not dissolve, the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract.

Channell Serjt. The authority of *Paradine v. Jane*, for the general rule there laid down, is not denied; and it is conceded that an embargo by a foreign government furnishes no excuse to an English ship-owner for the non-performance of his contract. Admitting the general rule, however, it is contended that an exception necessarily arises where the performance of a contract is forbidden by the country of which the contracting parties are subjects; and it is submitted that such an implied exception is sufficiently made out by the facts stated in these pleas. The defendants are not

driven to contend that there has been any dissolution of the contract; they contend merely for a suspension. *Hadley v. Clarke*, in some respects, resembles the present case; but here the prohibiting to land the goods is stated as continuing down to the time of the action. *Touteng v. Hubbard* (3 B. & P. 291), proceeded very much on the principle now contended for, which is laid down in the judgment of Lord Ellenborough in *Barker v. Hodgson*, cited on the other side (*ante*, p. 965). The question is, whether it sufficiently appears in the pleas, that the defendants were prevented from landing the goods by the authority of the government of this country. Generality of pleading is allowed in many cases where more particularity would lead to prolixity, or where the facts are incapable of being precisely stated. Whether the authority is sufficiently set out in these pleas must be determined with reference [968] to the circumstances disclosed. It is obvious that the same precision which is necessary in many cases will not be required here. It cannot be expected that the defendants should state the authority, step by step, of the parties who prohibited them from landing the goods, or set out the reasons which led to the prohibition; for acts of state policy are necessarily secret in their nature. It is submitted that the pleas are good in substance, and that the allegations as to the defendants being prevented from performing their contract by the acts of officers or servants of the government, lawfully authorised, are made with all the particularity of which the case will admit.

Bompas Serjt., in reply. The argument advanced on the part of the defendants is, that the interruption on the part of Capt. Elliott, and Capt. Smith, created a suspension only. This shews the two special pleas to be bad. The defendants have failed to make out that the act of those officers in preventing the delivery of the goods, was lawful. It has been contended that the act of those officers was the act of the British government. But it is not stated that the act complained of was done under any authority. The pleas contain no allegation of the existence of war, or of any danger of war. As no lawful interference is shewn, the plaintiffs are entitled to judgment.

TINDAL C. J. I am of opinion that the two pleas which have been demurred to are bad in point of law. The only ground upon which they could be an answer to the declaration would be, that the contract was dissolved by some superior authority. But the allegation amounts to no more than this,—that after the arrival of the ship and goods at Canton, certain persons, then being officers of the Queen, and duly authorised in that behalf, and then exercising the powers of Her Majesty's government there, to wit one Charles [969] Elliott, then being chief superintendent of the trade of Her Majesty's subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one Smith, then being captain of H. M.'s ship the "Volage," and then being the commanding officer of H. M.'s naval forces there, did, for divers good and sufficient and lawful reasons, them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their master, or mariners, or any of them, done or committed, or supposed, or alleged to have been done or committed, forcibly interrupt the said ship, being a British ship, and all other British ships, from further proceeding on its and their said voyage to Canton, and did, to wit, then prohibit, prevent and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by force and duress thereof, forcibly compel the said ship, and from thence continually had compelled the same, not to proceed to Canton, and thereby prevented, and thenceforth always hitherto had prevented, and still did prevent, the defendants from delivering the said goods at Canton. It is not said that this was done in the exercise of any prerogative of the Crown, to which it belongs to declare war and to make peace. But if war had been declared between England and China, it would not have been a case in which the contract of the parties would have been dissolved, as when a declaration of war has been held to put an end to a contract to carry goods to those who are now become enemies. Here, the engagement is to deliver goods to the agent of the shipper. The pleas seek to qualify the nonperformance of the contract, under the act of the chief superintendent, Capt. Elliott. We must see whether the act of the 3 and 4 W. [970] 4, c. 93, gives any such authority. By the 5th section, after reciting that it is expedient for the objects of trade and amicable intercourse with the

dominions of the Emperor of China, that provision be made for the establishment of a British authority in the said dominions, enacts "that it shall and may be lawful for His Majesty, by any commission, or commissions, or warrant or warrants, under His Royal sign manual, to appoint not exceeding three of His Majesty's subjects, to be superintendents of the trade of His Majesty's subjects, to and from the said dominions, for the purpose of protecting and promoting such trade, and by any such commission or warrant as aforesaid, to settle such gradation and subordination among the said superintendents, one of whom shall be styled the chief superintendent, and to appoint such officers to assist them in the execution of their duties and to grant such salaries to such superintendents and officers as His Majesty shall from time to time deem expedient." By this section the commissioner is armed with power to regulate the rotation of trade between this country and the dominion of the Emperor of China. By sect. 6, it is provided "that it shall be lawful for His Majesty, by any such order or orders, commission or commissions as to His Majesty in council shall appear expedient and salutary, to give to the said superintendents, or any of them, powers and authorities over and in respect of the trade and commerce of His Majesty's subjects within any part of the said dominions, and to make and issue directions and regulations touching the said trade and commerce, and for the government of His Majesty's subjects within the said dominions, and to impose penalties, forfeitures, or imprisonments, for the breach of any such directions or regulations, to be enforced in such manner as in the said order or orders shall be specified, and to create a court of justice, with criminal and admiralty jurisdiction, for the trial of offences committed by His Majesty's sub-[971]-jects within the said dominions, and the ports and havens thereof, and on the high seas within one hundred miles of the coast of China, and to appoint one of the superintendents hereinbefore mentioned, to be the officer to hold such court, and other officers for executing the process thereof, and to grant such salaries to such officers," &c.

Under this section, Captain Elliott might have been armed with sufficient power to make regulations for the government of the war, both between British subjects and the subjects of the Emperor of China. But the pleas do not state that any orders were issued by the Privy Council. Capt. Elliott may have exercised a sound discretion in preventing the goods from being landed at Canton. That however does not constitute a legal answer to the complaint of the non-delivery of the goods. It is not shewn that the contract made by the defendant to deliver the goods to the plaintiff's agent at Canton had been dissolved.

COLTMAN J. I am of the same opinion. The question appears to me to be a very narrow one. It is agreed on both sides, that unless the delivery of the goods at Canton is shewn to have been prevented by some competent authority, the two pleas demurred to cannot be supported. The authority must be stated on the face of the pleas. The defendants not being in privity with the party who makes the order, may not be bound to shew the authority with the same particularity as would be necessary where such privity exists. I do not say how that would be. But here, we find no statement at all of any authority under which Captain Elliott acted. The mere fact of his being superintendent without any order from the Privy Council, does not import that he had authority to make or to issue directions and regulations under the sixth section. The fifth section confers [972] very limited powers. It gives nothing further than what is necessarily implied in the term "superintendent." Both these pleas appear to me to be substantially defective in not containing an allegation of any power conferred on Capt. Elliott by an order in council.

ERSKINE J. It has been properly admitted by my brother Bompas, that if the defendants were prevented from delivering the goods by any person having due authority from this country, there would be a good answer to the present action. I am of opinion that no such authority appears in either of the pleas.

MAULE J. I am of the same opinion. It has not been argued that any general prerogative exists under which these acts on the part of Captain Elliott and Captain Smith could be justified. Then the statute only empowers them to act under an order made by the King in council, and there is nothing to shew that any order in council has been made.

Judgment for the plaintiff.

LEAKE v. LOVEDAY AND BROOKS. Nov. 21, 1842.

[S. C. 5 Scott, N. R. 908 ; 2 D. N. S. 624 ; 12 L. J. C. P. 65 ; 7 Jur. 17.]

A. in 1837 bought goods of B., and allowed B. to remain in possession of them up to 1839, when B. became bankrupt. B.'s assignees made no claim, and B. retained possession of the goods until 1841, when the sheriff under a *fi. fa.* against B. seized and sold the goods. After the sale B.'s assignees gave notice of their claim to the sheriff, who upon receiving an indemnity handed over the proceeds to them.—In trover brought by A. against the sheriff, held :—that, under the plea of not possessed, the sheriff might set up the title of the assignees.

Case. The first count of the declaration stated that one Cox was tenant to the plaintiff of certain premises in the county of Oxford under a demise thereof at [973] a certain weekly rent, to wit, the weekly rent of 5s., of which 42l. was in arrear ; that the plaintiff had seized divers goods as for and in the name of a distress, and had impounded them in a certain messuage ; and that the defendants broke the pound and took away the goods. The second count was in trover.

Pleas : first, not guilty to the whole declaration ; secondly, to the first count, that Cox did not hold as tenant to the plaintiff, *modo et forma* ; thirdly, to the first count, that the rent was not in arrear ; fourthly, to the first count, that the plaintiff did not seize the goods as and for a distress ; fifthly, to the first count, that the plaintiff did not impound the goods ; sixthly, to the first count, that before the plaintiff had seized and impounded the goods, a writ of *habere facias possessionem* issued to the defendant Loveday, as sheriff of the county of Oxford ; that the messuage in which the plaintiff had impounded the goods was parcel of the tenements in the writ mentioned, and thereupon the defendant Loveday as sheriff, and the defendant Brooks as his servant, entered upon the messuage ; that because the defendant Loveday could not give possession of the messuage without removing the goods, and because the plaintiff refused to remove them, the defendants removed the goods and deposited them at a reasonable distance for the use of the person entitled thereto ; verification.

Seventh plea, to the second count, that the plaintiff was not possessed, as of his own property, of the goods in that count mentioned, or any part thereof, *modo et forma* : concluding to the country.

The eighth plea set up a justification of the conversion of the goods in the second count similar to that contained in the sixth.

The plaintiff, by his replication, joined issue on the first, second, third, fourth, fifth, and sixth pleas. To [974] the sixth he now assigned that the pound broken by the defendants was another and a different pound from that mentioned in the sixth plea. There was also a new assignment to the eighth plea that the defendant, on another and different time, and for another and different occasion, converted the goods mentioned in the second count.

Pleas to the first new assignment : first, not guilty ; secondly, that the defendants did not impound the goods. To the new assignment to the eighth plea the defendants pleaded, first, not guilty ; and, secondly, that the plaintiff was not possessed as of his own property of the goods in the second new assignment mentioned, or any part thereof, *modo et forma*.

Upon all these pleas the plaintiff joined issue.

At the trial, before Erskine J., at the last Oxfordshire summer assizes, it appeared that a person of the name of Cox had, previously to a year 1837, been a partner with Messrs. Morrell in a bank at Oxford, and had resided in the upper part of the house in which the banking establishment was conducted ; and that after the dissolution of the partnership, Messrs. Morrell, to whom the house belonged, permitted him to occupy the same apartments without paying rent. In June 1837 Cox's goods were seized under a *fi. fa.* issued upon a judgment recovered against him by Cullis and Woodhouse, and the goods having been appraised in 350l., the sheriff, on the 1st of January 1838, on receiving that amount from the plaintiff, executed a bill of sale to him of the goods, and gave him possession thereof. On the 4th of January Cox entered into an agreement with the plaintiff, whereby he agreed to pay the plaintiff 12s. a week for the goods, and attorned tenant to him of the rooms in which the goods were placed, at 5s. a week. On the 15th of December a fiat issued against Cox, under

which he was declared a bankrupt; and on the 23d of January [975] 1839, assignees were duly appointed. Soon after the adjudication a messenger of the court of bankruptcy went to Oxford in order to take possession of the bankrupt's goods; but, on Cox shewing him the bill of sale, he withdrew, leaving Cox in possession of the goods. On the 20th of July 1841, the plaintiff put in a distress for 42l., the arrears of the weekly rent, under which he seized certain other goods belonging to Cox. On the 25th or 26th of July the defendant Brooks entered the premises under a writ of habere facias possessionem issued upon judgment signed by Messrs. Morrell, by virtue of a warrant of attorney, to confess judgment in an action of ejectment which had been executed by the bankrupt, and removed both the goods included in the bill of sale and also the goods which had been distrained upon, into the street. The goods were afterwards placed by a third party in an empty house adjoining. On the 11th of August the defendant Loveday seized the goods under two writs of *fi. fa.* issued against Cox at the suit of two different creditors, and on the 20th sold them by auction. After the sale the assignees of Cox gave notice to the sheriff that they claimed the goods; whereupon the sheriff, on receiving an indemnity from the assignees, paid over to them the net proceeds of the sale, amounting to 232l. 18s. 2d.

The bankruptcy of Cox, as also the trading petitioning creditors' debt and the act of bankruptcy, and the appointment of assignees were admitted. The fact of the sheriff being indemnified by the assignees was proved by the undersheriff, who was called as a witness on the part of the plaintiff.

It was contended for the defendants that the bill of sale was colourable and fraudulent, and that no property in the goods included in it ever passed to the plaintiff. It was also insisted that, even assuming the transaction to be *bonâ fide*, as the plaintiff had allowed [976] the goods to remain in the order and disposition of the bankrupt, the assignees were entitled to them. For the plaintiff it was argued that the defendant could not, under the plea of "not possessed," set up the right of third parties, the only question under that plea being whether the plaintiff was entitled to the goods as against the defendants. The learned judge expressed an opinion that it was not open to the defendants to set up the title of the assignees; and, after directing a verdict to be entered for the defendants upon so much of the first issue as related to the first count, with respect to which no case had been made out; and also upon the fifth, sixth, and seventh issues, he left it to the jury to say whether the bill of sale was *bonâ fide* or was fraudulent and colourable.

The jury having returned a verdict for the plaintiff upon all the issues arising out of the count in trover, with 253l. 3s. 6d. damages, it was agreed that the defendants should be at liberty to move to enter a verdict for them upon the issues raised by the pleas of "not possessed," in case the court should be of opinion that the goods, at the time of the bankruptcy, were left in the order and disposition of the bankrupt, with the consent of the true owner, and that the defendants were not precluded from setting up the title of the assignees.

Talfourd Serjt. having, on a former day in this term, obtained a rule nisi,

Channell Serjt. (with whom was W. J. Alexander) now shewed cause. The question in this case is, whether the sheriff, having sold the goods under two writs of execution, can set up the title of Cox's assignees in order to disprove the plaintiff's property in the goods; and it is submitted that he cannot do so. It is not denied that the plea of "not possessed" raises the question [977] of property, to a certain extent. If the assignees had been the defendants, they might have set up this defence; but it is not competent to the defendants, who have seized and sold the goods as the goods of Cox, to turn round and say that they belonged to his assignees. It is not contended that a defendant may not set up the title of a third party under a plea of "not possessed;" but it must be the title of some person connected with the defendants, and identified with them in point of interest; but here the assignees must be considered as strangers to the sheriff; for he seized and sold the goods, not on their account, but adversely to their claim. [Maule J. This is not an action of trespass, but of trover.] There is no distinction, so far as this case is concerned, between trespass and trover. In *Carne v. Brice* (7 M. & W. 183. 8 Dowl. P. C. 884), which was an issue under the interpleader act to try whether wearing apparel taken in execution under a *fi. fa.* against one Morgan, was his property or not: Lord Abinger C. B. rejected evidence of Morgan's bankruptcy, which was tendered to shew that, at all events, the property was not vested in him but in his assignees; and this

ruling was confirmed by the court of Exchequer. *Chase v. Goble* (ante, vol. ii. p. 930. 3 Scott, N. R. 245) may be cited as qualifying the doctrine laid down in *Carne v. Brice* (7 M. & W. 183. 8 Dowl. P. C. 884). In that case, however, the defendant was a creditor, and he had an interest in supporting the claim of the assignees by the deed, which amounted to an act of bankruptcy. *Owen v. Knight* (4 New Cases, 54. 5 Scott, 307) and *Butler v. Hobson* (4 New Cases, 290. 5 Scott, 798) will probably be also alluded to by the other side. But in *Owen v. Knight* the defendant asserted a property in himself. So, in *Butler v. Hobson*; for there likewise the assignees had an interest in setting up the title of the third party, inasmuch as the property in the hands of such party would be a [978] fund in which all the creditors would share. [Coltman J. Has not the sheriff an interest here? If he were to pay the proceeds over to the plaintiff, would he not be liable to an action at the suit of the assignees?] Here, the assignees do not make any claim until after the seizure and sale; and the sheriff having sold the goods as the goods of Cox, is estopped from setting up any authority subsequently derived from the assignees, which can only have a retrospective operation. In Brooke's Abr. tit. Justification, pl. 14 (citing Year Book 7 H. 4, 13 (a)), it is said that if a man, having no right, distrain in his own right, and after justify as bailiff of the lord, this is not a good justification; but if he distrained as bailiff, though he were not so in fact, and the lord afterwards agreed to the taking, such justification would be good. [Maule J. Suppose the defendants had pleaded that the goods were the goods of the assignees?] They are not justifying a conversion, but are only stating facts to shew that the plaintiff has no right to complain of a conversion. [Tindal C. J. If the sheriff, instead of defending the action, had come to the court under the interpleader act, might not the assignees, under an issue, have set up that the goods belonged to them by reason of Cox having been in possession of them with the consent of the true owner?] In that case the plaintiff would have known that the defendants meant to set up that defence in addition to the objection to the bill of sale, and the contest would then have been with the execution creditor. Had this been an issue the case would not have been distinguishable from *Isaac v. Belcher* (5 M. & W. 139. 7 Dowl. P. C. 516), where it was held that in trover, the plea that the plaintiff was not possessed, puts in issue the [979] right of the plaintiff to the possession of the goods as against the defendant at the time of the conversion. In *Fyson v. Chambers* (9 M. & W. 460) it was held that a party who, after the death of an intestate, has taken possession of the goods, cannot set up as a defence to an action of trover by the administrator that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees, the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them. Here, the assignee, after the title accrued, sent down a messenger who examined the bill of sale with the goods, and then withdrew. The assignees having thus repudiated their title, the sheriff cannot be allowed to set it up. They allowed Cox to remain in possession of the goods, not in his own right, but under his agreement with the plaintiff; and having assented to Cox's holding the goods under the plaintiff, it is doubtful whether they can now say that the goods vested in them. As against the execution creditors, it is clear that the plaintiff has a right to the goods.

Talfourd Serjt. (with whom was Keating) in support of the rule. After the cases of *Lingard v. Messier* (1 B. & C. 308. 2 D. & R. 495), and *Watson v. Peache* (1 New Cases, 327. 1 Scott, 149), it cannot be disputed that at the time of the bankruptcy, the assignees became entitled to the goods which were in the order and disposition of Cox, with the consent of the true owner; and if so, it is clear that the assignees are not precluded from asserting their title, because an ignorant messenger, after looking at the bill of sale, withdrew from the premises. *Issac v. [980] Belcher* shews that they may set up their title under the plea of not possessed. The assignees might have waived the tort, and brought an action for money had and received, if the proceeds of the sale had not been paid over to them. In trover a plaintiff is bound to make out an absolute title as against all the world. No authority has been produced to shew that in trover (whatever may be the case in trespass) a sheriff situated like the defendant Loveday is estopped from setting up the right of third parties. In trover the

(a) The case here intended to be referred to would rather appear to be H. 7 H. 4, fo. 34, pl. 1. And see 4 N. & M. 804.

plaintiff complains not of a wrongful taking, but of a wrongful conversion. Trover, therefore, essentially differs from trespass, and gives rise to a question as to the property in the goods. The case cited from the Year-book is not in point. It was an action of trespass, and the issue taken was, whether at the time of seizing the goods the party was the bailiff of the lord. In *Carne v. Brice* the evidence was rejected, not because it was inadmissible, but because it would have been against good faith and the understanding of the parties to allow it to be given. Here, the plaintiff was not taken by surprise by the title of the assignees being set up, for he knew they were the real defendants, and that the sheriff had paid over the money to them on an indemnity, and proved that fact as part of his case. *Owen v. Knight*, *Butler v. Hobson*, and *Chase v. Goble*, are in favour of the defendants, and cannot be distinguished in point of principle from this case.

TINDAL C. J. It seems to me that the verdict in this case ought to be entered for the defendants, the parties having very properly agreed that instead of there being a new trial, the verdict should be so entered if the court should be of opinion that the plaintiff was not entitled to recover. The main question which was raised at the trial, and which has been argued before us, is, whether upon the pleadings as they stand, and under the cir[981]-cumstances proved, the sheriff had a right to set up the *jus tertii*. If he had, there can be no doubt that the property of the goods in respect of which the action is brought, must be regarded as having vested in the assignees of Cox from the time of his bankruptcy. This is not like the ordinary case of goods left in a ready-furnished house, by which no false colour is held out to the world by reason of the apparent ownership of the bankrupt. Here, it appears that the goods were originally the property of Cox, and that they were assigned to the plaintiff by a bill of sale, no alteration being made in their place of deposit; so that the bankrupt still continued to have them in his order and disposition. The case therefore falls within the principle of *Lingard v. Messiter*, *Watson v. Peache*, and that class of cases; and I have no hesitation in saying, that if the sheriff can avail himself of the title of the assignees, the right to the goods is in them. The action is trover, to which the defendants have pleaded not guilty, and that the plaintiff was not possessed of the goods as his own property; and the question is, whether, under the latter plea, the title of third persons may be set up. It seems to me, that from the very form of that plea, the plaintiff is called upon to prove the goods to be his property, and that the defendants are let into any evidence which will shew that such goods are not the plaintiff's. The count in trover contains two allegations, both of which under the old rules of pleading were put in issue by the plea of not guilty; namely, that the goods were the property of the plaintiff, and that they had been converted by the defendant. Many cases occurred previously to the new rules, in which a defendant was permitted to set up the *jus tertii*. For instance, in *Blainfield v. March* (1 Salk. 285), where the plaintiff [982] brought trover as administrator, and declared on the possession of the intestate; and upon not guilty pleaded, the counsel for the defendant at the trial, offered to give in evidence that the pretended intestate made a will and appointed an executor, but Holt C. J. overruled it, and took this diversity, that where an administrator brings trover upon his own possession, the defendant may give in evidence a will, and an executor upon not guilty, otherwise if it be in the possession of the intestate (as in the principal case), for there the defendant ought to plead it in abatement; and if he does not, he shall not give it in evidence. So in *Daves v. Peck* (8 T. R. 330), in an action on the case by the consignor of goods against a common carrier for not safely carrying according to his undertaking, the carrier was permitted to shew that the property in the goods was not in the consignor but in the consignee. These authorities are sufficient to shew, that formerly in trover it was competent to a defendant, under not guilty, to set up the right of a third person as an answer to the action. I do not see why the same course should not be allowed under the plea of not possessed. *Carne v. Brice* (7 M. & W. 183. 8 Dowl. P. C. 884), at first sight appears to be in favour of the plaintiff; but the proper answer seems to have been given to it, namely, that it was an issue directed by the court to try the particular fact, and, therefore, peculiarly under the guidance and controul of the court, who might well refuse to allow the *jus tertii* to be set up in surprise of the plaintiff. That, however, is not the case here; neither was there any surprise; for the fiat and the proceedings thereon had been admitted between the parties, and the plaintiff himself called a witness to prove that the sheriff was indemnified by the assignees. It is clear

that the real battle was between the plaintiff and the assignees; though the plaintiff may have thought that [983] the main contest would be with respect to the validity of the bill of sale, and so have overlooked this line of defence. But whether that be so or not, as the objection was taken before the verdict was given, the defendants had a right to insist upon it; and as I am of opinion that if the point had been left to the jury they must have found that the goods were in the controul and disposition of the bankrupt, the verdict ought to be entered for the defendants.

COLTMAN J. I also am of opinion that upon the facts of this case the verdict on the issue alien on the plea of not possessed ought to be entered for the defendants. In the first place, has the plaintiff any property in the goods? The alleged conversion takes place when the goods are seized by the sheriff; and it is said that the sheriff was, at that time, as against the plaintiff, a wrongdoer, inasmuch as the assignees had not then come forward to assert their title. But they do assert it afterwards; and the effect is, to vest the property of the goods in them from the time of the bankruptcy. Upon this state of facts the sheriff is clearly not a trespasser as against the plaintiff; for he has seized, not his goods, but the goods of the assignees. That being so, the issue is found for the defendants, provided they are not estopped from setting up the title of the assignees. The rule whereby a party is precluded from availing himself of the *jus tertii* is not so extensive as has been contended. I have always understood it to apply only to cases where a person has placed himself in a position which prevents him from setting up a title in a third party.

ERSKINE J. At the trial two points were insisted on by the defendants under the plea of not possessed; first, that the plaintiff never had any property in the [984] goods, inasmuch as the bill of sale under which he claimed was fraudulent, the goods being bought with the bankrupt's money. That question was left to the jury, who found that the transaction was *bonâ fide*, and that the goods were the property of the plaintiff at the time of Cox's bankruptcy. The second ground of defence was, that admitting that the goods passed to the plaintiff under the bill of sale, yet inasmuch as they were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the plaintiff, the true owner, they vested in the assignees. It occurred to me at the trial, that if the assignees had been the defendants, they might clearly have set up as a defence to the action that the goods were theirs, and might have urged that defence successfully; for the goods having been Cox's originally, and the bill of sale having been kept secret from the world, it was one of those cases for which the legislature meant to provide. But it also occurred to me, that inasmuch as the assignees were not the defendants, and as the sheriff did not set up any authority from them, the defence that the goods belonged to the assignees was not open to him. I am now satisfied that I was wrong, and that the verdict ought to be entered for the defendants. The plea of "not possessed" puts in issue, not the right of the sheriff to seize the goods, but the plaintiff's property in them. The plaintiff, therefore, was bound to prove, not only that the goods became his in 1837, the date of the bill of sale, but that they continued his property down to the time of their being seized by the sheriff. It appeared to me, as the goods were in the plaintiff's possession, and the assignees had then asserted no right to them, the sheriff, by selling them, was guilty of a complete conversion. But I now agree with the rest of the court, that the goods were at that time the property of the assignees; and as they afterwards asserted their right to them, and called upon [985] the sheriff to pay over the proceeds of the sale, the defendants were at liberty to set up the title of the assignees as an answer to this action.

MAULE J. The right of the assignees to the goods in question depends upon whether those goods were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the true owner, within the meaning of the 6 G. 4, c. 16, s. 72. The cases shew that when assignees assert their title, as has been done here, the goods vest in them from the time of the bankruptcy. The observation of Parke J. in *Isaac v. Belcher* (5 M. & W. 139; 7 Dowl. P. C. 516), "that the plea that the plaintiff was not possessed, in this form of action puts in issue the right of the plaintiff to the possession of the goods as against the defendant, at the time of the conversion," is to be understood, not as narrowing but as enlarging the defence under that plea. There, under "not possessed," the defendants as assignees claimed, not an actual property in the goods, but a right to take them as being in the order and disposition of the bankrupt at the time of his bankruptcy; and on its being contended

that this could not be given in evidence under that plea, Parke B. in effect states, that the defendants might say, though the plaintiff has the property in the goods, he has none as against us. The question here is, whether the sheriff may set up the title of the assignees; and when the nature of the issue is looked at, the evidence is clearly admissible. This is not an action of trespass, for damage done to some chattel which the plaintiff asserts to be his. In trover the plaintiff seeks to recover for the wrongful conversion of property which he admits to have come lawfully into the possession of the defendants. The allegation in the declaration is, that the [986] plaintiff was lawfully possessed of the goods as of his own property. The effect of denying that averment is, to raise a question whether the plaintiff has such a title as will enable him to maintain an action of trover in respect of it. The defendant may shew, either that the plaintiff has no right against any body, or that he the defendant has some right which prevents the plaintiff from maintaining the action against him. Here, the defendants say that the plaintiff has no right to the goods at all. The evidence given by them was offered, not to shew the right of third persons, but to prove that the goods were not the property of the plaintiff. It is clear that the evidence was admissible; and I cannot understand how the defendants would be prevented from giving it unless by reason of some estoppel. An estoppel, however, can only arise out of some mutuality between the parties; but here the defendants are mere strangers. If such evidence were not admissible, the allegation that the plaintiff was possessed as of his own property, would become an idle averment, and the effect would be to destroy the distinction existing between trespass and trover.

Rule absolute to enter a verdict for the defendants on the issues raised by the pleas not possessed to the second count and new assignment thereon.

[987] DOE DEM. HENRY v. GUSTARD. Nov. 23, 1842.

It is no ground for staying proceedings in ejectment for a forfeiture, that the lessor of the plaintiff had previously brought an ejectment for the same premises in a different court, in respect of a former forfeiture, in which action a rule for entering a nonsuit is still pending.

Ejectment brought upon a clause of re-entry in an indenture of lease for a forfeiture by reason of nonpayment of rent.

On the 9th of April last the lessor of the plaintiff brought a similar action in the court of Queen's Bench, in which he obtained a verdict. An objection was taken at the trial of that cause that the demand of the rent was on a later day than that on which it ought to have been made, and a rule nisi was granted in Trinity term for entering a nonsuit upon that ground, which rule was still pending. The present action had been commenced subsequently for a fresh forfeiture in respect of the nonpayment of rent for two other quarters.

Dowling Serjt. now moved for a rule to shew cause why the present action should not be stayed until the determination of the other action in the court of Queen's Bench. [Coltman J. It does not follow that the action in the Queen's Bench will decide this.] The lessor of the plaintiff should either abandon the action in the Queen's Bench or that in this court. [Tindal C. J. The rule only applies where the second action is for the same forfeiture. Here, the lessor of the plaintiff is proceeding for a fresh cause of action.] It is said in Archb. Pr. by Chitty, 991, 7th ed., that "the courts have stayed the proceedings in a second ejectment until the special verdict in the former one should be determined;" for which position *Smith d. Dormer v. Parkhurst* (a) is cited. Supposing the defendant to succeed in the action in the Queen's Bench, he will be entitled to costs; but he will be prevented, by the bringing of the second action, from getting them.

[988] TINDAL C. J. You do not say that the lease is void, and yet you do not pay the rent at the time when it ought to be paid according to the reservation. How can we prevent the lessor of the plaintiff from bringing another action? *Smith d. Dormer v. Parkhurst*, as reported by Strange, does not support the position for which it is cited in Archbold's Practice. It is said to be more fully given in Andrews; and

(a) 2 Str. 1105. But no such point appears either in the short note in Strange or in the full report in Andrews, 315.

if you find that the latter report bears out your motion, you can renew it to-morrow ; but as at present advised I think it ought not to be granted, as this, on your own shewing, is a fresh action.

The rest of the court concurred.

Rule refused (a).

PERKINS v. VAUGHAN. Nov. 24, 1842.

[S. C. 5 Scott, N. R. 881 ; 12 L. J. C. P. 38 ; 6 Jur. 1114.]

In trespass by A. against B. for false imprisonment, B. justified on the ground that A. being possessed of a bill of exchange drawn by C. upon D., forged the acceptance of D. Issue being joined upon a replication de injuriâ, a witness called by A. proved that A. and B. went with him to D. on the day following that on which the bill had been dishonoured, when B. reminded D. that D. had on the presentment of the bill for payment stated that A. had forged D.'s acceptance, and that D. neither admitted nor denied that he had made such a statement. A witness called by B. stated that D., when he dishonoured the bill, did say that the acceptance was forged by A. Held, that this statement was admissible in evidence in mitigation of damages.—Sembles, that this statement would have been evidence for B., even if evidence of the subsequent conversation had not been given by A.

Trespass for assaulting the plaintiff and compelling him to go to a police station-house, and thence to a police court, and imprisoning plaintiff twelve hours.

Pleas : first, not guilty ; secondly, leave and licence ; thirdly, that before the committing of the trespasses, to wit, on the 14th of September 1841, the plaintiff [1899] having in his possession a bill of exchange, the tenor whereof was and is as follows ;—" 15l. Eton, September 14th, 1841. Two months after date pay to my order 15l. for value received. Robert Perkins. To Mr. John Dreweatt, 25 Bucklebury, London ;" he the plaintiff did feloniously forge on the said bill a certain false and counterfeit acceptance of the said bill, by writing on and across the said bill ; which false, forged, and counterfeit acceptance of the said bill was and is as follows ;—" Accepted, John Dreweatt ;" with intent to defraud the defendant, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown, and dignity ; wherefore the defendant well knowing the plaintiff to be guilty of the said felony, did, at the said time when, &c., give the plaintiff in charge to one Lawrence Anderson, then being a police and peace officer of our Lady the Queen, duly authorised in that behalf, and then requested the said L. A., so being such police and peace officer, to take the plaintiff into his custody, and safely keep him, and carry, and convey him before some police magistrate and justice of the peace of our said Lady the Queen duly authorised in that behalf, to answer the premises and to be dealt with according to law ; wherefore the said L. A., so being such police and peace officer, did, at the request of the defendant, take the plaintiff into his custody, and forced and compelled him to go in and along the said public streets to the nearest police station-house, being the said police station-house in the declaration first above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our Lady the Queen duly authorised in that behalf, to answer the pre-[1899]-mises ; and because there was not then at the last mentioned police station-house a proper police officer in that behalf ready and willing to take the charge against the plaintiff, and because the plaintiff could not be then and there conveniently kept and imprisoned as aforesaid, the said L. A. then being such police and peace officer as aforesaid, at the request of the defendant then forced and compelled the plaintiff to go from and out of the last mentioned police station-house into the public street, and forced him to go in and along divers other streets to a certain other police station-house, being the police station-house in the declaration secondly above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the

(a) The application was not renewed.

plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our said Lady the Queen duly authorised in that behalf, to answer the premises; and the said L. A., then being such police and peace officer as aforesaid, at the request of the defendant afterwards and as soon as conveniently could be, conveyed and carried the plaintiff in and along divers other streets to a certain police court, before J. R. Esq., then being a police magistrate and justice of the peace then acting and duly authorised to act in that behalf, for examination concerning the premises, and to be dealt with according to law; which are the same, &c. : verification.

A fourth plea differed from the third in stating that the plaintiff uttered the bill, knowing the acceptance to be forged, instead of alleging that it was forged by the plaintiff.

The plaintiff added the similiter to the first plea, and took issue upon the other pleas, by traversing the leave and licence in the second, and by replying *de injuriâ* to [991] the third and fourth. To these three traverses the similiter was added on the part of the defendant.

At the trial, before Maule J., at the sittings at Westminster, in Easter term last, the imprisonment was proved. A witness called by the plaintiff stated, upon his examination in chief, that the plaintiff and the defendant went with the witness to Dreweatt on the day following the dishonour of the bill; that the defendant, in the presence of the plaintiff, reminded Dreweatt that on the preceding day Dreweatt had charged the plaintiff with having forged the acceptance; and that Dreweatt neither admitted nor denied that he had made such a charge.

One Vaughan, a cousin of the defendant, who proved the dishonour of the bill, was asked what Dreweatt said at the time he refused to pay the bill. This question being objected to, the learned judge overruled the objection, and Vaughan answered that Dreweatt then stated that the plaintiff had forged the acceptance.

A verdict having been found for the defendant upon the third issue,

Talfourd Serjt. in the same term, moved for a new trial on the ground that the question had been improperly allowed to be put. The only measure of damage in this case is, the amount of suffering and injury actually sustained, whatever the impression on the mind of the defendant may have been.

Channell Serjt. in Trinity term shewed cause. The evidence was tendered and received, not to prove a forgery actually committed, but to lessen the damages. The statement of Dreweatt was a declaration accompanying an act done. It could not be a defence to this action that the defendant had reasonable ground to suspect that the plaintiff had forged Dreweatt's acceptance. [992] It was merely evidence in mitigation of damages. If when a bill is presented for payment to bankers they say that there are no effects, that is a declaration which may be given in evidence, as it accompanies the act of refusal. The statement made by Dreweatt was calculated to make a considerable difference in the amount of damages, and it would clearly have been admissible in evidence. [Cresswell J. That would be on a totally distinct ground from being a declaration accompanying an act.] The damages would be assessed upon the issue of not guilty; and that is so, whether the general issue is pleaded alone or with special pleas. Any facts which go to shew that the damages are less than the plaintiff seeks to recover are admissible upon the general issue. It cannot be said that the statement given in evidence was irrelevant to the matters into which the jury had to inquire.

Talfourd Serjt., in support of the rule. The plaintiff complains of the damage which he has sustained by the imprisonment, and not of the motives of the defendant. The defence which it was sought to set up by the alleged conversation was pleadable. Reasonable ground of suspicion might have been pleaded after an allegation, that a felony had been committed by some one. [Coltman J. That allegation could not have been made in this case. Maule J. There was no ground for supposing that any other person had committed the felony. That shews that the defence could not have been pleaded. Part of my brother Channell's argument is therefore left unanswered.] The plaintiff had no means of cross-examining the witness upon this statement, nor could he anticipate that any such statement would be attempted to be proved. [Maule J. Your objection would exclude a statement made by the defendant himself at that time. Tindal C. J. Facts can-[993]-not be given in evidence which might have been pleaded.] It was formerly supposed that circumstances of suspicion might be given in evidence. [Maule J. Pleas of justification are not drawn so as to enable

the party to be put upon his trial as upon an indictment. A felony is not laid to have been committed against the peace.] That is no doubt generally so; but here it is so drawn. The plaintiff contends that the evidence is not relevant, and that supposing it to be so, it is *res inter alios acta*.

TINDAL C. J. now delivered the judgment of the court.

This was an action of trespass and false imprisonment, in which the defendant pleaded—first, not guilty; secondly, leave and licence; thirdly, that the plaintiff had forged an acceptance of a bill of exchange, and that the defendant had caused the plaintiff to be arrested upon that charge. The jury having found a verdict for the defendant on the third issue, the plaintiff obtained a rule to shew cause why there should not be a new trial, on the ground of the admission of improper evidence.

The evidence objected to was this. One Vaughan was called by the defendant to prove the dishonour of the bill when presented for payment to Dreweatt, on whom the bill was drawn, and who appeared on the face of the bill to have accepted it; and this witness stated that he accompanied the defendant to Dreweatt's, and that Dreweatt refused to pay the bill; whereupon the witness was asked what Dreweatt said at the time of the refusal. It was objected by the plaintiff's counsel that such question could not be put to the witness; but the objection being overruled, the witness answered that Dreweatt said, in effect, that the acceptance in his name was a forgery by the plaintiff. The only point that has been argued before us is, whether the question was a proper question, and one which ought to have been allowed to be put to the witness. And we are of opinion that, upon the course which the evidence took on the trial of this case, the question was very properly allowed, and that the answer was admissible evidence in the cause. Even if the inquiry before us had depended on the determination of the point whether evidence by the defendant of the dishonour of the bill and of the circumstances attending such dishonour, was relevant to the question then before the jury of the acceptance by the plaintiff, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy; but upon the trial the plaintiff had made it part of his own evidence; and his first witness had proved, on his examination in chief, that the plaintiff and the defendant went with him to Dreweatt's on the day following that of the dishonour of the bill, and that the defendant, in the presence of the plaintiff, reminded Dreweatt of the charge of forgery which he had made against the plaintiff the day before, and had asked him to repeat his conversation; and the plaintiff's witness proceeded to state Dreweatt's answer, which neither admitted nor expressly denied that such conversation had taken place. In this state of the evidence it was certainly competent to the defendant to prove by his own witness, who was present at such conversation, what had really taken place between Dreweatt and the defendant, and that the conversation was such as the defendant had stated in the presence of the plaintiff. The plaintiff's object was, to lead the jury to believe that the defendant had referred to a fictitious conversation. It was perfectly competent, therefore, to the defendant to shew, on his part, that such conversation was real and not fictitious, and to follow up the plaintiff's account with his own.

Upon this ground we are of opinion that the question was properly allowed, and that the answer was properly admitted as evidence, and that the rule must be discharged.

Rule discharged.

[995] JOHN HAMPDEN GLEDSTANES v. THE RIGHT HONOURABLE JOHN WILLIAM EARL OF SANDWICH AND JOHN WISBY. Nov. 25, 1842.

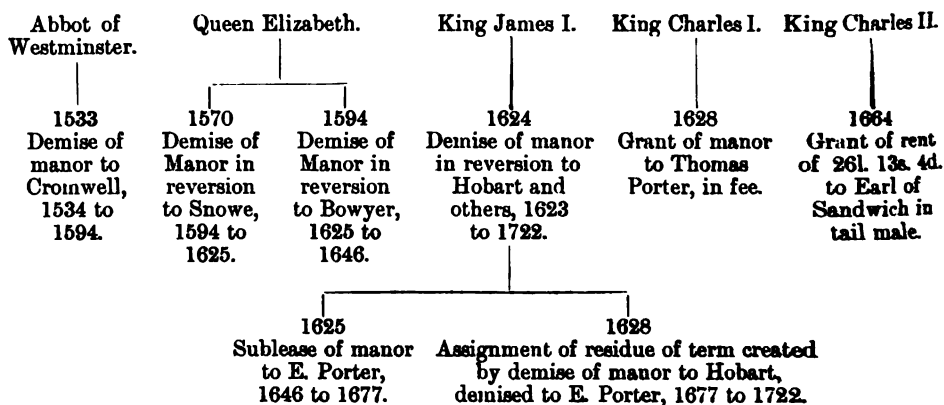
[S. C. 5 Scott, N. R. 689; 12 L. J. C. P. 41. Distinguished, *Great Eastern Railway v. Goldsmid*, 1884, 9 App. Cas. 941.]

Grants from the crown may be avoided upon three grounds;—First. Where the crown professes to give a greater estate than it possessed in the subject matter of the grant;—Secondly. Where the same estate, or part of the same estate, has already been granted to another;—Thirdly. Where the crown has been deceived in the consideration expressed in the grant.—In 1594, Queen Elizabeth, by letters patent, granted the manor of Dale in reversion to A. for twenty-one years, to expire in 1646, at a rent of 26l. 13s. 4d. In 1624, James I. by indenture demised the manor, without any reservation of rent, to B. and C., trustees for Prince Charles, for ninety-

nine years, to expire in 1722. In 1626 B. and C. demised the manor to D. for thirty-one years from the expiration, in 1646, of the term granted to A. at the same rent. 29th March 1628, B. and C. assigned to D. the residue of their term of ninety-nine years, at the same rent of 26l. 13s. 4d. till the expiration of the existing leases (in 1677) and from that time at the rent of 40l. 2d July 1628, Charles I., by letters patent, confirmed the former leases to D. for a valuable consideration, and granted the reversion of the manor to E. in fee, to be held of the crown by knight's service and without any rent during the residue of the term for ninety-nine years (ending in 1722) and from that time at a fee farm rent of 40l. : in which letters patent there was a clause releasing all the rent, made payable by the indenture of 1624. In 1664, Charles II., by letters patent, granted to F. in tail male, "all that yearly rent of 26l. 13s. 4d." by the letters patent of Charles I., of 2d July 1628, to the king, "his heirs and successors," reserved, or mentioned to be reserved, out of the manor of Dale.—Held, that although there was a misdescription in this grant to F.,—inasmuch as the rent of 26l. 13s. 4d. was reserved by the letters patent of Car. I. for a term and not in fee, yet, as there was a rent of 40l. thereby reserved in fee,—the crown had a sufficient estate in a rent, both as to interest and value, out of which the intention of the grant might be carried into effect; and, therefore, that such misdescription did not avoid the grant.—In 1798 the rental books of the entailtees were destroyed by fire, from which time they had been in the perception of a rent of 26l. 13s. 4d. paid by the tenants of the manor.—Held, that in the absence of any evidence that such rent commenced at that period, it was a legitimate inference that it had been paid from the period when it would become payable to the entailtees under the patent of Car. II.—In 1723 G. (claiming under E.) conveyed the manor to H. by a deed, which contained a covenant against incumbrances, with an exception "of a fee farm rent payable to the crown."—Held, that this covenant (coupled with the statement of the rents in the demises to D. and the grant to E.) shewed that the owner of the manor had express notice of the existence of such rent.—Held also, that there having been so long a perception of rent in the entailtees, and the owners of the manor having had notice of the reservation of a rent to the crown, every intendment was to be made in favour of the grant to F.

Replevin. The defendants avowed and made cognizance, first under a distress for a fee farm rent claimed to be issuing out of the manor of Allfarthing, in the parish of Wandsworth, in the county of [996] Surrey, whereof it was alleged that the said Earl of Sandwich was seised in fee; and, secondly, under a distress for a fee farm rent, claimed to be issuing out of the same manor, alleged to have been granted by King Charles the Second, as in the avowry and cognizance particularly mentioned (Vide post, in the judgment, p. 1020); and, issue having been joined upon the pleas in bar taking issue thereon, the following case was by the order of the Right Honourable Mr. Justice Erskine, and by the consent of the parties, stated for the opinion of this court.

STEMMA TITULI.



—February, 25 H. VIII. 1533 (1533).—By an indenture of this date, under the conventual seal of the late monastery of St. Peter at Westminster, the said manor was

demised to Thomas Cromwell, Knight, for the term [997] of sixty years, beginning from the feast of St. Michael the Archangel then next ensuing.

25th July, 12 Eliz. 1570.—By letters patent of this date, the said manor was granted in reversion to Elizabeth Snowe for the term of thirty-one years, beginning from the expiration, surrender, forfeiture or determination of the prior demise to Cromwell (a)¹.

12th April, 36 Eliz. 1594.—By letters patent of this date, the said manor was granted to John Bowyer for the term of twenty-one years, to begin from the expiration, surrender, forfeiture, or determination of the former grant to Elizabeth Snowe (a)¹.

15th June, 22 Jac. 1, 1624.—By an indenture of this date, made between his Majesty (King James I.) of the one part, and Henry Hobart, Knight and Baronet, Chief Justice of the Court of Common Pleas, and Chancellor of the Prince of Wales, James Fullerton, Knight, then Master of the Wards and Liveries, John Walter, Knight, then Attorney-General, and Thomas Trevor, Knight, then Solicitor-General, of the other part; His said late Majesty, of his special grace, certain knowledge, and mere motion, and at the request and nomination of Charles then Prince of Wales, did give, grant, and to farm let to the said Henry Hobart, James Fullerton, John Walter, and Thomas Trevor (inter alia), the said manor with the appurtenances, therein particularly mentioned to be of the yearly rent and value (beyond reprises) of 25l. 3s. 3d., and to have been parcel of the possessions of the late monastery of Westminster, and afterwards annexed to the honour of Hampton Court, for the term of ninety-nine years from the feast of St. Michael the Archangel then last past before the date of the said indenture.

8th March, 1 Car. 1, 1628.—By an indenture of [998] this date, between the said John Walter, James Fullerton and Thomas Trevor (who had survived the said Henry Hobart) of the one part, and Endimion Porter, Esq., one of the grooms of the chamber, of the other part, the said manor was by Walter, Fullerton and Trevor, granted in reversion to the said Endimion Porter for the term of thirty-one years, beginning from the feast of St. Michael the Archangel, 1646, or from the end, surrender, forfeiture, or determination of the term then existing (a)².

29th March, 4 Car. I. 1628.—By indenture of this date, made between the said John Walter, James Fullerton and Thomas Trevor of the one part, and the said Endimion Porter of the other part, the said John Walter, James Fullerton and Thomas Trevor, by the special warrant of His Majesty (King Charles I.), and by the direction of James, Earl of Marlborough, High Treasurer of England and others the commissioners authorised for the sale of lands, and in consideration of the yearly rent in and by the now stating indenture reserved, and thereout to be paid by the said Endimion Porter, his executors, administrators and assigns, and in consideration of a competent sum of money by the said Endimion Porter to the use of His said late Majesty paid, and for divers other good causes and considerations, the said John Walter, James Fullerton and Thomas Trevor did give and grant to the said Endimion Porter, the said manor of Allfarthing, with the appurtenances, and all the right, estates, title, interest, term of years to come, reversion and reversions, claim and demand whatsoever of them the said John Walter, James Fullerton and Thomas Trevor, and every of them, of, in and to the said manor, except as by the said now stating indenture is excepted; to have and to hold the same unto [999] the said Endimion Porter, his executors, administrators and assigns during the residue of the said term of ninety-nine years; yielding and paying therefore yearly, during all the residue of the said term, to the said John Walter, James Fullerton and Thomas Trevor, their executors, administrators and assigns, to the use of his said late Majesty, his heirs and successors, the yearly rents following, that is to say, during all the term then to come and unexpired of and in the said letters patent of 12th of April 36 Eliz., and the indenture of demise of 8th of March 1 Car. 1, or either of them, the yearly rent of 26l. 13s. 4d.; and after the expiration of the term aforesaid, then yielding and paying during all the residue of the said term of ninety-nine years, then to come and unexpired, the yearly rent of 40l., at the feasts of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, by equal and even portions, into the hands

(a)¹ See further particulars as to the two grants of Elizabeth in the judgment, p. 1022.

(a)² Vide post, in the judgment, p. 1022.

of the receiver of the revenues of the Prince of Wales, or the receiver of the county of Surrey, for the time being (a).

2d July, 4 Car. 1, 1628.—By letters patent of this date, after reciting the indenture of 15th of June, 22 Jac. 1, and also reciting that the said John Walter, James Fullerton and Thomas Trevor (who had survived the said Henry Hobart), were possessed, by virtue of the demise contained in the said indenture of the 15th of June, 22 Jac. 1, of, amongst other things, the said manor, by right of accruer, for the whole residue of the said term of years then to come and unexpired, and also reciting that by a certain indenture, bearing date the 29th day of March, then last past, made between the said John Walter, James Fullerton and Thomas Trevor of the one part, and the said Endimion Porter of the other part, the said John Walter, James Fullerton and Thomas [1000] Trevor, by the special warrant of the said late King, and by the direction of James, Earl of Marlborough, the said late King's Treasurer of England, and other the commissioners authorised for the sale of lands, and in consideration of the annual rent, in and by the same indenture reserved, and from thence payable and to be paid, by the said Endimion Porter, his executors, administrators, and assigns, and also in consideration of a competent sum of money, by the said Endimion Porter, for the use of the said late King, paid, and for divers other good causes and considerations the said John Walter, James Fullerton, and Thomas Trevor thereunto moving, granted and assigned to the aforesaid Endimion Porter the said manor of Allfarthing, with the appurtenances, and all the right, estate, title, interest, term of years to come therein, reversion and reversions, claim and demand whatsoever, of them the said John Walter, James Fullerton, and Thomas Trevor, and either of them, of, in and to the said manor, with its rights, members and appurtenances whatsoever, and of, in and to whatever is part and parcel thereof; except as by the said last recited indenture is excepted, which manor, it is by the now stating letters patent alleged, had been demised, by indenture, under the conventual seal of the late monastery of St. Peter's at Westminster, bearing date the last day of February, in the twenty-fifth year of the reign of the Lord Henry, late King of England, the Eighth, to Thomas Cromwell, Knight, for a term of sixty years, beginning from the feast of St. Michael the Archangel, then next following; and had been afterwards granted, in reversion, to one Elizabeth Snowe, by letters patent, of the late Queen Elizabeth, bearing date at Gorhambury, the 25th day of July, in the twelfth year of her reign, for a term of thirty-one years, to begin from the expiration, surrender, forfeiture or de-[1001]-termination of the former lease, so made to the said Thomas Cromwell, Knight, and had been afterwards granted in reversion to John Bowyer, by letters patent of the said Queen Elizabeth, dated the 12th day of April, in the thirty-sixth year of her reign, for a term of twenty-one years, beginning from the expiration, surrender, forfeiture or determination of the former letters patent, made to the said Elizabeth Snowe; and then lately granted in reversion to the said Endimion Porter, by indenture of the said John Walter, James Fullerton and Thomas Trevor, dated the 8th day of March, in the first year of his then Majesty's reign, for a term of thirty-one years, beginning from the feast of St. Michael the Archangel, 1646, or from the end, surrender, forfeiture or determination of the term then being, which should first and next happen; to have and to hold the said manor, with its appurtenances, to the said Endimion Porter, his executors, administrators and assigns, during the residue of the said term of ninety-nine years before mentioned, and then to come and unexpired; yielding and paying annually during the whole residue of the said term thence to come, to the said John Walter, James Fullerton and Thomas Trevor, their executors, administrators and assigns, for the use of the said late King Charles I., his heirs and successors, the annual rent following; (that is to say), for and during the whole term thence to come and unexpired, of and in the aforesaid letters patent and indenture of lease aforesaid, or either of them, the annual rent of 26l. 13s. 4d.; and, after the expiration of the term aforesaid, then yielding and paying during the whole residue of the said term of ninety-nine years then to come and unexpired, the annual rent of 40l. at the feasts of St. Michael the Archangel and the Annunciation of the Blessed Virgin Mary, by even and equal portions, into the hands of the receiver of the said rent, appointed [1002] by the said late King Charles I., when he was Prince of Wales, or to his said Majesty's receiver of the said county of Surrey, for the time being, the

(a) Vide post, in the judgment, p. 1023.

said late King Charles I., of his special grace, certain knowledge and mere motion, the said indenture, bearing date the aforesaid 29th day of March, to the said Endimion Porter, as is set forth, and all and singular grants, assignments, thing and things whatsoever, in the same mentioned and contained, approving and the same allowing and granting, and every of them, and the said manor and all and singular other the premises, under the rents, covenants, conditions and agreement and during the term, in the said indenture specified, to the said Endimion Porter, his executors, administrators and assigns, for his said late Majesty King Charles I., his heirs and successors; the said late King ratified and confirmed, by the now stating letters patent, and as well to the said Endimion Porter, his heirs, executors, administrators and assigns, and every of them, all and singular the premises, as also the said annual rent, in and by the said indenture, and (a) by the late King James I., as it is set forth made payable, as all arrears thereof, and all suits, claims and demands thereupon, the said late King Charles I. thereby released, acquitted and discharged; and by the now stating letters patent the said King Charles I., as well as in consideration of the sum of [1003] 300l., by the said Endimion Porter, paid to his said late Majesty, as also at the humble petition, requisition and nomination of the said Endimion Porter, and of the said late King's special grace, certain knowledge and mere motion, did give and grant, and for himself, his heirs, and successors, to Thomas Porter, of London, Esquire, his heirs and assigns for ever, his said late Majesty's reversion and reversions, remainder and remainders whatsoever of the said manor of Allfarthing, and all and singular other the premises, by the said indenture, by the said John Walter, James Fullerton and Thomas Trevor granted and assigned, or by the same indenture mentioned to be granted and assigned, with their rights, members, liberties and appurtenances whatsoever; also all that the said late King's demesne or manor of Allfarthing, with the appurtenances, except as therein excepted: to have and to hold the same (except as excepted) to the said Thomas Porter, his heirs and assigns, to the only proper use and behoof of him, the said Thomas Porter, his heirs and assigns for ever; to be held of the said late King, his heirs and successors, as of his said late Majesty's house of Hampton Court, by knight's service; (that is to say), by the service of half a knight's fee and without any rent or other thing to be rendered to the said late King, his heirs or successors, during the residue of the said term of ninety-nine years; and after that term is finished, rendering annually to the said late King, his heirs and successors, out of and for the aforesaid demesne or manor of Allfarthing and other the premises thereby granted, 40l. into the hands of the bailiffs or receivers of the premises, for the time being, or into the receipt of the exchequer of the said late King, his heirs or successors, at the feasts of St. Michael the Archangel and the Annunciation of the Blessed Virgin Mary, by equal portions, to be for ever; the first payment of the said rent to begin at such feast or feasts [1004] aforesaid as should first and next happen, after the expiration or other determination of the said term of ninety-nine years, by the said late King James I., by the said indenture bearing date the 15th day of June in the twenty-second year of his reign of England above—said mentioned to be granted, and not before, for and instead of all other rents, services, exactions and demands whatsoever, from thence to the said late King Charles I., his heirs or successors, in any manner to be rendered, paid or performed. And that so often as it should happen that the said annual rent of 40l. above, by the now stating letters patent, reserved, should be in arrear, and not paid in part or in the whole by the space of forty days next after any of the said feasts, in which it is stated it ought to be paid, that then, from time to time, it should be lawful for the said late King Charles I., his heirs and successors, by the receiver of the premises, for the time being, or his deputy or any

(a) The word "and" is not in the original. The passage runs thus:—

"Ac tam p'dict. Endimion Porter heredes executores administratores & assignat. suos & queml't eor. qm̃ om̃ia & singula p'missa tam de om̃ibz annuat. reddit. in ac p. p'dcām indentur. p. p'dcm prem nrm sic p'fert. fact. reservat. qm̃ de om̃ibz arrearagijs inde & de om̃ibz sectis impetiçōibz & demaund. p'inde relaxam'. acquietam'. & exon'ama'. p. p'sentes; nolentes p'd Endimion Porter, heredes executores administratores vel assignat. suos vel eor. aliquem p. dict. reddit. vel aliquibz arrearagijs inde aliqualit. inquietari p'sequi seu molestari."

Vide post, in the judgment, p. 1025.

others for the time being, in the said demesne, manor and other the premises, or any part or parcel thereof, to enter and distrain, and the distresses there found, or to be found, to take and retain, so that the late King Charles I., his heirs and successors, of the said late King's said rent, together with all arrears thereof (if any there should be), should be fully satisfied and paid; and so often as it should happen that the said annual rent, by the now stating indenture reserved, should be in arrear, and not paid for one month after the end of the said forty days, for the payment thereof limited, that then and so often the said Thomas Porter, his heirs and assigns, should forfeit and pay to the said late King Charles I., his heirs and successors, 8l. (in the name of a penalty) over and above the aforesaid annual rent, by the now stating letters patent reserved, for each month from thence next following, in which the said annual rent, or any parcel thereof, had been in arrear and un-[1005]-paid, in the manner and form aforesaid; and that from thence afterwards, from time to time, and so often as such cases should happen, it should be lawful for the said late King Charles I., his heirs and successors, by the receiver of the premises of the said late King, his heirs or successors, for the time being, or his or their deputy for the time being, into the said demesne or manor, or into any part or parcel thereof, to enter and distrain, and the distresses there found or to be found to take and retain, so that the said late King Charles I., his heirs and successors, the said rent and all arrears thereof, and all forfeitures and sums of money (in the name of penalty) to be forfeited, should be fully satisfied and paid."

3d February, 15 Car. II.—In letters patent of this date is contained as follows:—

"The king to all to whom, &c. Greeting. Know ye, that for and in consideration of the good, true, and acceptable service to Us, by Our beloved and faithful cousin and counsellor, Edward Earl of Sandwich, heretofore rendered, and for the better support of the said earl, his family and dignity, and for divers other goods, causes, and considerations, Us at this present, specially moving, of Our special grace and of Our certain knowledge and mere motion, We have given and granted, and by these presents do for Ourselves, Our heirs and successors, give and grant unto the said Edward Earl of Sandwich, and the heirs male of his body, lawfully begotten, all, &c., and all that yearly rent of 26l. 13s. 4d. by certain letters patent of Our said father, under His great seal of England, bearing date the 2d day of July, in the fourth year of his reign, made to Thomas Porter of London Esq., to Our said father, his heirs and successors, issuing or reserved or mentioned to be reserved, out of or for all that lordship or manor of Allfarthing, in the parish of Wannesworth, in the county of Surrey aforesaid, [1006] with all its rights, members and appurtenances, and out of or for all other lands, tenements and hereditaments whatsoever, and every part thereof, chargeable with the said annual rent or fee farm of 26l. 13s. 4d., by the aforesaid letters patent of Our said late father above mentioned, to the same Thomas Porter, his heirs and assigns, for ever granted or mentioned to be granted, or out of, or for any of the premises alone, or together with any lands, tenements, rents and hereditaments, in the letters patent above mentioned contained; and all manner of fealties, tenures and services of the premises above mentioned, by the said letters patent before mentioned to be granted, and of every part thereof, or by which they, or any part thereof, are or is held of Us; to have, hold and enjoy, all and singular the said several yearly rents or fee farms, of and for all and singular the premises, by the aforesaid several letters patent as aforesaid reserved, and by these presents granted or mentioned to be granted; and all and all manner of fealties, tenures and services of socage, and all and singular the other premises expressed and specified, and by these presents granted or mentioned to be granted, with all their appurtenances, to the said Earl of Sandwich, and the heirs male of his body lawfully issuing, to the sole and proper use and behoof of the said Edward Earl of Sandwich, and his heirs male for ever; to be held of Us, Our heirs and successors, as of the manor of East Greenwich, in Our county of Kent, by fealty only, in free and common socage, and not in chief, nor by knight's service, for all other rents, services, exactions and demands whatsoever for the same, to Us, Our heirs or successors, to be rendered, paid or made."

No rent of 40l. has ever been put in charge to the Crown, in respect of the said manor; nor has any rent of 40l. ever been paid to or demanded by, the Earls of Sandwich, or by any of them, either during the term of ninety-nine years, or since the expiration thereof.

[1007] In the ministers' accounts, in the office of the land revenue records, for the year 1624, 1 Car. I. is as follows:—

"The accounts of all and singular the bailiffs, farmers, provosts, collectors and other officers and ministers whomsoever of all and singular honours, castles, lordships, manors, lands, tenements and other possessions and hereditaments whatsoever, of the King's majesty in the county aforesaid, which were heretofore under the government or supervision of the late court of augmentation and revenues of the Crown, and now, —as well by virtue of an act of parliament held in the first year of the late Queen Mary, as of a certain commission by the same queen, by virtue of the same act of parliament, to William, Marquess of Winton, at that time Lord Treasurer of England, and chancellor of the Court of Exchequer, directed,—to the same court united and annexed, viz., reckoning from the Feast of St. Michael the Archangel, in the twenty-second year of our Lord James, by the Grace of God of England, France and Ireland, king, defender of the faith, &c., and of Scotland, the fifty-eighth, to the same Feast of St. Michael the Archangel thence next following, in the first year of our Lord Charles, by the Grace of God of England, Scotland, France and Ireland, king, defender of the faith, &c., to wit, for the space of one whole year.

"As below.

<p>"Manor of Chertsey, Hardwick, Egham and Thorpe, parcel of the possessions assigned to our Lord King Charles before his accession to the Crown of the realm of England.</p>	<p>The late monastery of Chertsey. Of ccxxxvi. xixs. xid. of rent and farm of the manor aforesaid, or of any other casual issues there, he doth not answer this year, because our Lord King Charles, by His letters patent, sealed with the great seal of England, dated at Oxford, on the 12th day [1008] of August in this first year of His Majesty's reign, gave and committed to certain commissioners, in the same letters patent named, a court for regulating, ordering, governing and disposing of all the revenues which he had before his accession to the Crown of England of which revenues the aforesaid manors are parcel; and so the bailiffs, farmers and others compute the manors aforesaid, and they have been accounted for, before the aforesaid commissioners, of the issues of the same, by virtue of the commission aforesaid;</p>
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"Sum nothing."

<p>"Parcel of the possession of the honour of Hampton Court.</p>	<p>Neither doth he answer for 26l. 13s. 4d. of the farm, of all that lordship or manor of Allfarthing, in the parish of Wannesworth, late in the tenure of Thomas Cromwell Knight, because it is committed (inter al.) by certain letters patent of our Lord King Charles, to certain commissioners as parcel of his revenues, which he had before his accession to the Crown of England, as above, in the title of the manor of Chertsey, &c.</p>
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"Sum nothing" (a).

The entry in the ministers' account for the year 1641, 17 Car. I., relating to the manor of Allfarthing, is as follows:—

"County of Surrey.—The accounts of all and singular bailiffs collectors, provosts, farmers and others, officers and ministers whomsoever, of all and singular honours, castles, lordships, manors, lands, tenements and other possessions and hereditaments whatsoever, of the King's Majesty, in the county aforesaid, which were heretofore under the government or supervision of the [1009] late court of augmentations of the Crown, and now, as well by virtue of an act of parliament held in the first year of the late Queen Mary, as of a certain commission by the same Queen, by virtue of the said act, to William Marquess of Winton, at that time Lord Treasurer of England and Chancellor of the court of Exchequer, united and annexed, being accountable, viz. from the feast of Michael, in the seventeenth year of the reign of our Lord Charles, by the grace of God of England, Scotland, France and Ireland, king, defender of the faith,

(a) This document was thus certified:—

Office of Land-revenue Records and Inrolments.

22d April 1841.

T. R. FEARNSIDE,
Keeper of the Records.

&c., 1641, to the feast of Michael thence next following, in the nineteenth year of the same Lord the King, to wit, for the space of two whole years ;

“ As below.

“ Manor of Batrichsey and Wannesworth and manor of Allfarthing, parcel of the honour of Hampton Court. } Of 151l. 12s. 0½d. per annum, for fee farm, or yearly rent, reserved, issuing or payable out of the manor of Wannesworth, with all its right, members and appurtenances, or of 26l. 13s. 4d., for a like fee farm or rent, reserved, issuing or payable, out of the manor of Allfarthing aforesaid, with its rights, members, and appurtenances, here he does not answer this year, because it is charged among the revenues of our Lord the King, which he had before his accession to the Crown of the realm of England, of which the aforesaid two manors are parcel, and there now are answered to the use of our said Lord the King and the commonwealth (a) ; as among the same revenues more fully appears.

“ Sum none ” (b).

The protectorate was established in the year 1653, and from this period until the year 1660, 12 Car. 2, [1010] when the King returned, the ministers' accounts were discontinued. No accounts of the Crown revenues during the protectorate are now in existence.

In the year 1660 the ministers' accounts were recommenced, and the entry in that year, relating to the manor of Allfarthing, is as follows :—

“ County of Surrey.—The accounts of all and singular bailiffs, farmers, provosts, collectors and other officers and ministers whomsoever, of all and singular honours, castles, lordships, manors, lands, tenements and other possessions and hereditaments whatsoever, of the King's Majesty, in the county aforesaid, heretofore being under the government or supervision of the late court of augmentations and revenues of the Crown, and now, as well by virtue of an act of Parliament, held in the first year of the late Queen Mary, as of a certain commission, by the same queen, by virtue of the same act of parliament, to William Marquess of Winton, then Lord Treasurer of England and Chancellor of the court of Exchequer, directed to the same court, united and annexed, viz. computing from the Feast of St. Michael the Archangel, in the eleventh year of the reign of our Lord Charles II., by the grace of God of England, Scotland, France and Ireland, king, defender of the Faith, &c., to the same feast of St. Michael thence next following, in the twelfth year of the reign of the Lord the king of England, &c., to wit, for the space of one whole year ;

“ As below.

“ Parcel of the possessions of the honor of Hampton Court.

“ The account of Thomas Porter Esq., fee farmer there.

“ Arrears, none. “ Sum none.

“ Fee farm.

“ But he accounts for 26l. 13s. 4d., issuing from a [1011] fee farm of all that lordship or manor of Allfarthing, in the parish of Wannesworth alias Wandsworth, in the county aforesaid, with all its rights, members and appurtenances, late in the tenure or occupation of Thomas Cromwell, knight, and now or late in the tenure or occupation of John Bowyer, or his assigns, so granted to the said Thomas Porter of London, his heirs and assigns in fee farm, for ever, by letters patent of our lord king Charles I., bearing date the 2d day of July, in the fourth year of his reign, to hold of our said lord the king, his heirs and successors, as of the honour of Hampton Court, by Knight's service, viz. by the service of half a knight's fee, yielding, at the feasts of St. Michael the Archangel, and the annunciation of the blessed Virgin Mary, equally every year as above ; as in the same letters patent, inrolled in Book XVIII. fol. 184, more fully appears.

“ Sum xxvj. li. xij. s. iij. d. ”

“ The amount of the charge aforesaid 26l. 13s. 4d. ; from which is allowed for the

(a) Ad usum dicti domini regis et rei-publicæ.

(b) The document was also similarly certified by the Keeper of Records in the Office of Land-revenue Records, &c.

stipend for the clerk of the auditor, writing this account for this year, 2s., and there remains 26l. 11s. 4d., which is charged in the accounts of the receiver.

"And he is quit" (a).

After the year 1660 the ministers' accounts were again discontinued, and they were never again resumed. From that time the accounts of the land revenues of the Crown have been kept in the form of rentals. There is no rental in existence in the office of land revenue records of an earlier date than the year commencing at Michaelmas 1696; but the rentals exist, with few exceptions, from the year 1696, down to a period subsequent to the expiration of the term of ninety-nine years, created by [1012] the indenture of the 15th of June, 22 Jac. 1. The manor of Allfarthing is not in charge, in any of these rentals, either for the rent of 26l. 13s. 4d., or for the rent of 40l., or for any other sum.

An annual rent of 26l. 13s. 4d., issuing out of the manor of Allfarthing, has been paid to the Earls of Sandwich for many years past, by half yearly payments at Lady-day and Michaelmas, old style.

There is no evidence to shew when the Earls of Sandwich commenced the receipt of such rent of 26l. 13s. 4d.

The rentals and stewards' books of the Earl of Sandwich of an earlier date than 1798 were destroyed, by an accidental fire, at the mansion of the Earl of Sandwich in Huntingdonshire, some years since. The earliest rental now in existence is for the year 1798, in which the rent of 26l. 13s. 4d. is stated to have been received; and the same rent has been paid to the Earls of Sandwich, from that time, down to the 11th of October 1837. The earliest receipt, in the possession of the plaintiff, is of the year 1814, and it is in the following form;

"Manor of Allfarthing, in Wansworth.

Received, the 7th day of April 1814, of Lady Buckinghamshire, thirteen pounds six shillings and eight pence, being half a year's fee farm rent due to the Earl of Sandwich, at Lady-day last, old style.	£13	6	8	
	1	6	10	Land Tax deducted.
	£12	3	10	
	1	4	4	Property tax deducted.
	£10	19	6	
			8	Acquittance.
	£11	0	2	

JOHN LAWRENCE."

By indentures of lease and release, bearing date the 28th and 29th days of January 1723, the release made between John Porter of the first part, the Honourable Richard Sutton and Catherine Sutton, spinster, of the second part, the right honourable Sir Robert Sutton, [1013] Knight, and Richard Liddell, Esq. of the third part, and the honourable Conyers Darcy, Robert Sutton, Esq. and Peniston Lamb of the fourth part; the said manor was conveyed to the said Sir Robert Sutton and Richard Sutton, and their heirs, to certain uses therein mentioned; and, in the covenant against incumbrances, the said manor is covenanted to be free from incumbrances, except certain sums therein stated to be charged thereon, amounting to the sum of 2800l. in favour of the brothers and sisters of the said John Porter; and also except a fee farm rent of 40l. payable to the Crown, in respect of the same manor.

The manor has long since been dismembered.

On the 26th day of March 1840, a distress was taken by the Earl of Sandwich, on the premises called Burntwood Cottage (which is, for the purpose of the present case, admitted to be within the said manor), for 53l. 6s. 8d. alleged to be due for two years' arrears of an annual fee farm rent of 26l. 13s. 4d., alleged to be issuing out of and charged upon the said manor, ending on the 11th day of October 1839, which distress the plaintiff admits to be of the value of 53l. 6s. 8d.

If the court shall be of opinion that the said manor of Allfarthings was not liable to the payment of an annual fee-farm rent of 26l. 13s. 4d., to the said Earl of Sandwich, under the circumstances mentioned and set forth, in the above case, then judgment

(a) This document was also similarly certified by the Keeper of the Records in the Office of Land-revenue Records and Inrolments. Vide supra, 1008 (a).

is to be entered for the plaintiff, by confession, or as the court should direct; but if court shall be of a contrary opinion, then judgment was to be entered for the defendants, by *nolle prosequi* or otherwise, as the court shall direct.

The court is to be at liberty to draw any conclusion or inference from the foregoing statement, that to the court shall seem fit, in like manner as if the case were tried by a jury; and it is admitted that the respective documents annexed hereto and marked respectively with [1014] the letters A. B. C. D. and E.(a)¹, are true copies of the original instruments mentioned, or in part set forth, in the case, and that they are to be read or referred to by the court, or by either of the parties, as and for such originals, and as if they had been incorporated at length in the case (b).

The case was argued in last Easter term.

Manning Serjt. (with whom was Sir T. Wilde Serjt.) for the plaintiff. The question in this case will mainly turn upon the letters patent granted by King Charles I. to Thomas Porter (A.D. 1628) (ante, p. 999), and by King Charles II. to the Earl of Sandwich (A.D. 1664) (ante, p. 1005). It is submitted, on the part of the plaintiff, that the present earl is not entitled either to a fee-farm rent, as claimed in the first avowry, or to a rent charge in tail, as claimed in the second.

There is clearly no pretence for the claim as to the [1015] rent in fee. As to the rent in tail, the principal facts of the case are as follows:—The first three demises by the Abbot of Westminster in 1534, and by Queen Elizabeth in 1570 and 1594, may be laid out of the question, as the terms thereby granted have expired.—In 1624, King James I. demised the manor to certain trustees for a term of ninety-nine years, which would expire in 1722. In 1626 the surviving trustees granted the manor in reversion to Endimion Porter, for thirty-one years, commencing at Michaelmas 1646 (when the last term granted by Queen Elizabeth would expire), and ending therefore in 1677. On the 29th of March 1628, the trustees assigned the residue of the term of ninety-nine years (from 1677 to 1722), to the same Endimion Porter; and, by the indenture of assignment, the rent reserved was 26l. 13s. 4d. during the term granted in 1626—ending in 1677; and 40l. after that time, during the residue of the term for ninety-nine years—ending in 1722. And then, on the 2d of July 1628, King Charles I., by his letters patent, in consideration of 300l. paid by Endimion Porter, granted the manor in fee to Thomas Porter, releasing the rent (a)² during the residue of the term for ninety-years (ending in 1722), and reserving a rent-charge of 40l. from that time for ever. Thus it appears that the Crown was interested in three different rents, at three different periods—first, in the rent of 26l. 13s. 4d. down to the year 1677, which was reserved to the trustees; secondly, in the rent of 40l. from 1677 to 1722, also reserved to the trustees; and, thirdly, in the rent of 40l. from 1722, reserved to the Crown in fee. This being the state of things, in 1664, King Charles II., by his letters patent, granted to the Earl of Sandwich, in tail male, a yearly [1016] rent of 26l. 13s. 4d. thereby stated to have been reserved in the patent of Charles I. (A.D. 1628) to the King in fee. But no such rent was in fact reserved. It is not difficult to see how the mistake arose. In the ministers' accounts after the Restoration

(a)¹ These were copies, in latin, of the following documents:

A. Grant to Thomas Porter, 2d July, 4 Car. 1.

B. Grant of several fee farm rents to Lord Sandwich under the great seal, 3d Feb. 15 Car. 2.

C. D. and E. Copies of the ministers' accounts set out in the case. *Supra*, 1008, 1009, 1011.

(b) The following points were marked for argument on the part of the plaintiff.

"The plaintiff will contend that no rent of 26l. 13s. 4d. passed to the Earl of Sandwich by the letters patent of 15 Car. 2; and that if any such rent passed, the same passed for a term of years only, which has long since expired."

On the part of the defendants, the points marked were as follows:—

"The defendants will argue that, upon the facts disclosed in the special case, the Earl of Sandwich, at the time of the distress made, was seised of a rent of 26l. 13s. 4d. issuing out of the manor of Allfarthing, as mentioned in the pleadings in this cause; it being a legitimate presumption from these facts, either that the said earl was seised in fee, as alleged in the first avowry and cognizance, or that he was seised in fee tail, as alleged in the second avowry and cognizance."

(a)² *Vide post* in the judgment, p. 1026.

(A.D. 1660) (ante, p. 1010), Thomas Porter, accounts as fee-farmer of the Crown, for 26l. 13s. 4d., incorrectly described as issuing "from a fee-farm" of the manor of Allfarthing. The officers had fallen into an error in supposing that there was a fee-farm rent of that amount payable from Thomas Porter; whereas the 26l. 13s. 4d. was a rent reserved in respect of the grant of a term. And hence the origin of the mistake in the grant of Charles II.

The other side will probably contend for a presumption in favour of some other grant; but such a presumption cannot be made in the face of the existing grant; and such grant, having been made under a mistake, passes nothing, according to the principle laid down in *Alcock v. Cooke* (5 Bingh. 340; 2 M. & P. 625). It was there held, that an immediate grant to A. in fee, under the seal of the Duchy of Lancaster, of property which was in the possession of B. under an unexpired lease from the duchy for years (such lease not being recited in the grant), was void, notwithstanding there had been a user under the grant, from 1631 the date of that deed to 1760. That which is a sound rule with regard to the duchy, holds equally with regard to grants by the Crown made of property held *jure coronæ* (vide ante, vol. i. p. 584, n.). And the same case establishes that the thing itself professed to be granted in this instance—namely, the rent in fee tail—could not pass by the description given of it in the letters patent of Charles II. Best C. J., in giving the judgment of the court in that case, [1017] says, "We take it to be a principle of the common law of this country, that if the King makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the King has been deceived in that grant, and, therefore, that the grant is void." To apply that principle to the present case. The grant of King Charles II. is in these words—"We give and grant unto the said Edward, Earl of Sandwich, and the heirs male of his body lawfully issuing, all that yearly rent of 26l. 13s. 4d. by certain letters patent of Our said father, &c., bearing date the 2d day of July, in the fourth year of his reign, to Thomas Porter, &c., made, issuing, or reserved, &c. to our said father, his heirs and successors, out of or for all that lordship or manor of Allfarthing," &c. But in the grant made by Charles I. in 1628, no rent of the amount of 26l. 13s. 4d. is reserved from Thomas Porter, but a rent of 40l., which is not to commence till after the year 1722. The King, therefore, was deceived as to the amount and nature of the rent. [Cresswell J. The mistake seems to be in putting the sum of 26l. 13s. 4d. instead of 40l.] That would assume that it was intended to grant a rent of 40l. The defendants in their second avowry set up a grant of 26l. 13s. 4d., parcel of 40l. But it is submitted that either the grant is void in toto, or it enures only as a grant of the rent of 26l. 13s. 4d., which, by the assignment of 1628, and which expired in 1677, was reserved to trustees for the benefit of the Crown. No presumption ought to be made in favour of the creation of a fee-farm rent, Hargrave's note to Co. Litt. 143 b. n. (5).

Channell Serjt. for the defendants. It must be admitted that the whole onus in this case lies upon the defendants. It is not in dispute that for many years past the Earls of Sandwich have received this rent of 26l. 13s. 4d. from the manor of Allfarthing. The proof [1018] of this is not carried further back, it is true, than 1798, when the documents were destroyed by fire, but receipts for that sum are brought down from that time to 1837. On the other hand, the earliest receipt which the plaintiff is enabled to produce is in 1814. No receipt on the part of the Crown is shewn either of the 26l. 13s. 4d. or of the 40l. Under these circumstances, every fair presumption will be made in favour of the rent which has been paid to the Earls of Sandwich for so long a period.

The term of thirty-one years, granted to Endimion Porter in 1626, would merge in the term of ninety-nine years granted to him in reversion by the deed of assignment of March 1628. [Manning Serjt. admitted that would be so (a). Coltman J.

(a) These were not two successive terms. The term of thirty-one years created in 1626 was a sublease made by persons holding for a term of ninety-nine years, and carved out of their estate. The sublessee might therefore surrender to his lessors, or his lessors might release to him their reversion; in either case, the sublease would merge in the larger estate out of which it had been taken. If the conveyance of the 29th of March 1628 operated as an assignment, the payments therein reserved as rent would be sums in gross. Vide 5 M. & R. 157.

May there not be some doubt as to that? Can one term be merged in another? Perhaps it would be more proper to describe it as a re-union of the two estates than as a destruction of the former estate. There may be a question, perhaps, whether under that assignment of 1628, the rent of 26l. 13s. 8d. was to run on to 1646 (when the second term demised by Queen Elizabeth would expire) or to 1677 (when the first lease to E. Porter would terminate), for that rent is reserved "during all the term" in the said letters patent of Queen Elizabeth and the demise of Charles I., "or either of them;" but whether the rent of 40l. was to commence from 1646 or from 1677 is not very material. For the grant by Charles I. of July 1628, to T. Porter in fee, recites the previous grant to E. Porter, and the [1019] terms thereof, and releases the rents which E. Porter had to pay, reserving a rent of 40l. in fee after the expiration of the ninety-nine years in 1722. Then comes the grant by Charles II. of the rent of 26l. 13s. 4d. to the Earl of Sandwich, in tail, which could not commence till 1722. It is clear that the Crown intended to deal with some rent payable from T. Porter under the grant of July 1628, for that grant is referred to in the letters patent; and that fact materially distinguishes the present case from *Alcock v. Cooke*. That was a grant in possession of property which was already in the possession of another by a previous grant, and it was held that this second grant was void, as it was inconsistent with the King's honour, that he should grant the right of possession in the same thing to two persons at the same time. The second grant in that case did not notice the previous lease, which, having been enrolled, must have been in the knowledge of the second grantee; and therefore it was held that the King was deceived by him, and that the grant was void. No such objection exists in this case, and the court will make every necessary presumption to give effect to the King's grant.

Manning Serjt., in reply. The claim set up on the other side, is, for the rent of 26l. 13s. 4d. as parcel of the rent of 40l. But in that case what becomes of the residue 13l. 6s. 8d., being one-third of the rent of 40l.? The Crown has never received it. The court will not presume that a portion of the 40l. rent was granted, so as to render the tenant liable to two distresses instead of one. Charles II. granted an entire rent, totum illum redditum.

Cur adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The question before us arises upon a special case [1020] stated by consent of the parties under the order of my brother Erskine, and made after the proceedings on the record had gone on to the joining of issue on the pleas in bar in an action of replevin. The distress had been made for two years' arrears of an annual fee-farm rent of 26l. 13s. 4d., alleged to be issuing out of the manor of Allfarthing, in the parish of Wandsworth and county of Surrey, and to have been due at Old Michaelmas 1839.

The defendants in their first avowry and cognizance, claim it to be a fee-farm rent of 26l. 13s. 4d., whereof the Earl of Sandwich was seised in fee. In the second avowry and cognizance they allege that King Charles I. was seised in fee of the manor of Allfarthing, subject to a term of ninety-nine years granted by King James I. to Sir Henry Hobart, Sir James Fullerton, Sir John Walter and Sir Thomas Trevor (which term had ended long before the said time when, &c.), and that King Charles I. granted to Thomas Porter, Esq., and his heirs, the reversion of the said manor, expectant on the determination of the said term of ninety-nine years, to hold by the service of half a knight's fee, and without rent, during the remainder of the term of ninety-nine years, and after that term rendering yearly to the King, his heirs and successors 40l., out of the said manor of Allfarthing, at Michaelmas, and the feast of the annunciation, by equal portions, with a clause of distress; and they further allege, that afterwards, and before the expiration of the said term of ninety-nine years, King Charles II., by letters patent, dated the 4th February, in the fifteenth year of his reign, granted to Edward, Earl of Sandwich, and the heirs male of his body, the annual rent of 26l. 13s. 4d. of the said annual rent of 40l., so by the said letters patent of Charles I. reserved as aforesaid, to the said King Charles I., his heirs and successors; to hold the said rent of 26l. 13s. 4d. to the said Edward, Earl of Sandwich, and the heirs [1021] male of his body, together with the said power of distress; and they then deduce the title of the present Earl, the defendant, to such rent, as heir male of the body of the said original grantee.

Various pleas in bar were pleaded, to which it is unnecessary particularly to refer, as the broad question stated in the case, and which formed the principal ground of

argument before us, was whether the Earl of Sandwich had established his right, either to a fee-farm of 26l. 13s. 4d. in fee, or to a rent of 26l. 13s. 4d. parcel of the annual Crown rent of 40l. in tail male, under the grant of Charles II., set out in the second avowry.

It may be advisable, before we consider the objections raised against the grant of King Charles II., to ascertain how long and under what circumstances the annual rent of 26l. 13s. 4d., has been actually paid by the tenant for the time being of the manor, and actually taken and enjoyed by the present Earl and his ancestors. And it appears from the statement in the case that at least from the year 1798, down to the time of the accruing of the arrears for which the distress was put in, that is, down to Old Michaelmas day 1837, an annual rent of 26l. 13s. 4d., issuing out of the manor of Allfarthing, has been paid by the tenants of the manor and received by the Earls of Sandwich, by half-yearly payments at Lady-day and Michaelmas, in every year. This was proved by the earliest rental and steward's book in existence, viz., the book of the year 1798; and, as all the rentals and stewards' books of an earlier date are stated to have been destroyed by an accidental fire some years since at the mansion house of the Earl, we think the fair and necessary inference which a jury ought to have drawn, and would have drawn from those premises is, that the payment of the rent did not commence originally in 1798, but must have been a payment continued by the tenants of the manor to the Earls of [1022] Sandwich, from some earlier period; there being nothing whatever to shew any legal ground of its commencement in 1798, rather than any other year: and, as there is no period to which upon the facts stated in this case, a jury could reasonably assign the date of its commencement other than the year at which it would become payable to the Sandwich family, under the grant of Charles II., the inference is that it has been paid from that time, that is, at all events, if such grant is valid, and free from the objections which had been urged against it in argument; a point which we shall presently take into consideration.

It further appears, from the special case, that the owners of the manor of Allfarthing, at all times had notice of the existence of an annual rent reserved out of the same manor to the Crown; that is, first, of the rent of 26l. 13s. 4d. payable for a term of years, and afterwards of the rent of 40l. reserved and payable in fee. The earlier leases set out in the special case do not, indeed, state what rents were reserved; but we have, since the hearing of the argument, with the consent of the learned counsel, received a certificate from the officers of the Rolls chapel, from which it appears that the rent reserved in the lease granted by Queen Elizabeth, in the twelfth year of her reign, to Elizabeth Snowe, and also in the reversionary lease granted by the same Queen, in the thirty-sixth year of her reign, to John Bowyer, was the annual rent of 26l. 13s. 4d.; and we have ourselves inspected the original indenture of the 8th of March, 1 Car. 1, which was brought to us by the officers of the Duchy of Cornwall, from which it appears that Sir John Walter and the other lessees of the Crown, under the lease which had been granted to them in the fifteenth year of King James I. for ninety-nine years, as trustees for the then Prince of Wales, afterwards Charles I., demised to Endimion Porter for the term of thirty-one years, to commence in 1646, [1023] "under the antient yearly rent or sum of 26l. 13s. 4d." We have also inspected the original indenture of the 29th of March, in the fourth year of Charles I., by which the same trustees, by the direction of Charles I., assign to Endimion Porter the whole of their interest in the term of ninety-nine years, at and under the yearly rent of 26l. 13s. 4d., until the expiration of the then existing leases, that is, until the year 1677, and from that year until the determination of the said term of ninety-nine years, at and under the yearly rent of 40l. We think, therefore, there is express notice to Endimion Porter, and all claiming under him, during the continuance of those terms, of the existence of the reservation of those rents. And, when King Charles I., by his letters patent of the 2d of July, in the fourth year of his reign, confirms those leases so granted to Endimion Porter, and in consideration of the 300l. by him paid, grants the reversion of the manor, after the determination of the said term of ninety-nine years, to Thomas Porter in fee, subject to the annual rent of 40l., payable to the Crown for ever; there is again express notice to Thomas Porter, and all claiming the manor under him, of the perpetual charge of a rent of 40l.; indeed when John Porter, by indentures of lease and release of the 28th and 29th of January 1723, (the year next after the expiration of the term of ninety-nine years), conveys the same manor of Allfarthing to the Sutton family, the covenant against incumbrances contain an

express exception "of a fee-farm rent of 40l. payable to the Crown, in respect of the said manor."

Under these circumstances, it is unnecessary to say that every intendment ought to be made to support the grant of a rent, which has been accompanied, on the one hand, with actual perception and enjoyment for so many years, and, on the other, with full notice to those who have become owners of the manor for the time being, [1024] that a rent of 26l. 13s. 4d. was payable out of the manor to the Crown, or the Crown's grantee down to the year 1677; and that, from that period, the larger rent of 40l. was payable therout to the Crown for ever.

Still the question arises, and must be determined, whether the grant to the Earl of Sandwich is valid in point of law. It is objected, on the part of the plaintiff, that there is in that grant such mistake and misdescription, as to the subject matter thereof, and as to the Crown's interest therein, that, upon the general rule of law applicable to the construction of the King's grants, it must be taken that King Charles II. was deceived in his grant; and consequently that the same is void.

This question involves an inquiry into two points:—first, whether there is any and what mistake or misdescription in the grant; secondly, if mistake or misdescription exists, whether it is of such nature, character and quality, as will have the effect of avoiding the grant of the King.

The first inquiry can only be determined by investigating, from the documents referred to in the case, the exact state of the rent granted by the letters patent of Charles II., at the precise period of time when such grant was made, and by comparing such state of the rent with the terms of the grant itself.

Now, by referring to the documents which we have already mentioned, it will appear that the reservation of annual rents to the Crown out of the manor of Allfarthing stood thus:—an annual rent of 26l. 13s. 4d. had been reserved by the Crown, under the demise granted by Queen Elizabeth in the year 1570, and the same annual rent had been continued under successive demises, either immediately or mediately, from the Crown, from that year down to the year 1677. From the year 1677, the annual rent of 40l. had been reserved by the indenture [1025] of assignment, made by the trustees of the Crown to Endimion Porter, which latter rent continued to exist down to the year 1722; and from the latter year the annual rent of 40l. had been reserved to the Crown, in fee, under the letters patent of the 2d July, 4 Car. 1.

But it will be proper to consider the operation and effect of those letters patent upon the rents reserved under the indentures of demise of the 8th of March 1625, and the 29th of March 1628: for, in the course of the argument, it seems to have been considered that such rents were, by those letters patent, released by the Crown.

By those letters patent, reciting the indenture under the great seal of the 15th of June in the 22 Jac. 1, whereby the king demised to Sir Henry Hobart, Sir John Walter and others, the manor of Allfarthing (amongst other premises), to hold for the term of ninety-nine years from Michaelmas then last past (which demise, by reference thereto, appears to have been made to them as trustees for the then Prince of Wales); and also reciting the indenture of the 29th of March then last past, made to the said Endimion Porter by Sir Thomas Walter and the other surviving trustees therein named, King Charles I. ratifies and confirms the said last-mentioned indenture, and all the matters therein contained, approving and accepting of the same and the premises therein mentioned, under the rents, covenants, conditions and agreements, and during the term in and by the said indenture specified: and the King then (according to the proper construction of the original letters patent, which accompany and form part of the case) releases the said Endimion Porter from all the rents reserved and made payable, "in and by the said indenture by the late King James I. made payable, and all arrears thereof;" and the King then, for the considerations therein mentioned, proceeds to grant the reversion [1026] of the manor to Thomas Porter, in fee, under the reservation of the annual rent of 40l., for ever. Under these letters patent, therefore, the rents reserved and mentioned in the indenture of the 29th of March then last past, continue in full force, and nothing is released to Endimion Porter but the rents, whatever they may be, which are reserved by the said indenture of lease of King James, a clause of release which could only have been introduced, *ex abundanti cautela*, in favour of the grantees of the Crown, as, in fact, upon reference to that indenture, no rents were reserved or made payable by the trustees to the Crown. Looking, therefore, at the general effect of all these grants, it appears that at the

precise time of the execution of the grant by King Charles II. to the Earl of Sandwich, in 1664, the annual rent of 26l. 13s. 4d., which commenced at least as early as the year 1570, was still in existence and payable out of the manor, and would continue in existence and payable, until the year 1677; and that the annual rent of 40l. payable out of the manor, in fee, would become payable to the Crown in the year 1677, but not before.

Now, the description of the rent in the letters patent of the 3d of February, 15 Car. 2, is this—"All that yearly rent of 26l. 13s. 4d. by certain letters patent of Our said father, under the great seal of England, bearing date the 2d of July, in the fourth year of his reign (to Thomas Porter of London, Esq., made), to Our said father, his heirs and successors, issuing or reserved, or mentioned to be reserved, out of or for all that manor or lordship of Allfarthing" (a)¹. And, beyond all doubt, [1027] upon comparing the terms of the grant with the state of the rent actually in existence and vested in the Crown at the time, there is between the two some variance and misdescription. Up to a certain point both well agree together. There was upon the 3d of February 1664, a rent of 26l. 13s. 4d. vested in the Crown, and issuing and reserved out of the manor or lordship of Allfarthing; and this rent, although not originally reserved by the letters patent of the 2d of July, 4 Car. 1, is yet a rent "reserved or mentioned to be (a)² reserved" to the Crown in such letters patent; the indenture of 1628 being confirmed thereby, and such rent being made payable at the exchequer for the use of the Crown. So far, therefore, the description in the grant may be held, as it appears to us, to agree with the real state of the King's title. But, the difference between the two is this, that whereas such rent is described in the letters patent of Charles II. to have been reserved to King Charles I., his heirs and successors (b), in truth it was reserved for a term only, by those letters patent, namely, for a term which expired in 1677, after which it became an annual rent of 40l., continuing down to the year 1722, and from that time an annual rent (c), of the same amount for ever.

Such, therefore, being the exact state of the misdescription in the grant, the question arises whether it is of such nature, quality and character, as that, according to the decided cases, it must have the effect of avoiding the King's grant. If the rent issuing out of the manor of Allfarthing, which was vested in Charles II. at the time of making his grant, had been a rent of 26l. 13s. 4d. for the then residue of a term of years only, [1028] and nothing more had been vested in the Crown, no doubt the grant would have been void. In that case, the King, by professing to grant an estate in fee-tail, in a rent which he held for a term of years only, would have professed to grant a larger estate than he had himself, and must be held to have been deceived in making such grant. Such was the case of *Alton Woods* (1 Co. Rep. 40), and many other cases there referred to. But, in the case now before us, King Charles II. was not only possessed of the rent of 26l. 13s. 4d., issuing out of the manor of Allfarthing for the residue of a term of years, but was also possessed of a rent of larger amount, namely, of the amount of 40l. per annum, issuing out of the same manor, commencing immediately on the expiration, or other sooner determination, of the former rent, and continuing for ever. And this larger rent the Crown might undoubtedly, by its prerogative, apportion and divide amongst different grantees, in such quantities and proportions as the Crown might think fit, without any attornment of the tenant of the land, or any other ceremony; Co. Litt. 148 a., 309 b. It is manifest, therefore, that King Charles II., at the time of his making the grant, was possessed of a rent issuing

(a)¹ Ac tot. ill. annual. reddit. viginti et sex librar. tresdecim solidor. & quatuor denarior. legal. monet. Angl. p. quasd. iras. paten. dei. pat. nri. sub magno sigill. suo Angl. geren. dat. secundo die Julij anno regni sui quart. Thome Porter de London. Ar. confect. p'fat. pat. nro. hered. & successoribz suis exeun. sive reservat. vel mentionat. FORE reservat. de aut p. tot. ill. domin. sive maner. de Allfarthing."

(a)² These English words are ambiguous; but the construction put upon them would appear to require "fuisse" instead of "fore" in the original. Vide ante, 1025, 1026 (c).

(b) This description appears to be correct. A party seised in fee who demises for a term rendering rent, has a descendible interest in such rent.

(c) And fee-farm.

out of this manor, sufficient in quantity of estate, and more than sufficient in value, to satisfy the grant so then made to the Earl of Sandwich, in tail-male.

And, upon consideration of the cases in which the King's grant has been held to be avoided by reason of any misdescription or mistake thereon, they will be found to fall under one of three classes; first, where the King has by his grant professed to give a greater estate than he had himself in the subject matter of the grant; as in the case of *Alton Woods* and the other cases above considered; secondly, where the King has already granted the same estate, or part of the same [1029] estate, to another; in which case the second grant would work injustice, or, at all events, great inconvenience; such was the case of *Alcock v. Cooke* (5 Bingh. 340; 2 M. & P. 625), cited by the plaintiff in argument, and *The Earl of Rutland's case* (8 Co. Rep. 57); or, thirdly, where the King has been deceived in the consideration expressed in his grant; as where the consideration has been untruly stated, or the subject of the grant has been recited to be of less value than it really is, or where, as in the case of *Mead v. Lenthall* (2 Roll. Abr. 189), the King recites a former grant of an office for life, and a surrender; and then grants the same office to J. S. whereas in truth, either the King had not granted the office for life, or the office had not been surrendered; here the grant would be void, because there was no such consideration as was recited.

The present case, however, stands manifestly clear from the grounds of objection which apply to the two latter classes; and we think it is equally distinguishable from the cases of the first description; for there appears to be nothing to prevent the intention of King Charles II., as expressed in his letters patent, from being carried into effect; for as those letters patent refer to the grant of the 4 Car. 1, they make the terms of that grant part of the description of the subject matter of the letters patent of Charles II. It is manifest, therefore, by reference to the former grant, that the King had sufficient estate in a rent, both in respect of interest and value, out of which the intention of the Crown might be satisfied and carried into effect; as in fact it has been satisfied and carried into effect from the time of the grant down to the present time. And we think the present case is to be governed by the principle laid down in the case of *Rex et Regina v. Kempe* (1 Lord Raym. 49), that where the King is not deceived in his consideration, nor otherwise to [1030] his prejudice, by any suggestion on the part of the grantee, but the intent was to pass the interest expressed in the grant, only the King has been mistaken in the law (*a*), there he shall not be said to be deceived, to the avoidance of the grant. This doctrine is laid down by Eyre J., in giving his judgment for the defendant, in the case above referred to; and Holt C. J., in giving his judgment also in favour of the defendant, expresses no dissent from the principle so laid down.

Upon the whole, therefore, we come to the conclusion that the manor of Allfarthing is still liable to the payment of the annual rent of 26l. 13s. 4d., as claimed by the Earl of Sandwich in tail-male; and we therefore direct, under the agreement stated in the special case, that a judgment of *nolle prosequi* be entered on the record.

Judgment for the defendants (*b*).

(*a*) Here, the King, being entitled to the benefit of a rent of 26l. 13s. 4d. issuing out of a term, and of a rent of 40l. issuing out of another term, and being seised of a rent of 40l. expectant upon the determination of both terms, in fee, must be taken from the recitals to have been informed that he had one rent of 26l. 13s. 4d. The mistake in law would appear to consist in imagining that the rent of 40 pounds reserved by Charles I. was a rent of 40 marks, the amount reserved on former occasions where the grants were for a term only. The letters patent of Charles II. grant forty-eight different rents to the Earl of Sandwich, and in the great majority of cases the subject granted is "rent or fee-farm;" but in that part of the grant which relates to a rent issuing out of the manor of Allfarthing, the words are *totum illum redditum de 26l. 13s. 4d.*, not, as in other cases, *totum illum redditum vel feodi firmam*, which seems to lead to the inference that the grant was of the rent of 26l. 13s. 4d., and not of the fee-farm, or any part of the fee-farm, of 40l.

(*b*) It was advised that an application should be made for leave to turn the case into a special verdict, for the purpose of obtaining the opinion of a court of error as to whether a grant from the Crown was vitiated by a misdescription not falling within any of the three classes to which former cases of misdescription were reducible. See *The Earl of Kent's case* upon a petition of right, H. 21 E. 3, fo. 47, pl. 68. But the

[1031] SCOTT v. CRAWFORD AND OTHERS. Nov. 10, 1842.

[S. C. 5 Scott, N. R. 781.]

Under an arrangement between A., a merchant at Manchester, and C. a merchant at Liverpool, A. bought goods for C. in A.'s name, and consigned them for sale in A.'s name, to houses in India, the correspondents of B. At the time of the arrangement and of the shipment of the goods, C. was the factor of B. at Liverpool (which fact was known to A.), and advised B. of the shipments, and as to the advances B. might make thereon to A. B. had from time to time accounted with A., and handed over to him the balance of the proceeds of each shipment, after deducting commission, &c. C. having become bankrupt, B. refused to pay over to A. the balance in his hands, claiming a lien thereon in respect of the debt due to him from C. on the ground that the goods were the property of C. and not of A., and alleging that the course of dealing between A. and C. was a fraud upon B. A. having brought an action for money had and received against B., the judge left it to the jury at the trial to say; first, whether, as between A. and B., the goods were the property of A.; and, secondly, whether the transaction between A. and C. amounted to a fraud on B., which was productive of injury to the latter. The jury having found a verdict for A. for the amount of the balance in the hands of B., the court refused to grant a rule nisi for a new trial.

Assumpsit for money paid, money had and received, interest, and money found due upon an account stated.

Pleas; non assumpsit; and, secondly, payment; on which issue was taken by the replication.

At the trial, before Tindal C. J., and a special jury at the sittings in London after Hilary term last, the following facts appeared. The plaintiff is a merchant carrying on business at Manchester; and the defendant, Messrs. Crawford, Colvin, and Co., are merchants in London, and are the agents or correspondents of the houses of Remington, and Co. of Bombay, and Colvin, Ainslie, Cowie, and Co. of Calcutta.

The plaintiff had been in the habit of buying, in his own name, goods on commission for a Mr. John Coupland, a merchant residing at Liverpool. About the year 1830 it was arranged between the plaintiff and Coupland that the former should purchase, on Coupland's account, large quantities of goods, to be shipped to Bombay and Calcutta through the house of Crawford, Colvin, and [1032] Co.; and, in pursuance of this arrangement, the plaintiff from time to time purchased goods under instructions received from Coupland, which were consigned in the plaintiff's name to Remington and Co. at Bombay, and Colvin, Ainslie, and Co. at Calcutta for sale on commission. The defendants made advances to the plaintiff on the goods so consigned upon the understanding that they were to be repaid such advances, and also their commission and charges for insurance, &c. out of the proceeds which were to be remitted to them from the houses in India; the balance to be transmitted to the plaintiff. Some shipments were also made of goods purchased by the plaintiff, and shipped on his own account, and others of goods bought by Coupland himself, and shipped in the name of the plaintiff; but in all the transactions the plaintiff appeared to be the shipper.

During the period covered by these transactions the defendants employed Coupland as their factor or agent at Liverpool, for which he received a commission. The invoices of the goods, consigned as above-mentioned, were made out in the plaintiff's name. When Coupland himself bought goods and shipped them in the plaintiff's name, he sent the invoices to the plaintiff, who copied them, and transmitted such copies to the houses in India; but Coupland gave instructions to the houses in India as to the sale and returns of the goods. Coupland also forwarded the bills of lading to the defendants, and advised them of the shipment, and instructed them as to the amount they might advance on each consignment. A separate account was kept of each shipment. The accounts sales and accounts current from the houses in India were rendered direct to the plaintiff; they were made out in his name, and he was always treated and considered as the bonâ fide owner of the goods shipped. The proceeds of sale were

plaintiff, who had no personal interest, considered that, as a trustee, he would be justified in acquiescing in the judgment already pronounced.

remitted on the plaintiff's account to the defendants, who, after deducting the advances they had made, their commission, and the premiums of insurance and other charges, they handed over the balance to him, or, in case of a deficiency, which occasionally happened, the defendants claimed and received from the plaintiff the amount over advanced.

The invoices of goods consigned in the plaintiff's name were headed—"Invoice of twenty casks of, &c., shipped per 'Fatima' to Calcutta, and consigned to Messrs. Colvin and Co. (or as the case might be) on account of David Scott, Esq."

The defendants, on receipt of the bill of lading and advice of shipment from Coupland, wrote to the plaintiff to the following effect:—

"Sir,—Under Mr. Coupland's instructions this morning received, we pay to your credit with the Manchester Branch Bank 500l., as our advance on your shipment of copper per 'Fatima'; and we insure as follows, &c."

(Signed) "CRAWFORD, COLVIN, AND Co."

The account sales of the goods rendered to the plaintiff by the houses in India were headed as follows:—"Account sales of thirteen casks of copper nails, &c., ex 'Fatima,' sold by Colvin and Co. on account of David Scott Esq." The accounts current which accompanied the account sales were headed—"Dr.—David Scott, Esq., in account with Colvin, Ainslie and Co.—Cr." The defendants, upon receipt of remittances from India, rendered accounts to the plaintiff of each shipment in the following form:—"Dr.—D. Scott, Esq., for ——— casks, &c. per 'Fatima.'—Cr."

The whole or the greater part of the advances made by the defendants to the plaintiff were paid over by him to Coupland. On the 1st of January 1836, a Mr. Duncan entered into partnership with Coupland, and the plaintiff continued to deal with Coupland and Duncan in the same manner until they became bankrupts in November 1836. At the time of Coupland and Duncan's [1034] bankruptcy, Coupland owed the plaintiff about 5600l., and Coupland and Duncan were also indebted to him to nearly the same extent. Coupland was likewise indebted to the defendants in about 18,000l.

Besides the consignments made in the plaintiff's name, Coupland employed other parties to make purchases for him, and made other shipments in the names of other parties, amongst whom were a Mr. Mallalieu and a Mr. Wood.

On the 28th of December 1836, the following notice was served upon the defendants by the assignees of Coupland and Duncan:—

"We, the undersigned, the assignees, &c. of John Coupland and Frederick Duncan, of Liverpool, merchants and factors, against whom a fiat in bankruptcy is now in prosecution, do hereby give you notice that David Scott of Manchester, merchant, Samuel Wood of Manchester, merchant, James Mallalieu of Manchester, manufacturer, and Robert Baird of Liverpool, merchant,—in whose names various shipments of goods were made through the said John Coupland alone, or the said J. Coupland and F. Duncan in partnership, to your correspondents, Messrs. Remington and Co. of Bombay, and Messrs. Colvin, Ainslie, and Co. of Calcutta, and upon which shipments you came under advances to the respective shippers,—were not the true owners of the shipments made in their respective names, and that such shipments were in fact for the account, and upon the risk of the said J. Coupland, individually, or of the said J. Coupland and F. Duncan, in copartnership, the said D. Scott, &c. having agreed to lend their names to the said J. Coupland and F. Duncan, to conceal the fact of their being engaged in shipments on their own account. And we do further give you notice, and require of you not to pay or deliver over to the said D. Scott, &c., or any of them, any goods, bills, or specie shipped or re-[1035]-mitted to you by the said Messrs. Remington and Co., and Messrs. Colvin, Ainslie and Co., or either of them, as or in part of return for any shipments made by the said nominal shippers through the said J. Coupland alone, or the said J. Coupland and F. Duncan in partnership; but to pay or deliver all such goods, specie, and bills to us as assignees, &c.; we, the said assignees, claiming and insisting upon the returns of all the said shipments as part of the assets of the said bankrupts."

The defendants forwarded this notice to the plaintiff with the following letter, of the 28th of December 1836:—

"Sir,—We annex copy of a notice which we have this day received from the

assignees of Messrs. Coupland and Duncan, which we think it right to lay before you for the purpose of urging the necessity of a settlement between you and them, in order that the particular shipments on which they really can substantiate claims may be allowed, and then set at liberty.

"Until this point is attained we shall not be able to act so as to obviate the inconveniences attaching to the stop thus put by the assignees; while, at the same time, we shall be very unwilling parties to any measure that may be prejudicial to any of our correspondents."

On the 31st of December 1836, the defendants addressed the following letter to the assignees in reply to their notice:—

"Gentlemen,—We acknowledge the receipt of a notice under the signature of, &c., that various shipments of goods made to our correspondents in India through J. Coupland, and Coupland and Duncan, in the names of D. Scott, Samuel Wood, J. Mallalieu, R. Baird, and Turner, Brade, and Co., to whom we came under advances as the shippers, are not the property of the several persons in whose names they were shipped, but of the bankrupts to whose estates you are the assignees. [1036] You further give us notice not to pay over to those parties, any of the returns for any shipments made by the said nominal shippers, but to deliver them to you as the assignees, you claiming and insisting upon all the said shipments as assets of the bankrupts.

"We have had extensive transactions with the parties you have named through J. Coupland, and Coupland and Duncan, as our agents, and our advances have invariably been made in bank post bills, transmitted direct to the shippers, whose acknowledgments of the same were duly returned to us. We have reason to know, beyond all doubt, that in a great many of these transactions, no reasonable pretence can be set up that they were otherwise than bona fide dealings of the several parties on their own account. With this knowledge, it is quite repugnant to our sense of justice, and to our inclination, to lend ourselves to the sweeping measure of most serious injury which would be uselessly, for your purpose, inflicted on those who have confided in us, were we to give effect to your notice of not paying to the several shippers any part of the returns for any shipment made in their names through the agency of the bankrupts.

"We think it belongs to you, in any notice you may choose to serve on us, to particularise the several shipments on which you may consider yourselves entitled to receive the return proceeds; and we beg to observe, that in order to entitle such notice to our consideration, we expect you will accompany it with an undertaking indemnifying us for all consequences to which we may be made liable for withholding, if we should be advised to do so, property as to which we can know no other owner than the person in whose name it was shipped, who received the advance from us, and on whose account we made the necessary insurances.

"Assuming that there are pending transactions of [1037] that character which you have assigned to all our dealings with the parties you have named—that persons were found to accept the trust reposed in them by receiving into their names and by acting as the owners of property which in reality belonged to the bankrupts to whom they were to account—we should put it to you whether the parties having so acquired a *prima facie* ownership, as between them and the bankrupts, by delivery and possession, are not in a situation to maintain their lien on that property in satisfaction of any debts now due to them by the bankrupts. We entertain a strong opinion that you, as assignees, must submit to such preferable claim; but it is a point on which doubt need not long exist, when the highest legal opinion can be so easily obtained.

"Referred to as we now are in the character of stake-holders, we feel ourselves at liberty to submit to you the expediency of the earliest possible adjustment of the accounts of the parties you have named to us with the bankrupt's estate, in order to bring all future questions within the smallest possible compass, by defining at once the extent of debt which these parties may set up to have liquidated from the properties which now stand directed to our hands for their use, to ascertain the sufficiency or otherwise of the expected assets, and thus to see the probable surplus as to which these parties can have no right.

"We deem it our duty to furnish a copy of this letter for the information of the several persons whose interest are intended to be affected by your notice."

(Signed) "CRAWFORD, COLVIN, AND CO."

Some further correspondence took place between the plaintiff and the defendants, and in a letter from the latter, dated the 31st of October 1837, the following passage occurs:—

[1038] "We are quite alive to the probability of unpleasant features occurring in the progress of a law suit, which we should much regret, and to avoid which it may become a question with us whether we may not think it best to relieve ourselves under the act of the interpleader."

The plaintiff having ultimately made a formal demand on the defendants, the latter, in July 1840, through their solicitors, refused to account to the plaintiff for the proceeds of shipments made in his name by Coupland, and Coupland and Duncan, claiming a lien on such proceeds in respect of the debt due to them from the bankrupts.

At the trial, the plaintiff called Coupland, who proved the course of dealing between them. It appeared in his cross-examination that the plaintiff knew that he acted as the agent of the defendants. He stated also, that he had at various times obtained advances to a considerable amount from the plaintiff, upon the faith that the shipments, of the goods in question would enable the plaintiff to reimburse himself. On his re-examination, he stated that the plaintiff knew nothing of his arrangements with the defendants, and that the debt due from him to them arose out of entirely different transactions. It also appeared from Coupland's evidence, that part of the balance claimed by the plaintiff arose from the sale of goods bought by the plaintiff himself, and part from the sale of goods purchased by Coupland, which were shipped in the name of the plaintiff.

It was contended on the part of the plaintiff, that, as between the plaintiff and the defendants, the goods were undoubtedly the property of the plaintiff, and that the defendants, having received the proceeds on his account, were not justified in withholding the amount.

For the defendants it was submitted that the goods so shipped in the name of the plaintiff, being in point of fact the property of Coupland, and Coupland and Duncan, [1039] the plaintiff was not entitled in an action for money had and received to recover the proceeds, and that the course of dealing between him and Coupland, whom he knew to be the agent of the defendants, amounted to a fraud upon them, which invalidated his claim, supposing it could otherwise be supported.

The Lord Chief Justice left it to the jury to say whether, as between the plaintiff and the defendants, the goods consigned to India, the proceeds of which had come to the hands of the defendants, were the property of the plaintiff; and, secondly, whether the dealings between the plaintiff and Coupland amounted to a fraud which had been productive of injury to the defendants. His lordship told them that if they were satisfied that, as between the plaintiff and the defendants, the goods were the goods of the plaintiff, and that no fraud had been practised on the defendants, by which they had sustained injury, their verdict should be for the plaintiff (a). The jury having returned a general verdict for the plaintiff, damages 8204l. 3s.

Bompas Serjt., in Easter term last, obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

Sir T. Wilde and Channell Serjts. (with whom was Tomlinson) now shewed cause. There is no foundation for saying that either the plaintiff or Coupland committed any fraud on the defendants. It will be argued [1040] that Coupland would commit a fraud on them if he consigned his own goods to India in the name of the plaintiff, as he might thereby have obtained larger advances upon them from the defendants than the invoices would warrant. But no such fraud is suggested to have been practised; neither was it shewn at the trial that the defendants had sustained any loss or injury from the transactions between the plaintiff and Coupland. It may be admitted that the plaintiff knew that Coupland was the representative of the defendants at Liverpool; but it did not appear that he was acquainted with the terms of

(a) Sir Thomas Wilde, on the part of the plaintiff, excepted to the summing up, on the ground that the question of property and fraud were both irrelevant, contending that the only question that ought to be submitted to the jury was, whether the defendants had received the proceeds of the sales upon an undertaking to account with the plaintiff. The finding of the jury rendered the exception unnecessary to be considered.

the agency. Even supposing it to be true that the plaintiff practised some concealment or deception on the defendants, it is difficult to see how that can be any answer to the action. [Tindal C. J. The point which the defendants seem to make is, that they have a right to say that the goods are the goods of Coupland.] It is clear that, after having treated them as the goods of the plaintiff, and received the proceeds to his use, the defendants cannot turn round and say that they belong to Coupland. *Dixon v. Hammond* (2 B. & Ald. 310) shews that an agent cannot dispute the title of his principal. *Easum v. Calo* (5 B. & Ald. 861; 1 D. & R. 530) is also in point. Leaving the question of fraud out of the case, it is impossible to say that, as between the plaintiff and the defendants, the goods were not the property of the plaintiff. Admitting, for the sake of argument, that fraud can be set up as an answer under the circumstances of this case, it is denied that any fraud was committed. There appears to have been nothing to prevent Coupland dealing with the plaintiff in the manner in which the consignments were made to India; and there is no ground for supposing that the plaintiff was privy to any fraud. As to the latter, the question of fraud properly resolves itself into two points:—[1041] first, whether he practised any deceit on the defendants; and, secondly, if so, whether the defendants sustained any injury. It is clear, as already observed, that the defendants suffered no injury from the dealings between the plaintiff and Coupland. There can be no doubt that if Coupland had not failed in debt to the defendants, they would never have disputed the plaintiff's right to receive this money. Nothing would be more unjust than to allow them to retain it in order that they may set off against it a debt due to them in respect of a totally distinct transaction. On the whole, it is submitted that there is nothing to shew that the verdict (which negatived fraud in the plaintiff) is wrong; for the jury were fully warranted in coming to the conclusion at which they arrived.

Bompas Serjt. (with whom was Hugh Hill) in support of the rule. This is a clear case of fraud on the part of the plaintiff and Coupland, who conspired together to cause the defendants to believe that they had an agent who would properly estimate the amount of the advances to be made on the goods consigned. It is clear that the defendants never would have made any advances without ascertaining the value of the goods, either personally, or by employing some one on whose unbiassed judgment they could rely; whereas Coupland, with the knowledge and consent of the plaintiff, placed himself in a situation which deprived the defendants of his services, and exposed them to imposition. It is just the same as if the cashier of a bank was to get a third party to apply to him to make an advance on a security actually belonging to himself. Here Coupland has advised the defendants that they might safely make advances on goods which turned out to be his own. The question does not turn upon the point, whether ultimately there is any loss. It is a [1042] clear principle of law that where a man undertakes a duty, it is a fraud on his employers for him to place himself in a situation which prevents him from discharging such duty. The action for money had and received is an equitable one, in which the plaintiff must clearly make out that it is against good conscience for the defendant to withhold the money. It is said that the plaintiff's name was always used; but that is the fraud charged,—that he lent his name to conceal the fact that the goods belonged to Coupland; and if that be so, the plaintiff cannot set up the circumstance of the goods passing in his name as entitling him to recover. [Maule J. Suppose the defendants have, by some fraud of the plaintiff and Coupland, been induced to receive the money to the plaintiff's use. Although so induced, yet, having received it, does not a promise arise to pay it over?] It is submitted that they would have a right to hold the money for the true owner. [Maule J. Here if the defendants had chosen to pay the money to the plaintiff, Coupland could not have objected to their so doing.] *Hardman v. Wilcock* (9 Bingh. 382, n.) is very analogous to this case. It was there held that the jury having found that the plaintiff got possession of the goods by means of a fraud, concerted between him and an insolvent, he could not stand in a better situation than the insolvent himself. So, here, the plaintiff having consigned these goods in his name by a fraud between him and Coupland, cannot stand in a better situation than the latter. [Tindal C. J. The plaintiff did not merely lend his name; he advanced large sums of money on the goods. Maule J. If Coupland, instead of owing 18,000l., had merely been indebted in 1000l. to the defendants, could the defendants have held the balance for more than the 1000l.?] They were clearly entitled to hold it to the [1043] amount of their debt. [Maule J. If that be so, should not the defendants have pleaded that

the money was received to the use of the plaintiff, and then have set out the circumstances under which they claimed to retain it? It was not necessary to plead specially. The money never belonged to Scott. It is quite immaterial who was entitled to the balance beyond the amount of the defendants' debt. Suppose there had been no debt due from Coupland to the plaintiff, and there was a debt owing by him to the defendants, could the plaintiff then, by a fraudulent use of his name, prevent a set-off between Coupland and the defendants? [Maule J. That would be a case of mutual credit. The defendants would have trusted Coupland, and he would have trusted them.] It is submitted that the defendants have a right to say that Coupland gave them credit, that the goods are his, and that he handed over the goods to them, and the defendants made him advances thereon. It was never left to the jury whether the plaintiff had a lien on the goods. Supposing the jury to have, in effect, found that the plaintiff did not know that Coupland was the defendants' agent, their verdict was clearly against evidence. [Tindal C. J. The jury may have found that, looking at the whole case, no possible injury could have resulted to the defendants from the dealings between the plaintiff and Coupland.] It is a fallacy to look only at the ultimate result. Looking at the questions left to the jury, their verdict was not warranted by the evidence.

TINDAL C. J. I can see no reason for sending this cause down to a second investigation. The action is for money had and received; and it appeared by various documents produced at the trial, that the defendants uniformly dealt with the plaintiff as the shipper of the goods, that they treated the proceeds thereof as his, and that they stated the balance of each transaction to [1044] be the plaintiff's money. The money in question was therefore clearly had and received to the use of the plaintiff, unless the circumstances shew that a fraud was committed by the plaintiff and Coupland, which was productive of injury to the defendants. Two questions were left to the jury. The first was, whether, as between the plaintiff and the defendants, the goods were the property of the plaintiff; and the jury have found that they were. The second question was, whether any fraud had been practised between the plaintiff and the defendants to the injury of the defendants, and the jury seem, in effect, to have found that there had not. I am not disposed to disturb the verdict, particularly as no new light can be thrown on the case, inasmuch as Coupland was examined at the trial. I am at a loss to see what bearing the alleged misconduct of Coupland and the plaintiff can have upon the case. One effect is said to be, that larger advances may be made on the consignments sent to India. Even if that were so, it is admitted that all those advances were deducted before the balance was struck for which the verdict was given. No injury resulted to the defendants. On the contrary, they reaped an advantage from the transaction by getting a larger commission than they would otherwise have done. Consequently I cannot see how the circumstance—that the plaintiff allowed Coupland's goods to pass in his name, could affect the question between the plaintiff and the defendants. It has been admitted that if the latter had had no demand against Coupland, they could not have denied that the balance in their hands belonged to the plaintiff. But how can that balance be less money had and received by them to the plaintiff's use, because it turns out that Coupland is largely indebted to the defendants upon another account? It seems to me that justice has been done, and that we ought not to send the case to a second trial.

[1045] COLTMAN J. I am of the same opinion. The money in question must be assumed to have been had and received to the use of the plaintiff, unless the dealings between the plaintiff and Coupland amounted to a fraud upon the defendants. I agree that the conduct of these parties is not altogether correct; for I think that persons ought to let the real nature of their transactions be known, and that concealment is unfair and destructive of the confidence which should exist between merchants. The defendants, perhaps, might have had a right to repudiate the contract on discovering its real nature; but they stand in a different situation when the transaction has been completed, and they have the proceeds in their hands. In that position they may possibly be entitled to say, that although they had treated the plaintiff as the owner of the goods, and had held the proceeds on his account, yet, as that was owing to misrepresentation, they would hold such proceeds for the true owner. The question is, whether, as between these parties, the plaintiff is not the true owner. The case might have been different if the defendants had sustained any actual injury; but none has occurred; for they have been repaid their advances, and have received their com-

mission on the consignments. It has been suggested that the debt due to the defendants from Coupland has been the consequence of the plaintiff's dealings with Coupland; but I cannot see any legal connection between such debt and the misrepresentation which was made. As between Coupland and the plaintiff, the latter is clearly entitled to this money; and, as between him and the defendants, it is money received to his use, although it might have been different if any injury had resulted to the defendants from the transaction. The jury, however, have found that no injury was sustained by them.

[1046] **ERSKINE J.** In this case the jury have found that the defendants received the money to the plaintiff's use; and the evidence clearly shewed that the defendants had treated it as money which had come to their hands on his account. But it is said that the verdict cannot be sustained because of a misrepresentation practised on the defendants with the knowledge of the plaintiff, which amounted to a fraud upon them. If it had appeared that the defendants had sustained any injury, it would have been material to consider whether such a fraud had been committed, and whether the jury had come to a right conclusion upon that point. Whether the consignments were made in the name of the plaintiff for the purpose of enabling Coupland to receive larger advances than he would otherwise have obtained, it is impossible to say; but no evidence was given that larger advances than were warranted were made on any goods, except in a few instances, which may be considered accidental. On the part of the plaintiff it has been contended, that the object of the arrangement was not that adverted to, but was, to give the plaintiff a security both for advances made by him in respect of the goods, and for a debt then due to him from Coupland. The latter swore that such was the object of the arrangement, and consequently there was evidence from which the jury might fairly come to that conclusion. There was, therefore, nothing necessarily wrong in the finding of the jury, assuming that fraud alone would have defeated the plaintiff's right of action. But it appears to me that even if the dealings of the parties had amounted to fraud, that would not have been sufficient, unless the defendants could have shewn that they had been injured. But, instead of being injured, they appeared to have been benefited by the commission received by them on the larger amount of goods, which was probably purchased in consequence of the arrangement between the plaintiff [1047] and Coupland. It is also said that Coupland owes the defendants 18,000*l.*, and that, if allowed to retain this money as belonging to him, they might set off against it a portion of their debt. I agree, however, with the Lord Chief Justice, that this case cannot be altered by the fact that Coupland was indebted to the defendants, if they actually received the money to the use of the plaintiff, and incurred no injury from the arrangement between the plaintiff and Coupland. On the whole, I can see no ground for disturbing the verdict.

MAULE J. I also think that this was money had and received to the use of the plaintiff; and as all the facts were clearly brought out at the trial, that the verdict ought not to be disturbed. The object of Coupland in entering into the arrangement with the plaintiff was probably to obtain larger advances from the defendants than he could otherwise have done. When, however, the plaintiff, having received advances from the defendants, made further advances to Coupland, he became the purchaser of an interest in the goods. The plaintiff, therefore, having an actual interest in the goods, and being the party actually contracting with the defendants, Coupland could not interfere between the plaintiff and the defendants, and dispute the right of the former to receive the proceeds. The defendants had the benefit of the contract with them, making advances which were for the benefit of the plaintiff, and afterwards reaping the benefit of that part of the contract which was for their advantage, namely, the payment of those advances and their commission out of the proceeds of the consignments. Having done so, they clearly held the balance to the use of the plaintiff, unless the alleged fraud is an answer to his claim. Assuming that there was a fraudulent representation, by which larger advances were made than would otherwise have been [1048] obtained, or whereby advances were made which would not have been made at all, would such a fraud prevent the plaintiff from recovering? Cases have been cited to shew that a party, on discovering fraud, may rescind a contract into which he has entered. But he cannot take the benefit of part of a contract, and repudiate the rest. Here, the defendants would not have contested the matter with the plaintiff at all if Coupland had not happened to be indebted to them. The defen-

dants do not seek to put an end to the whole of the transactions with the plaintiff. They have applied part of the proceeds to the payment of their own advances and charges, and they cannot withhold the balance from the plaintiff. When a person has received money as an agent for another under a misrepresentation, he is bound to pay it over, and if he sustains any injury, he may bring an action against the party guilty of such misrepresentation. Here, these defendants, having received the money under a contract with the plaintiff, cannot now say that Coupland was the real party to the transaction. The plaintiff was not a mere agent of Coupland, but entered into a contract with the defendants, in which contract the plaintiff had an interest. I think that the jury came to a right conclusion; that this was money had and received to the plaintiff's use.

Rule discharged.

[1049] JOHN INMAN TUCKER, WILLIAM TUCKER, AND JOHN JAMES v. WILLIAM SOUTHCOTE INMAN AND ANNA VICTORIA LITTLE. Nov. 23, 1842.

[S. C. 5 Scott, N. R. 843; 12 L. J. C. P. 21: at Nisi Prius, Car. & M. 82. Referred to, *Smart v. Tranter*, 1888-90, 40 Ch. D. 168; 43 Ch. D. 587.]

In prohibition the declaration objected to the jurisdiction of the ecclesiastical courts to grant probate of a testamentary paper made by S. I., a feme covert, under a power purporting to be contained in a deed, to which her husband was not a party. The plea stated the title of the defendants under the will of S. I., and that they were about to file a bill in Chancery enforcing their equitable right, upon the ground that according to the rules of equity the husband must be taken, by his conduct, to have assented to the deed; and that by the course and practice of that court, in order to obtain the adjudication thereof upon the validity in equity of the said appointment so made (under the will) by S. I., it was necessary that letters of administration with the will annexed, should be granted, limited so far as concerned the right of S. I. to the sum of money which she, by virtue of the deed, had a right to dispose of, and had, by the said will, disposed of accordingly; to the end that such administrator with the will annexed, might be made a party to the suit in Chancery. The replication traversed the allegation of the existence of any such rule and practice of the court of Chancery.—At the trial it was proved that in the case of a will made by a married woman, either with the assent of her husband or under a power, a limited administration is granted by the ecclesiastical court, and that such administration or a general administration, is required by the court of Chancery, before it will allow any party to claim any interest under such will:—Held, that upon this evidence, the defendants were entitled to the verdict.—Held also, upon motion for judgment non obstante veredicto, that the plea contained an answer to the action, as alleging that the defendants would be able to prove in the court of Chancery facts which either amounted to an election on the part of the husband to take under the provisions of the deed, whereby the power was conferred on the wife to make a will, or to an assent by him of the exercise of such power by the wife.

Prohibition (a). The declaration stated that whereas, previously to the marriage of one George Inman, clerk, since deceased, with one Joan Darch, spinster, to wit, on the 19th of January 1760, certain hereditaments situate at Blagdon, in the county of Somerset, were legally conveyed and assured to certain trustees, their heirs and assigns, to the use of the said George Inman in fee until the said marriage, and then [1050] to the use of the said George Inman for life, with remainder to the use of Joan his intended wife for her life, with remainder to the use of trustees, to preserve contingent remainders; and after the death of the survivor of them, the said George Inman and Joan his intended wife, to the use of such child or children of the said marriage in such shares and proportions, and for such estate or estates, as the said George Inman should, by any deed or writing under his hand and seal executed in the presence of two witnesses, or by his last will and testament in writing duly

(a) See the proceedings upon the rule *Ex parte Tucker*, ante, vol. i. p. 519. 1 Scott, N. R. 379, post, 1079.

executed and attested, limit, appoint or devise ; and in default thereof, to the use of the first son of the said George Inman and Joan, and the heirs of the body of such first son lawfully issuing ; that afterwards, to wit, on the day and year last aforesaid, the said marriage was duly solemnized ; that afterwards, to wit, on the day and year last aforesaid, there was issue of the said marriage, one other George Inman, one Henry Inman, one John Inman, and one Sarah Inman, who afterwards, to wit, on the day and year aforesaid intermarried and took to husband one other John Inman ; that afterwards, to wit, on the 1st of January 1795, by an indenture under the hand and seal of the said George Inman, clerk, and made between the said George Inman, clerk, of the first part, and the last mentioned John Inman and one John Whitley of the other part, which indenture was executed by the said George Inman, clerk, in the presence of two witnesses, the said George Inman, clerk, in exercise of the power so given or reserved to him in and by his marriage settlement, appointed the said hereditaments to the said John Inman and John Whitley, their heirs and assigns for ever, upon trust, to receive the rents and profits thereof, and apply the same and so much thereof as should be necessary in the maintenance of the said George Inman the son for his life, and after his decease then, as to one moiety of the said hereditaments, [1051] to the use of such person and persons and for such estate and estates as the said Henry Inman should in manner therein mentioned appoint, and in default thereof to the use of the said Henry Inman, his heirs and assigns ; and as to the remaining moiety of the said hereditaments to the use of such person or persons, and for such estate and estates as the said Sarah Inman should in manner therein mentioned appoint, and in default thereof to the use of the said George Inman, clerk, his heirs and assigns for ever ; and in which indenture was contained a power for the said last mentioned trustees, in case the rents and profits of the said hereditaments should be more than sufficient, with certain other provisions therein mentioned, for the support and maintenance of the said George Inman the son, to pay over the surplusage thereof from time to time unto the said Henry Inman and Sarah Inman, their executors, administrators, and assigns in equal shares ; and wherein was also contained a declaration, that in case the said last mentioned trustees, during their joint lives, should think it was beneficial to sell the said hereditaments, it should be lawful for them to do so, and place out the net produce on government or other good security, and to apply the interest money arising therefrom towards the maintenance of the said George Inman (the son) for his life, in the same manner as the rents were thereinbefore directed to be applied, together with the surplusage, and at his decease to pay all such moneys, together with all interest money or dividends as should be then due and in the hands of the said John Inman and John Whitley, or of the survivor of them, his heirs or assigns, unto the said Henry Inman and Sarah Inman, their heirs, executors, administrators and assigns, equally between them absolutely ; that neither the share of the said Henry Inman nor that of the said Sarah Inman in the moneys which might arise by any such sale as aforesaid was by the said in-[1052]-denture subjected to any power of appointment whatsoever ; that afterwards, to wit, on the day and year last aforesaid, the said George Inman, clerk, died ; that afterwards, to wit, on the 5th and 6th of November, 1795, by certain indentures of lease and release, the release being made between the said George Inman, the son, of the first part, the said Henry Inman and Katherine his wife, the said John Inman and Sarah his wife and John Whitley, of the second part, Robert Blake of the third part, and Peter Cox of the fourth part ; and by a common recovery afterwards, to wit, on the day and year last aforesaid, duly suffered in pursuance thereof, the same hereditaments were conveyed, limited and assured to the use of the said John Inman and John Whitley, their heirs and assigns, upon trust, to sell the same and invest the net produce in some of the public stocks, or on government or real security, by way of mortgage, and to apply the dividends towards the maintenance of the said George Inman, the son, for his life, and to apply the rents and profits in the mean time until the sale, in the like manner ; and after the decease of the said George Inman, the son, then to stand possessed of the said trust moneys and the future interest or dividends thereof, upon trust, for the said Henry Inman and Sarah Inman, in equal shares, or in trust for their respective executors, administrators or assigns, in case they or either of them should die in the life time of the said George Inman (the son) and to pay and transfer the same accordingly ; that afterwards, to wit, on the day and year last aforesaid, the said hereditaments were sold ; that afterwards, to wit, on the 24th of February, 1802, a certain indenture

expressed to be made between the said George Inman (the son) of the one part, and the said John Inman and John Whitley of the other part, was executed by the said George Inman (the son), and which indenture never was executed by the said John [1053] Inman and John Whitley, or either of them, and to which indenture neither the said Henry Inman nor the said Sarah Inman was made or was named as party; by which indenture, after reciting the said hereinbefore recited indenture of the 1st of January, 1795, so far as related to the appointment thereby made of the hereditaments aforesaid, and the uses thereby declared thereof, but wholly omitting the particular trusts thereby declared with respect to the application of the moneys arising from any sale of the said hereditaments; and after reciting that the said hereditaments had been sold, and that the said George Inman (the son) was desirous and willing that the moneys arising from the sale aforesaid, amounting to the sum of 1050l. should be vested in the said John Inman and John Whitley, for the uses thereafter mentioned, agreeably to the intention of the said George Inman, clerk, it was witnessed, that for the purpose of carrying such intention into effect, and in consideration of 1s. to the said George Inman (the son) therein stated to be paid by the said John Inman and John Whitley, the said George Inman (the son) did direct and declare that the said sum of 1050l. should from thenceforth be vested in the said John Inman and John Whitley, their executors, administrators and assigns, upon trust, that they and the survivor of them, and the executors, administrators and assigns of such survivor, should apply the interest, dividends or produce of the said sum of 1050l., or so much thereof as should be necessary, in the maintenance of the said George Inman (the son) during his life, and after the decease of the said George Inman (the son) upon trust, as to one moiety of such principal sum of 1050l. to the use of such person or persons as the said Henry Inman should in manner therein mentioned appoint, and in default thereof to the use of the said Henry Inman, his executors, administrators and assigns, and as to the [1054] remaining moiety or half part of the hereditaments and premises thereby limited and appointed to the effect following, that is to say, to the use of such person or persons, for such estate and estates, either absolutely or conditionally, and with or without power of appointment, and in such sort, manner and form, and subject to such powers, provisos, conditions and agreements as the said Sarah Inman, by herself alone, and whether sole or covert, should from time to time, by any deed or deeds, writing or writings to be by her signed, sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament, which last will and testament, it was thereby expressed that the said Sarah Inman should have power to make, as to her should seem meet, to be by her signed and published in the presence of three or more credible witnesses, direct, limit and appoint; and in default thereof, to the use of the said George Inman (the son); and by the last mentioned indenture it was provided that in case the interest and dividends of the said 1050l. should be more than sufficient, with a certain other provision in that indenture mentioned, for the support and maintenance of the said George Inman (the son) it should be lawful for the said John Inman and John Whitley, and the survivor of them, his executors or administrators, to pay over such surplusage from time to time, or any interest or dividends then in their hands, unto the said Henry Inman and Sarah Inman, their executors, administrators and assigns, in equal shares and proportions; that afterwards, to wit, on the 3d of September, 1807, the said Sarah Inman died, leaving her husband John Inman her surviving, having previously to her death executed an instrument, purporting to be a testamentary appointment, dated the 3d of September, 1807, and purporting to be made in pursuance of the power so expressed to be given to her in and by the said indenture on the 24th of February, 1802, [1055] in which instrument it was expressed that the said Sarah Inman had appointed the interest, produce or dividends arising from all such money or principal sum of money over which she had a disposing power, unto the said John Inman for his life, with remainder to her nephew John Inman, of Minehead, in which instrument it was also expressed that she, the said Sarah Inman, appointed her said husband executor of her said will; that afterwards, to wit, on the 27th of January, 1813, the said John Inman (the husband) died, leaving the said John Whitley him surviving, having previously duly made and published his last will and testament in writing, bearing date the 11th of April, 1812, and thereby appointed James Tucker and the said John Whitley executors of the said will, and who duly proved the same in the Prerogative Court of Canterbury; afterwards, to wit, on the 6th of December, 1831, the said John

Whitley died, leaving the said James Tucker him surviving; that afterwards, to wit, on the 5th of April, 1834, the said James Tucker died, having first duly made and published his last will and testament in writing, and also a codicil thereto, and thereby appointed the said John Inman Tucker, William Tucker and John James (the plaintiffs), executors thereof, who, afterwards, to wit, on the 3d of June, 1834, duly proved the same in the Consistorial Episcopal Court of Wells; that afterwards, to wit, on the 1st of August, 1838, the said George Inman (the son) died; and that afterwards, to wit, on the day and year last aforesaid, the said William Tucker, as one of the personal representatives of the last-mentioned John Inman, as aforesaid, applied for and obtained a commission out of the said Prerogative Court of the Archbishop of Canterbury, for the purpose of being duly sworn to administer the goods and chattels of the said Sarah Inman deceased, in order to obtain letters of administration to be granted to him of the [1056] goods and chattels of the said Sarah Inman deceased, for the purpose of administering the same to and amongst the residuary legatees under the said last will and testament of the said John Inman deceased; that before the said commission so obtained by the said William Tucker was executed, to wit, on the 28th of December, 1839, the defendants caused a citation to issue out of the said Prerogative Court, requiring the plaintiffs to appear in the said Prerogative Court by a day therein named, and leave in the registry of the said court the original will of the said Sarah Inman deceased, (thereby meaning the said instrument so signed by the said Sarah Inman as aforesaid), and to shew cause why letters of administration, with the said will annexed, of the said goods, chattels and credits of the said Sarah Inman, should not be granted to William Southcote Inman and Anna Victoria Little (the defendants), they alleging that in or about the month of April, 1819, they had purchased from the said John Inman (the nephew) the reversionary interest in the said trust fund so bequeathed to the said last named John Inman, in and by the said pretended will of the said Sarah Inman, and claiming to be entitled to such letters of administration, with the said will or testamentary writing annexed; whereupon, inasmuch as, by the laws of this realm, a feme covert cannot make any will or testament, or do any act or make any appointment by an instrument in the nature of a last will and testament, without having authority from her husband for that purpose; and inasmuch as the said Sarah Inman had no such authority, and inasmuch as the determining whether a feme covert has such authority is not matter of ecclesiastical cognisance, but belongs to the cognisance of Her Majesty's courts of common law, the plaintiffs prayed that Her Majesty's writ of prohibition might issue out of this honourable court, directed to the proper judge of the said Prerogative Court, to prohibit that [1057] court from proceeding to require the plaintiffs to shew cause why letters of administration, with the said will or testamentary writing annexed, of the goods and chattels of the said Sarah Inman should not be granted to the defendants; and of this the plaintiffs brought suit, &c.

Plea. That Her Majesty's writ of prohibition ought not to issue out of this honourable court as by the said declaration prayed; because, after making of the indenture in the declaration fourthly mentioned and therein alleged to be expressed to be made between the said George Inman (the son) of the one part, and the said John Inman (the husband) and John Whitley of the other part, to wit, on the 3d of September 1807, in the county aforesaid, the said Sarah Inman did make and publish such last will and testament as in the same indenture is mentioned, bearing date, &c. and signed and published by the said Sarah Inman, in the presence of, and attested by, three credible witnesses; and which instrument being in the custody of the plaintiffs, the defendants could not bring the same into court (a); and the said Sarah Inman thereby, by virtue of the powers and authorities in that behalf her enabling, gave, limited and appointed the interest, produce and dividends arising from all such money or principal sums belonging to her, or over which she had a disposing power as aforesaid, unto the said John Inman (the husband), for and during his natural life; and after his decease she gave all such money or principal sum to her nephew, John Inman of Minehead, with a certain limitation over, as in the said last-mentioned instrument mentioned, in the event of the said nephew of the said Sarah Inman dying in the lifetime of her said husband; and the said Sarah Inman thereby appointed her said husband to be the executor of her said will; that afterwards, and in the lifetime

(a) No profert of a will being necessary, no excuse of profert was necessary.

of [1058] her said husband, to wit, on the 1st January 1812, to wit, in the county aforesaid, the said Sarah Inman died, without having revoked or altered her said will, leaving her said husband, and also her said nephew, her surviving; and that afterwards and after the death of the said Sarah Inman, to wit, on the 1st January 1813, the said John Inman (the husband) died, leaving the said John Inman (the nephew) him surviving; and that afterwards and after the death of the said John Inman (the husband) to wit, on the 15th April 1819, by a certain indenture then duly made between the said John Inman (the nephew) of the one part, and the defendants therein particularly described of the other part; (profert), for the considerations therein mentioned, the said John Inman, party thereto, assigned unto the defendants as therein mentioned all the right, title and interest of him the said last-mentioned John Inman, of, in and to the moiety of the said principal sum of 1050l., and of the securities whereupon the same might be laid out or invested, so appointed to him as aforesaid by the said Sarah Inman, as by the said last-mentioned indenture reference being thereto had will more fully appear; that afterwards, to wit, on the 1st of August, 1838, the said George Inman (the son) died; whereupon and whereby, according to the rules in equity in that behalf (vide post, 1065, 1072), the defendants then and there had good and valid grounds for exhibiting their bill of complaint in Her Majesty's High Court of Chancery, wherein they would have stated and alleged the several premises aforesaid, and also to the effect that according to the rules of equity in that behalf the said John Inman (the husband) must be deemed and taken by reason of his conduct in respect of the premises to have assented to the said indenture in this plea first mentioned, and that by and [1059] according to the said rules of equity it was open to the said John Inman (the husband) to elect either to take the benefit given to him by the last-mentioned indenture, and to permit and allow the said Sarah Inman, his wife, during her coverture, to make an appointment by will or otherwise, according to the power contained in the last-mentioned indenture in that behalf, or to reject the benefits given to him by the last-mentioned indenture, and to retain his contingent right to the said moiety of the said sum of 1050l. in the event of his surviving the said Sarah Inman; and the defendants would also have stated and alleged in the said bill to the effect that the said last-mentioned John Inman had so conducted himself in the premises that by and according to the rules of equity he must be deemed and taken to have elected to give effect to the said indenture in this plea first mentioned, and to have sanctioned the said testamentary appointment so made by the said Sarah Inman as aforesaid; and the defendants would thereby also have prayed the said court of Chancery for relief in that behalf; that the plaintiffs claiming to be the personal representatives of the said last-mentioned John Inman, as in the declaration mentioned, and having obtained possession of the said will of the said Sarah Inman, then and there refused to admit or acknowledge the said equitable right of the defendants to the said moiety of the said principal sum of 1050l. after the death of the said George Inman (the son); wherefore, after the said death of the last-mentioned George Inman, the defendants being otherwise unable to obtain payment of the said moiety of the said principal sum of 1050l., it then became and was necessary, for the purpose of enforcing the said equitable right thereto, that the defendants should institute a suit in Her Majesty's High Court of Chancery, according to the course and practice of the same court; that according to the course and practice of the said High Court of Chancery, and [1060] the rules of equity in that behalf, in order to obtain the adjudication of the said court in due form upon the validity in equity of the said appointment, so made by the said Sarah Inman to pass the equitable right and interest of and in one moiety of the said sum of 1050l., according to the tenor and effect of the said last-mentioned appointment, it was and is necessary that letters of administration, with the said will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title and interest of her the said Sarah Inman in and to the said moiety of 1050l., and all interest due and to grow due thereon, which she the said Sarah Inman, by virtue of the said indenture in this plea first-mentioned, had a right to dispose of, and had by the said will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators, with the said last will and testament annexed, but limited as aforesaid, might be made a party or parties to the said suit in chancery; that by reason of the premises, and because the plaintiffs, although then in that behalf requested so to do, refused to propound the said will in the ecclesiastical

court, and to take out or suffer any other person or persons to take out letters of administration with the said last will and testament annexed, and limited as aforesaid or otherwise, and the plaintiffs then fraudulently intended and contrived to hinder and prevent the defendants from proceeding to enforce their said equitable right, and to obtain an adjudication in the said court of Chancery upon the validity in equity of the said appointment; that the defendants, to wit, on the day and year in the declaration in that behalf mentioned, caused a citation to issue out of the said Prerogative Court, in the declaration mentioned, requiring the plaintiffs to appear in the said Prerogative Court by a day therein named, and leave in the registry of the [1061] said court the said will of the said Sarah Inman deceased, and to shew cause why letters of administration, with the will annexed, of the goods, chattels and credits of the said Sarah Inman, but limited, as before is mentioned in that behalf, should not be granted to the defendants, as they lawfully might, for the cause aforesaid; which was the citation in the declaration mentioned; and this the defendants were ready to verify, &c., wherefore they prayed judgment, and that the said writ of prohibition might not issue in manner and form as prayed by the said declaration.

Replication. That according to the course and practice of the said High Court of Chancery, and the rules of equity in that behalf, in order to obtain the adjudication of the said court in due form upon the validity in equity of the appointment in the said plea, alleged to have been made by the said Sarah Inman, to pass the alleged equitable right and interest of and in one moiety of the said sum of 1050l., according to the tenor and effect of the said supposed appointment, it was not nor is necessary that letters of administration, with the said supposed will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title and interest of the said Sarah Inman in and to the said moiety of 1050l., and all interest due and to grow due thereon, which the said Sarah Inman, by virtue of the said indenture in the said plea first mentioned had a right to dispose of, and had by the said alleged will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators, with the said alleged last will annexed, but limited as aforesaid, might be made a party or parties to the said suit in chancery, provided that there was a sufficient legal personal representative of the said Sarah Inman before the said court of Chancery; that before the issuing of the said citation, to wit, on the day and year in the [1062] declaration of the plaintiffs in that behalf above mentioned, the said William Tucker, as one of the personal representatives of the said John Inman, the husband of the said Sarah Inman, applied for and obtained a commission out of the said Prerogative Court, for the purpose of being duly sworn to administer the goods and chattels of the said Sarah Inman, in order to obtain letters of administration, to be granted to him the said William Tucker, of the goods and chattels of the said Sarah Inman, for the purpose of administering the same to and amongst the residuary legatees, under the said last will and testament of the said last-mentioned John Inman; that from the time of the issuing of the said commission hitherto the said William Tucker had been and still was ready and willing to be duly sworn to administer the goods and chattels of the said Sarah Inman, and to obtain and accept letters of administration, to be granted to him the said William Tucker, of the goods and chattels of the said Sarah Inman, and thereby to constitute himself and become the legal personal representative of the said Sarah Inman; without this, that according to the course and practice of the said High Court of Chancery, and the rules of equity in that behalf, in order to obtain the adjudication of the said court in due form upon the validity in equity of the said appointment so made by the said Sarah Inman, to pass the equitable right and interest of and in one moiety of the said sum of 1050l., according to the tenor and effect of the said last-mentioned appointment, it was or is necessary that letters of administration, with the said will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title and interest of the said Sarah Inman in and to the said moiety of 1050l., and all interest due and to grow due thereon, which the said Sarah Inman, by virtue of the said indenture in the said plea first mentioned, had a right to [1063] dispose of, and had by the said will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators, with the said last will and testament annexed, but limited as aforesaid, might be made a party or parties to the said suit in chancery modo et formâ; concluding to the country.—Similiter inde.

At the trial of the cause before Tindal C. J. at the sittings for Westminster after

last Michaelmas term (a)¹, evidence was given, in the first instance, on the part of the defendants to the following effect :—

Mr. Chapman and Mr. Ellison, two gentlemen practising at the chancery bar, stated that, according to the practice of that court, in order to obtain an adjudication on the validity of the testamentary appointment of a married woman, as in this case, it was necessary that letters of administration of her effects, limited to the property appointed, should be obtained from the ecclesiastical court ; that such letters of administration, with the will annexed, should be granted in order to establish the testamentary character of the papers, and that such a limited administration, if granted, would be sufficient. But on cross-examination they stated that there would be no objection in the court of Chancery if a general administration was granted, and that when executors were named in the will of a married woman it would be sufficient for them to obtain probate. On re-examination they stated that a general administration was not required, and that nothing was necessary beyond a limited one ; but that the court of Chancery would be satisfied with such administration as the Prerogative Court would grant.

Dr. Curteis, an advocate in the ecclesiastical court, stated, that where a married woman makes a will under [1064] a power of appointment enabling her to appoint a particular fund, and appoints an executor, and he dies, the court will grant letters of administration, with the will annexed, limited to that fund over which her power extends ; and that when the interest under the will is sold, the purchaser of that interest is entitled to call for the limited administration, omitting the parties primarily entitled. On cross-examination he stated that the husband or his representatives could not have letters of administration without proof that the wife died intestate ; that after the grant of limited administration to another party he or his representatives might have letters of administration *cæterorum*, but that both could not be granted by the same instrument. On re-examination he stated, that when another party was entitled to the beneficial interest, that party would have a right to the limited administration ; that in the present case the defendants would be entitled thereto, and that it was necessary that limited administration, with the will annexed, should be granted to some party. On a resumed cross-examination he stated, that if the executors of the executor of the testatrix in this case were willing to take out general letters of administration, with the will annexed, this might be done, but that as general administrators they would not be entitled to the fund in question, and that the party beneficially interested under the will would be the party entitled to the limited administration ; and where the personal representatives of the husband denied the equitable right of the latter, letters of administration, with the will annexed, would be granted to such parties.

No witnesses were called on behalf of the plaintiffs, but it was insisted on their part that the issue in the case was on the general question, whether it was necessary, by the practice of the court of Chancery, that a limited administration should be granted under the circum-[1065]-stances stated, and that the affirmative of such issue had been disproved.

TINDAL C. J., after stating that he considered it was not an issue as to the general practice of the Court of Chancery to require a limited administration, but an issue to try whether, according to the practice of the court, a limited administration would be sufficient in this particular case, and that upon the evidence the defendants had established their plea, directed a verdict to be found for them ; but the learned judge reserved leave to the plaintiffs to move to set it aside and enter a verdict for themselves.

Manning Serjt., in last Hilary term, obtained a rule nisi for a new trial, on the ground that the evidence did not support the plea, or for judgment *non obstante veredicto*, on the ground that the plea alleged, not that the defendants were entitled to administration, but that they wished to have an opportunity of raising that point in some other court.

April 28.—Channell Serjt. (with whom was H. Hill), in last Easter Term (a)², shewed cause. The plaintiffs here contend that they in effect represent John Inman, the husband of the party whose will is in question, as being the executors of his surviving executor. The defendants, on the other hand, claim under the appointment made in

(a)¹ See 1 Carr. & Marshm. 82.

(a)² Cor. Tindal C. J., Coltman, Erskine and Cresswell JJ.

the will of Sarah, the wife. The prohibition was originally moved for on the ground that the Ecclesiastical Court could not decide the question whether a feme covert had the power to make a will. But the question raised upon these pleadings is, whether, according to the practice of the Court of Chancery, it is not necessary that some probate should be granted of the will in question, in order to enable that court to [1066] determine whether the power to make such will existed; and if it did exist, whether it had been properly pursued. That court is clearly the proper tribunal to decide the question whether the husband so acted as to make the deed of appointment operate against him, and also the question whether the power of the wife has been properly executed. And it was clearly established by the evidence that the Court of Chancery will not act in the case unless there be some person before it representing Sarah Inman. The defendants do not set up the right of the Ecclesiastical Court to decide the question as to the validity of the will, but merely its right to grant the probate *valet quantum*. The defendants have alleged that the Court of Chancery would not act without a limited administration. The substance of this issue is that there must be some one to represent the wife in Chancery, at least to the extent of the estate to be there dealt with; and the defendants having proved the affirmative, are entitled to the verdict, although it was shewn that the Court of Chancery would also act upon a general administration *cum testamento annexo*. The defendants proposed to state the minimum of duty to be performed by the Ecclesiastical Court in order to satisfy the Court of Chancery—namely, that at least there must be a limited administration: and that was proved—though it was also proved that if more were obtained from the Ecclesiastical Court, that would form no objection in the Court of Chancery, the lesser being contained in the greater.

If the defendants are entitled to the verdict, the next question is whether the plaintiffs can have judgment *non obstante verdicto*. The proceedings in this case originate in the stat. 1 W. 4, c. 21, s. 1, under which the only judgment that the court can give is, either that the writ of prohibition do or do not go, as justice may require. Now, justice does not require the writ to issue in this case. If it had been shewn that the decision of [1067] the Ecclesiastical Court would have been binding in a matter over which the temporal courts have jurisdiction, then the writ should have issued; but it is shewn that the decision of that court will leave the question to the ultimate decision of the Court of Chancery, which must decide upon the validity of the appointment by the wife. The only ground upon which prohibition can issue to the Ecclesiastical Court is that it is going to decide a point, and to decide it against the temporal law (a).

Unless the Ecclesiastical Court first grants a probate, the Court of Chancery will not entertain the question as to the validity of the appointment. The result of the authorities upon this point is thus stated in *Williams on Executors* (b). "It often occurs that the will of a married woman is made in pursuance of an agreement before marriage, or of an agreement made after marriage for consideration. Wills of married women made under such circumstances fall under the same rules as those made by *femes covert* by virtue of a power. Although a different rule formerly prevailed, a testamentary appointment of such a nature by a wife cannot now be made available, either at law or equity, without probate. The Ecclesiastical Courts, however, will allow such appointment to be proved without the husband's consent, (the probate being limited to the property comprised in the power), although their former practice was to require the husband's concurrence before they would admit the instrument to probate. Formerly the Ecclesiastical Courts did not take upon themselves to enter with any great minuteness into the construction of the powers under which wills of this kind were executed, or as to the due compliance with their conditions. But it is now established that the court of probate is bound to decide in the [1068] first instance whether the power has been duly executed before it gives the instrument the sanction of its seal. Yet, if the court feel any real doubt on the point, it seems the safer course to admit the paper to probate: inasmuch as the production of such a probate will not alone be sufficient to induce a court of equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, viz. attestation, sealing, &c. the temporal courts

(a) See *Burder v. Veley*, 12 A. & E. 233; 4 P. & D. 452.

(b) Pa. 45, 3d edit. And see A. 3 E. 3, *Itin. Nott. Fitz. Abr. tit. Devise*, pl. 12.

have never been contented with the judgment of the spiritual court: whilst, on the other hand, if the court of probate should reject the paper, its decision would be final; as the court of construction will not proceed to the consideration of the effect of any testamentary paper till it has been proved in the proper ecclesiastical court." That statement is fully borne out by what is said by Lord Eldon C. in *Rich v. Cockell* (9 Ves. 376), by Lord Mansfield C. J. in *Stone v. Forsyth* (2 Dougl. 707), and by the case of *Ross v. Ever* (Sugd. on Pow. 6th edit. p. 287, cit. 3 Atk. 156), referred to by Lord Mansfield C. J. in *Jenkin v. Whitehouse* (1 Russ. 431). These authorities shew that, although the decision of the Ecclesiastical Court established the fact of there having been a will, it is worth nothing unless there has been an appointment properly made in pursuance of the power; and upon that fact the Court of Chancery will determine. The defendants will be concluded if the writ issues; the plaintiff, on the other hand, will not be, if it is refused.

The learned serjeant then proceeded to argue that the second branch of the rule must fail upon another ground, namely, that the plaintiffs could only claim a right to the consideration of the question upon the ground that they were the legal representatives of John Inman, the husband; it appeared, however, that his executors had taken out a prerogative probate, but that [1069] the plaintiffs, as the executors of his surviving executor, had only taken out a diocesan probate; and that therefore the chain of representation was incomplete. He cited 1 Williams' Executors (3d edit. p. 231); *Fowler v. Richards* (5 Russ. 39); *Jernegan v. Baxter* (5 Sim. 568). In the *Goods of Powell* (3 Hagg. 195); and *Twyford v. Traill* (7 Sim. 592). But upon this point the court gave no opinion.

Manning Serjt., in support of the rule, contended upon the last point, that the defendants ought to shew by distinct allegations that the probate was wrong. *Omnia presumuntur rite esse acta*. The prerogative probate would operate as a diocesan probate until repealed, or bona notabilia out of the diocese may have been reduced into possession between the two probates. But unless the defendant's title to the interference of the Ecclesiastical Court be made out, they have no right to compel even a tortious holder to bring the document into the Ecclesiastical Court.

As to the general question, it is true that if the parties have any equity, the Court of Chancery will administer it, and the parties must be before the court to enable it to do so. But the first stage is to shew that the Ecclesiastical Court has jurisdiction to entertain the case and admit the will to proof; and that question will depend upon the due creation of the power to Mrs. Inman to make a will. This point is to be determined by the temporal courts generally, and not exclusively or primarily by courts of equity. The question whether the assent of the husband was given, is for the temporal courts. [Coltman J. Can a married woman make a will merely with the assent of her husband?] It is submitted that she can. [Tindal C. J. Can she do so at common law? In Com. Dig. tit. Devise (G.) which is headed Who may devise, a [1070] married woman is not mentioned (a).] A married woman might always make a bequest of chattels with the consent of her husband (b). [Coltman J. It is certainly laid down in Blackstone's Commentaries that a married woman, by her husband's licence, may make a testament (c).]

The fallacy upon which the whole of the argument on the other side turns is this,

(a) Sed vide ibid. Devise (H.) headed, Who not, tit. (H. 3), Feme covert; where it is said, "If an husband covenants or agrees before marriage, that his wife shall make a will, though it be a void will, the disposition by it shall be good. R. Cro. Car. 219, 376, 597. R. Cro. El. 27." And again, "So if a wife devises by will, and the husband assents to it after her death, it will be good. Semb. 1 Rol. 608, l. 23. R. 1 Mod. 211." But the last of these authorities has no reference to an assent of the husband after the wife's death.

(b) See the authorities on this subject collected in 1 Wms. Executors, 43, et seq. 3d ed.

(c) 2 Bl. Com. 498, citing Dr. & St. dial. 1, c. 7. But there does not appear to be anything in the chapter cited to authorise that position. The learned commentator adds, "but such licence is more properly his assent; for unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will." (Citing Bro. Abr. tit. Devise, 34. 2 Stra. 891.)

that because the grant of a probate is necessary, in order to give the Court of Chancery jurisdiction to examine into the rights of the parties, therefore the Ecclesiastical Court must be allowed to enquire whether the power to make a will has been well executed or not. The grant of probate is not a mere form to enable a party to try his right in equity. The question in the case is, whether the instrument of 1802, giving the power to Mrs. Inman to make a will, was properly executed, it not having been executed by her husband; and that question is clearly one for the common law courts. If any other circumstances existed which gave such a power to the wife, such as the assent of the husband, those facts should have been alleged by the defendants, and this court would then have decided upon their validity. But they have alleged nothing to oust this court of its jurisdiction to issue a prohibition. [1071] [Coltman J. But what has the Ecclesiastical Court done as yet in excess of their jurisdiction? They have merely issued a citation. If Mrs. Inman had the assent of her husband she might make the will, and they may then grant the probate.] But if the power to make the will is contested, they cannot decide on the validity of the power. [Coltman J. How is the assent to be tried? Cannot they inquire into that?] The cases cited on the former argument (a)¹ shew that they cannot, and that the question is one exclusively for the common law courts. [Coltman J. But the common law courts cannot grant the probate.] Two steps are required, the first is to inquire if the married woman had the power to make a will. Then, if that power be established, either by the assent of the interested parties in not contesting the will, or by the decision of the common law courts in refusing a prohibition, or in granting a consultation, the Ecclesiastical Court may proceed to grant probate. [Erskine J. Although the deed of 1802 was not executed by the husband, the defendants contend that his conduct was equivalent to an execution by him.] Then that fact ought to have been so pleaded that the plaintiffs might have traversed it, the assent or non-assent of the husband being a question of fact. They might have pleaded that, though John Inman did not execute the deed, he acted upon the provision enabling him to dispose of the surplus rents, and thereby assented to the power contained in the deed for his wife to make a will. [Erskine J. Would not that have been pleading evidence?] Perhaps it might; but the plaintiffs might have demurred generally, and have thus raised the question. Or the defendants might have pleaded the husband's assent broadly, and the plaintiffs might have traversed the allegation. [Channell Serjt. The defendants con-[1072]-tend, not that there was an assent by the husband, which would render the power to make a will good at law, but that there were circumstances sufficient to make it a good power in equity against the husband. It would have been of no use therefore to plead that of which this court could take no useful notice. The defendants say that, according to the rules of equity, they were entitled to relief; and the plaintiffs have admitted this allegation by not traversing it.] The plea states that "the defendants had good grounds for exhibiting their bill of complaint," not that they were entitled to relief. [Erskine J. referred to *Rex v. Bettesworth*, 2 Stra. 891, 1111, 1118.] But supposing John Inman the husband to have assented to the making of a will, yet as there was no assent by him as executor to the bequest to the nephew, the interest would pass to Tucker and Whitley, the personal representatives of both husband and wife.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The plaintiffs in this case declared in prohibition, and the declaration stated a marriage settlement, in which certain hereditaments were conveyed by one George Inman, clerk, the settlor, to trustees in fee, upon the trusts therein mentioned, with a power of appointment by deed to the husband, (the settlor,) amongst the children of the marriage; and also stated a subsequent deed made in exercise of such power of appointment, whereby the husband appointed (amongst other things) one moiety of the settled premises to the use of such person or persons as Sarah Inman (one of the children of the marriage, and at that time the wife of John Inman) should by deed or will appoint; and in which deed of appointment was contained a power of sale of the settled hereditaments, and a direction to the trustees (a)² to lay out the [1073] net

(a)¹ *Anon.* 1 Mod. 211; *Brook v. Turner*, 2 Mod. 170; *Jenkin v. Whitehouse*, 1 Burr. 431; *Scammell v. Wilkinson*, 2 East, 552. Vide ante, vol. i. p. 527, 528.

(a)² Le. to Inman and Whitley, trustees in the now reciting deed of 1795, not the trustees of the settlement of 1760.

proceeds of such sale in government or other good security, and to pay the proceeds thereof into the hands of Henry Inman and Sarah Inman, equally between them absolutely, but not giving any power of appointment of the proceeds to Sarah; and the declaration further proceeded to state the sale of the said hereditaments and the placing of the money obtained thereby in the names of the said trustees, and to set out a deed bearing date the 24th of February 1802, expressed to be made between one George Inman, the eldest son of the marriage of the one part, and other trustees (the said John Inman, and one John Whitley) of the other part, but which was not executed by the last-mentioned trustees, by which George Inman, the son, in order to carry into effect the intention of the settlor, as expressed in his deed of appointment, directed and declared that the trustees should stand possessed of the said proceeds of the sale (amounting to 1050*l.*), as to one moiety thereof, to the use of such person or persons as Sarah Inman, the wife, should by deed or will appoint, and in default of appointment to George Inman, the son; and the declaration then stated that Sarah Inman died in the lifetime of her husband John Inman, having, before her death, executed an instrument purporting to be a testamentary appointment of her said moiety, whereby she bequeathed the interest to her husband for his life, and, after his death, the principal to her nephew John Inman; and the declaration lastly proceeded to allege that William Tucker, one of the plaintiffs, as one of the next of kin of John Inman, the husband (*a*), had applied to the Prerogative Court of Canterbury for letters of administration to the goods and chattels of Sarah Inman, for the purpose of administering the same amongst the residuary legatees under the will of John Inman her husband; and that thereupon the defendants cited the plaintiffs unto the [1074] Prerogative Court, requiring them to bring into court the original will of the said Sarah Inman, and to shew cause why letters of administration, with the will annexed, of the goods of the said Sarah Inman, deceased, should not be granted to them, the defendants, as purchasers of the interest given by such will of the said Sarah to her nephew John Inman; and the plaintiffs then suggesting in their declaration that, by the laws of this realm, a feme covert cannot make any will or testament, or any instrument in the nature of a will or testament, without having authority from her husband for that purpose, which it is alleged the said Sarah Inman had not; and that the determining whether such feme covert had such authority is not matter of ecclesiastical cognizance, but belongs to the courts of common law, the plaintiffs pray Her Majesty's writ of prohibition from this court, directed to the proper judge of the Prerogative Court, to prohibit that court from proceeding therein.

To this declaration the defendants put in a plea stating their title to the sum bequeathed by the will of the said Sarah Inman by their purchase of the same, and that they were about to file a bill in Chancery for the purpose of enforcing their equitable right thereto; "and that by the course and practice of the said court, in order to obtain the adjudication of the said court upon the validity in equity of the said appointment so made by the said Sarah Inman, it was and is necessary that letters of administration with the will annexed should be granted to some person or persons limited so far only as it concerns all the right, title and interest of her the said Sarah Inman in and to the sum of money which she, by virtue of the indenture in the plea first mentioned, had a right to dispose of, and had, by the said will, disposed of accordingly; but no further or otherwise, to the end that such administrator, with the said [1075] will annexed, but limited as aforesaid, might be made a party to the said suit in Chancery;" and the plea then alleged the refusal of the plaintiffs to propound the will for the purpose of such limited administration in order to prevent the defendants from proceeding to enforce their rights.

To this plea the plaintiffs put in a replication, concluding with a formal traverse of the rule and practice of the Court of Chancery, as above set forth in the plea, on which traverse the issue was joined.

At the trial before me the jury found a verdict for the defendants; and as to that part of the plaintiff's motion which seeks to enter the verdict for the plaintiffs, upon looking at the form of the traverse, and comparing it with the evidence at the trial, we are satisfied that the verdict was properly found in favour of the defendants. There was very strong evidence to shew that, in the case of a will made by a married

(a) As one of the executors of the surviving executor of that John Inman, *supra*, 1055, 1065; *infra*, 1078 (b).

woman, either with the assent of her husband or under a power, an administration limited to the subject-matter of the bequest contained in such will, is the usual and proper form of administration; and that such administration is required by the practice of the Court of Chancery before they will allow any party to claim any interest under such will. It appeared undoubtedly that if the spiritual court were to grant a larger and more general administration, the Court of Chancery would not be dissatisfied therewith, nor, on that account, refuse to entertain the suit; but at the same time that such court would require, at the very least, the limited administration, and would not allow the suit to proceed without it. But the real meaning of the plea, when construed with reference to the subject-matter of inquiry, is, that it is necessary, at the very least, that a restricted administration should be taken out, and that an administration with less extended power would not be sufficient. And that [1076] proposition was fully borne out by the evidence at the trial.

With respect to the motion for judgment non obstante veredicto, such prayer can only be granted where the plea, though admitted to be true in fact, discloses no legal answer to the declaration. The question, therefore, in this case, is, whether the plea has disclosed such matters of fact as will bring the case within the principle of those decided cases in which the spiritual court has for a very long period of time been permitted to grant, and has been in the habit of granting, a limited administration to the will of a married woman.

The general rule undoubtedly is, that the spiritual court has no jurisdiction to grant administration in the case of the testament of a married woman, unless such testament is made with the licence or consent of her husband. And this rule is so well known and admitted in the courts themselves that a will of a married woman, made without the licence of the husband, would, by the practice of those courts, be considered as a mere nullity, and would not be admitted to probate; *Bransby v. Haines* (Sir George Lee's Reports, 120). But the rule that the spiritual court shall not exercise jurisdiction in the case of a married woman's will is admitted in practice to be subject to many exceptions. First, as already stated, the rule does not apply where the will is made with the assent of the husband, in which case the spiritual court is allowed to entertain the question whether made with his assent or not. Another exception is, where the wife takes in character of executrix, and her will is confined to matters and things which she takes in that character, in which case she may make the testament without the husband's assent, and the ecclesiastical court may grant administration. A third class of exceptions is, where [1077] the will of a married woman is made in pursuance of an agreement with the husband before marriage, or an agreement with consideration after marriage. These are acknowledged exceptions, as to which the ecclesiastical courts have been accustomed for a very long period to inquire into the facts of each case, whether there was an assent of the husband, whether the will is made in conformity with the power, whether there exists such agreement, and the like; and, when satisfied, to grant a limited administration, upon the ground that those questions could not be entertained or litigated in a court of law or equity, without administration having been first obtained in a spiritual court: see the authorities collected in Williams's Law of Executors, vol. i. p. 43, et seq. (3d edit.).

The question therefore is, whether the ground upon which the defendants rest their claim to a limited administration in their plea, does not fall substantially within the principle of some of those acknowledged exceptions; and we think there is reasonable ground for holding that it falls within such principle. The defendants rest their claim to the right of administration with the will annexed of Sarah Inman limited as before mentioned, upon the ground that they shall be able to prove that her husband, who survived her, so acted and conducted himself in her lifetime, and, after her death, with respect to the provisions of an indenture of the 24th of February 1802, that a court of equity would deem him to have elected to take under the provisions of that deed. And we think, that whether the facts are to be taken as amounting to an election strictly and properly so considered, or as amounting to an implied assent on the part of the husband to his wife's making her will, in either case it is within the spirit and meaning of that exception to [1078] the general rule, which holds that a will made with the husband's assent, is provable in the spiritual courts. And we think further, that when it is alleged upon the pleadings, and is found by the verdict, that the defendants could not in any way set up or litigate their claim

before the Court of Chancery, without a limited administration, if we were to grant the present prohibition, it would, in effect, amount to a denial of justice (a).

After all, the allowing this limited administration to issue is a matter of little real consequence to the interests of the parties. The money being vested in the names of trustees, whether the plaintiffs, as next of kin (b)¹ of the husband, take administration of the wife's assets, or the defendants take limited administration, with the will annexed, to the wife; in either case the money cannot be reached without the intervention of the Court of Chancery; and the question, whether the assent of the husband has been given, or whether the husband has made his election to take under the deed, and has thereby waived his right to object to his wife's power to make a testament, may and will be as thoroughly contested and investigated before that court as if the administration had not been granted.

For the reasons which we have given, we think this rule must be discharged.
Rule discharged.

[1079] EX PARTE TUCKER, IN THE MATTER OF INMAN. Nov. 24, 1842.

The party in whose favour judgment is given in an action of prohibition is entitled to the costs of the application for a writ of prohibition without obtaining a rule for such costs.

Channell Serjt. applied for a rule nisi that the original rule herein, for a writ of prohibition, which had been obtained in Easter term, 1840, and which had been enlarged in Trinity term following (ante, vol. i. p. 519), should be discharged, with costs. He referred to the statute 1 W. 4, c. 21, s. 1 (b)².

[1080] Manning Serjt., contra, submitted that if the defendants were entitled to costs under the statute, the court need not interfere.

(a) Quære whether, supposing the defendants to have had any right, they might not have pleaded that right as an answer at common law to the declaration in prohibition. This point, upon which the rule nisi for arresting the judgment was obtained, supra, 1065, and was attempted to be supported, supra, 1071, 1072, does not appear to be adverted to directly or indirectly in the judgment.

The object of the motion for a prohibition was, to secure to the parties the benefit of a cheap and speedy decision in a court of law, of the common law question as to the existence of assent on the part of the husband,—whether that assent was to be evidenced by writing, or by acts done,—instead of their embarking in a chancery suit. This object the defendants succeeded in defeating.

(b)¹ Supra, 1073 (a).

(b)² By which, after reciting "that the filing a suggestion of record on application for a writ of prohibition was productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued, was an unnecessary form, and that it was expedient to make some better provision for payments of costs in cases of prohibition;" it is enacted, that "it shall not be necessary to file a suggestion on any application for a writ of prohibition; but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on behalf of the party and His Majesty, and shall contain and set forth, in a concise manner, so much only of the proceedings in the court below as may be necessary to shew the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters by way of traverse or otherwise, as may be proper to shew that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs."

The court, however, granted the rule nisi; but the matter was ultimately referred to a judge at chambers. And the parties attended before Coltman J. on the 7th of December, when the learned judge made an order (which was afterwards made a rule of court) discharging the rule of Easter term, 1840. The defendant's costs of all the proceedings were afterwards taxed and allowed under the statute without a rule.

DODSON v. WENTWORTH, ESQUIRE. Nov. 17, 1842.

[S. C. 5 Scott, N. R. 821; 12 L. J. C. P. 59; 6 Jur. 1066.]

Bales of flax sold by A. in London to B. residing at Mickley Mill, are addressed to "B. Mickley," and are shipped for Hull under a bill of lading making them deliverable "at the port of Boroughbridge for B., Mickley Mill." The bales are forwarded from Hull to Boroughbridge by water-carriage, and are deposited there in the warehouse of C., a party unconnected with the carriers, who was in the habit of receiving goods for B. and holding them at B.'s risk, and without charging warehouse-rent, until fetched away by B. or delivered to other persons by B.'s order.—The transitus is at an end, and the bales cannot be stopped by A. upon the insolvency of B. although B. has exercised no act of ownership over them.

Trover for 100 bales of flax. Pleas; not guilty, and not possessed.

At the trial before Lord Denman C. J., at the last assizes for Yorkshire, it appeared that the action was brought against the sheriff of that county under the following circumstances:—The plaintiff was a flax merchant in London, who for many years past had had dealings with one Thomas Weatherald, a flax-spinner, residing at Mickley Mill, about thirteen miles from Boroughbridge, in Yorkshire. The goods which Weatherald had from time to time purchased of the plaintiff, were usually sent by sea to York or Hull, and thence [1081] by canal to Boroughbridge, or sometimes to Ripon; from which places they were conveyed to Mickley Mill, sometimes by carrier, sometimes in Weatherald's own carts. On the 16th of August, 1841, Weatherald ordered of the plaintiff 100 bales of jute (a species of flax from the East Indies) "to be sent to Boroughbridge, as usual." On the 21st of August the flax, directed "to T. Weatherald, Mickley Mill, near Ripon," was shipped by the plaintiff on board a vessel, called the "Laurel," then lying in the Thames. In the bill of lading the "Laurel" was described as "bound for Boroughbridge," and the jute was "to be delivered at the aforesaid port of Boroughbridge unto Mr. Thomas Weatherald, Mickley Mill, near Ripon, or to his assigns, he or they paying freight for the said goods, 15s. per ton, delivered free in Boroughbridge." The "Laurel" arrived at York in due course, and the flax was transhipped into a boat belonging to the Ripon Fly-boat Company, which company conveyed goods by canal from York to Ripon. On the 4th of September the flax was landed from the fly-boat at Boroughbridge, and was lodged there in a warehouse belonging to the Ouse Navigation Company, which had no connexion with the Fly-boat Company. On the 6th of September, Weatherald stopped payment; but his insolvency was not known to the plaintiff until the 8th. On that day the plaintiff wrote to the canal agent at Ripon, desiring him not to deliver the flax to Weatherald. On the 10th, the flax was seized by the defendant, under an execution against Weatherald, who had never claimed the flax, or exercised any act of ownership over it.

The agent of the Fly-boat Company stated that goods addressed to Weatherald were always put by him into the warehouse belonging to the Ouse Navigation Company, unless Weatherald's carts were ready, at the time of landing, to receive them. And the warehouseman of the [1082] Ouse Navigation Company added that goods so received were considered to be at the risk of Weatherald, as no wharfage or warehouse charges were ever made in respect of them; and that when he sent for them, or directed them to be delivered to third parties, they were delivered accordingly, without any further communication with the Fly-boat Company.

On the part of the plaintiff, who insisted that the transitus was not at an end, and that his right of stoppage had therefore been properly exercised, *James v. Griffin* (1 M. & W. 20. S. C. after a new trial; 2 M. & W. 623) and *Jackson v. Nichol*

(5 N. C. 508 ; 7 Scott, 577) were cited ; and on the part of the defendant, *Wentworth v. Outhwaite* (c) and *Allan v. Gripper* (2 C. & J. 218 ; 2 Tyrwh. 217).

His lordship thought that the transitus was at an end, and directed a verdict for the defendant ; reserving leave to the plaintiff to move to set it aside and enter a verdict for himself for 249l., the amount agreed upon.

Channell Serjt. on a former day in this term (2d of November), having obtained a rule nisi accordingly,

Bompas Serjt. now shewed cause. The goods had reached their destination, as far as the plaintiff was concerned, when they were landed at Boroughbridge. The Ouse Navigation Company had authority to receive them for Weatherald, the consignee ; and the goods would remain in their warehouse until they were again set in motion by him. The right of stoppage in transitu was therefore at an end. The cases relied upon by the plaintiff are distinguishable. In *James v. Griffin*, though the goods were landed at a wharf by the directions of the [1083] consignee, yet it was clearly proved that he did not intend to take possession of them as owner. In *Jackson v. Nichol*, the goods were stopped before there had been any delivery to the consignee, either actual or constructive. *Dixon v. Baldwin* (5 East, 175) is a strong authority for the defendant. In that case Lord Ellenborough said the transit was at an end "when the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and where, without such orders, they would remain stationary." That principle is strictly applicable to the present case. [Tindal C. J. In that case the delivery was to the appointed agent of the consignee. *Rouge v. Pickford* (8 Taunt. 83 ; 1 J. B. Moore, 526), is much nearer to the present case.] The facts there are almost identical with those in this case. *Foster v. Frampton* (6 B. & C. 107 ; 9 D. & R. 108) is also to the same effect ; though in that case certainly the consignee had done a positive act equivalent to taking possession, in taking samples of the goods sent. The case of *Wentworth v. Outhwaite*, in which the present defendant was the plaintiff, arose out of circumstances that were nearly precisely similar to those in the present case, connected with other goods consigned to the same party, Weatherald, forwarded by railway to Leeds, and warehoused at the railway terminus there ; and the court held that the transit was at an end upon the arrival of the goods at the terminus. It is true, in that case, Weatherald had taken possession of a portion of the goods ; but no stress was laid upon that point in the judgment of the court, nor would it determine the vendor's right of stoppage in transitu as to the residue ; *Dixon v. Yates* (5 B. & Ad. 313 ; 2 N. & M. 177). The cases of *Jackson* [1084] *v. Nichol*, *Richardson v. Goss* (3 B. & P. 119), *Coates v. Railton* (6 B. & C. 422 ; 9 D. & R. 593), *Stokes v. La Riviere* (cited, 3 T. R. 466), *Ellis v. Hunt* (3 T. R. 466), and *Bohllingk v. Inglis* (3 East, 381, 398), all support the proposition, that where fresh directions from the vendee are required in order to set the goods again in motion, the transit is at an end.

Talfourd Serjt. (with whom was Hoggins) in support of the rule. The fact of the vendee having taken possession of part of the goods in *Wentworth v. Outhwaite* forms a material distinction between that case and the present, and, though not adverted to by the court, cannot be supposed to have escaped their observation. It is a circumstance of weight, as tending to shew the position of the goods. The acts of the vendee are always of the greatest importance to the decision of the question whether or not the transit is at an end. In this case the goods, when warehoused at Boroughbridge, were in an ambiguous situation ; the character of which would be determined by a very slight act on the part of the vendee. They are addressed to him at Mickley Mill, thirteen miles from Boroughbridge. [Maule J. By the bill of lading they are to be delivered "at the port of Boroughbridge unto Mr. Thomas Weatherald, Mickley Mill." That must mean of Mickley Mill. It is mere description.] When the goods arrive at Boroughbridge, the vendee gives no direction respecting them ; he is not liable for warehouse rent or wharfage dues ; and he does not exercise any act of dominion over them. Under these circumstances the goods cannot be said to have come even to his constructive possession. The Ouse Navigation Company cannot be considered as his agents, so as to bring the case within the principle of *Dixon v. Baldwin* (5 East, 175) ; *Tucker v. Humphrey* (4 Bingh. 516 ; 1 M. & P. 378)

(c) 10 M. & W. 436 (not reported at the time of the argument of the principal case).

is in point. In that case [1085] the shippers, acting for one G., purchased and paid for with their own money, flour at Stockton, which was sent by a vessel to London, and the invoice forwarded to G. A manifest of the flour was also forwarded by the shippers to a wharfinger in London, whose practice it was to deliver goods to the consignee named in the manifest, upon application, and, till application, to keep it on board the vessel; if not applied for before the vessel returned, he landed it, and kept it in his warehouse, to the order of the shipper; if the goods were to be delivered to order, he delivered them to persons producing either bills of lading or the shipper's invoices. G. was in the habit of having flour consigned to him at the wharf, and sometimes sold it on board, sometimes when it was landed, and kept for him in the wharfinger's warehouses. The flour in question arrived at the wharf on the 12th April, but was not landed till the 22d; on the 17th, before any application by G., who had become bankrupt, the flour was claimed under an order from the shippers; and it was held that the flour not having been landed, nor any application having been made by G., the shippers might stop in transitu. [Tindal C. J. The great distinction between that case and the present is, that there, if the vendee did not apply for the goods, the wharfinger held them to the order of the shippers; but here the warehouseman held them, and would have delivered them, to the order of Weatherald, and not of the plaintiff.] There was nothing here to shew any command or controul by Weatherald over the goods; the warehouse, in which they were housed, was not his, either actually or constructively, as he was not to pay any rent. [Erskine J. It does not appear that the mere fact of rent being paid would have made any difference; *Hammond v. Anderson* (1 N. R. 69).] *James v. Griffin* shews that [1086] a mere delivery of goods to a wharfinger, though by the directions of the consignee, if the latter does not intend to take possession of them, will not take away the right of stoppage in transitu. [Maule J. The question is upon whose account the warehousemen held the goods in this case,—it is clear they did not hold them for the Fly-boat Company, as that company were not consulted about the delivery.] The warehousemen are not to be considered as the agents of Weatherald to receive goods on all occasions, because in some former cases goods had been left for him at their warehouse.

TINDAL C. J. It appears to me that this case falls within the principle laid down in *Dixon v. Baldwin*, and that the transitus was at an end when the goods were lodged, under the circumstances stated in evidence, in the warehouse of the Ouse Navigation Company at Boroughbridge. The goods, which were shipped in London, on board the "Laurel," were, by the terms of the bill of lading, to be delivered at Boroughbridge to Thomas Weatherald, Mickley Mill, near Ripon. The goods were brought in the "Laurel" to York, and there, in the usual course, transhipped and put on board of boats belonging to the Fly-boat Company, who carry goods from York to Ripon. In passing Boroughbridge, the goods were landed there, and placed in a warehouse belonging to the Ouse Navigation Company, who are totally distinct from the Fly-boat Company. Now it is not immaterial to observe that the warehouse in which the goods were lodged was not the warehouse of the carrier; as some of the cases turn upon the point that the transitus is not at an end while the goods remain in the possession of the carrier, not only in the actual course of the journey or voyage, but even while they are in a place of deposit connected with their transmission. But the place of deposit here, is the warehouse of a third [1087] party—the Ouse Navigation Company; and then the question comes to this, whether that company are to be considered as the agents of the carriers or of the consignee. Now what is the evidence upon that point? It appears that the Fly-boat Company had been in the habit, for some time past, of receiving and carrying goods addressed to Weatherald, and of landing them at Boroughbridge, where they were put into the warehouse in question, unless Weatherald's carts were there ready to receive them. So that it seems that, quoad the transitus, the goods were as much delivered to Weatherald, when placed in that warehouse as if they had been at once loaded in his waggons. It further appears that the Ouse Navigation Company did not hold the goods on account, or subject to the control, of the Fly-boat Company, inasmuch as the Ouse Navigation Company delivered them over without any communication from the Boat Company, and according to directions received from Weatherald. This state of facts very closely resembles that in *Dixon v. Baldwin*, where it was laid down that the delivery of goods to the appointed agents of the vendee, from whom the agents were to receive orders as to the ultimate destination of the goods, put an end to the right of stoppage in transitu. I cannot distinguish

that case from the present. In this case it is true no wharfage or warehouse charges were paid by Weatherald to the Ouse Navigation Company; but, though the fact of such a payment is often a material circumstance, it is by no means conclusive. It might be an object with the Ouse Navigation Company to provide such accommodation for parties without charge, as an inducement to them to send goods by the canal, the company considering themselves sufficiently remunerated by the tolls. *Allan v. Gripper* is also very analogous to the present case, there Goods were conveyed by a carrier by water, and deposited in his warehouse, for the convenience of the [1068] vendee, to be delivered out as he should want them; and the transitus was held to be at an end, although it appeared that the carrier claimed to have a lien on the goods. That is much stronger than the present case. For these reasons I think the verdict for the defendant ought to stand.

COLTMAN J. I am of the same opinion. By the bill of lading the goods are to be delivered at Boroughbridge; and the words "Mickley Mill, Ripon," after the name of the consignee, do not point out the place of destination where the transitus is to end: they are merely a designation of the party to whom the goods are consigned. Boroughbridge is clearly the place at which the carriage of the goods is to terminate, and at which their delivery is to take place. This appears from the bill of lading; and the evidence in the case is consistent with this; as it appears that when the goods arrived at Boroughbridge, they were landed and placed in a warehouse where goods had been in the course of being left for Weatherald. *James v. Griffin* was relied upon by the plaintiff, to shew that it was competent to Weatherald to refuse to receive them. Possibly that may be; but there is, at any rate, no evidence of any such refusal on his part. In point of honour, he may have been called upon to decline receiving them, knowing the state of his own affairs; but, in point of fact, he did not do so. No question, therefore, can arise as to the effect of any refusal. It seems to me to be the same thing as if the goods had been delivered at the consignee's own premises, without his knowledge, after his insolvency.

ERSKINE J. The question really is, whether, under the circumstances of this case, the warehouse of the Ouse Navigation Company was to be considered as the warehouse of Weatherald or not. It does not appear [1069] that either the plaintiff or the carriers, the Fly-boat Company, had any thing to do with the warehouse; but it does appear that Weatherald had been previously in the habit of using that warehouse as a place of deposit for goods which were consigned to him. Therefore, according to all the cases, and especially according to *Allan v. Gripper*, which is a much stronger case than the present, the transitus was at an end, and the consignor had lost his right of stoppage.

MAULE J. I am of the same opinion. The goods were shipped by the vendor, and, by the terms of the bill of lading, they were to be delivered to the vendee at Boroughbridge. The duty of the carriers was at an end when they had brought the goods to Boroughbridge, and had delivered them there to the vendee or to some person on his behalf. It appears from the evidence that the vendee had, in effect, appointed the Ouse Navigation Company his agents to receive goods on his behalf. The carriers, therefore, completed their duty by delivering the goods to the Ouse Navigation Company, who were to receive and hold them—not on behalf of the carriers, for the purpose of forwarding them to the vendee,—but on the behalf of the vendee and subject to his order. I think it quite clear that, under all the circumstances, upon the delivery at the warehouse of the Ouse Navigation Company, the right of the consignor to stop these goods was at the end.

Rule discharged.

[1090] EDSALL v. RUSSELL. Nov. 18, 1842.

[S. C. 5 Scott, N. R. 801; 2 D. N. S. 641; 12 L. J. C. P. 4; 6 Jur. 996.]

A count in slander, after an inducement that the plaintiff was an apothecary and had attended the defendant's child, stated the words to be, "He killed my child; it was the saline injection that did it;" innuendo, that the plaintiff had been guilty of feloniously killing the child by improperly and with gross ignorance and with gross and culpable want of caution, administering the injection. Plea, that the plaintiff had professed to be an apothecary, and the defendant, upon the faith of his

being qualified as such, suffered him to attend the child ; and that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a saline injection to the child, who thereupon shortly afterwards died ; and that the death was caused or accelerated by the injection :—Held, that the words, as laid, contained a charge of manslaughter, and that the plea, which must be taken to have confessed the words in the sense imputed to them in the count, contained no justification of the words, so understood.—A second count was upon the following words :—“He made up the medicines wrong through jealousy, because I would not allow him to use his own judgment ;” innuendo, that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines which he had administered to the child in a wrong and improper manner ; and that such medicines were, to the plaintiff’s knowledge, unfit and improper to be administered to the child :—Held, that the count was bad, as the words—which were not charged to have been spoken of the plaintiff in his profession—did not impute any indictable offence.—A third count was upon the following words :—“Mr. P. told me that he (the plaintiff) had given my child too much mercury, and poisoned it ; otherwise it would have got well.” The plea justified so much only of the words as imputed the giving too much mercury.—Held, bad, inasmuch as the words attempted to be justified were not slanderous.

Case for slander. The first count of the declaration, after the usual inducement as to the plaintiff’s good name, &c., stated that, before the committing, &c., the plaintiff had, at the request of the defendant, attended a certain child of the defendant, which child was then ill, sick and disordered, with the view of curing and healing such illness, sickness and disorder ; and, that the plaintiff, with the view and intention aforesaid, and with the consent and permission of the defendant, made up and administered to the said child, in a proper and careful manner, and to the best of the plaintiff’s know-[1091]-ledge in that behalf, certain medicines, and amongst others, a certain saline injection ; that afterwards, and before the committing of the grievances thereafter mentioned, the said child died of the sickness, illness and disorder aforesaid ; that, before and at the time of the happening of the special damage to the plaintiff as therein-after mentioned, the plaintiff was an apothecary, and the business of an apothecary then carried on with skill and attention. Yet the defendant, contriving, &c., theretofore, to wit, on, &c., in a certain discourse, &c. falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said administering by the plaintiff of the said saline injection to the said child of the defendant, the false, scandalous, malicious and defamatory words following, that is to say, “he (meaning the plaintiff) killed my (meaning the defendant’s) child ; it was the saline injection that did it” (thereby meaning the said saline injection ; and that the plaintiff had been and was guilty of feloniously killing the said child by improperly and with gross ignorance, and with gross and culpable want of caution, and without due regard to the safety of the said child, administering to it the said saline injection).

Second count—that the defendant, further intending, &c. afterwards, to wit, on, &c., spoke and published the false, &c. words following of and concerning the plaintiff, and of and concerning the said making up and administering by the plaintiff of the said medicines to the said child of the defendant, that is to say, “he (meaning the plaintiff) made up the medicines (meaning the said medicines so made up and administered by the plaintiff to the said child as aforesaid) wrong, through jealousy, because I (meaning the defendant) would not allow him (meaning the plaintiff) to use his own judgment,” (thereby meaning that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines [1092] which he had administered to the said child, in a wrong and improper manner, and that such medicines were thereby, to the knowledge of the plaintiff, unfit and improper to be administered to the said child). By means of the committing of which said grievances thereinbefore respectively mentioned, one, Joseph Brookbank, afterwards, and after the plaintiff had become and was an apothecary, and whilst the plaintiff used and carried on the profession and business of an apothecary as aforesaid, and before the commencement of the suit, to wit, on, &c. refused to employ the said plaintiff in his said profession and business of an apothecary, as he otherwise would have done ; whereby the plaintiff had necessarily lost and been deprived of divers great gains, &c.

Third count—that the plaintiff, before and at the time, &c. was an apothecary, and the profession and business of an apothecary used and carried on with skill and integrity. Yet the defendant, further contriving as aforesaid, to wit, on &c. in a certain other discourse, &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such apothecary as aforesaid, the false, &c. words following, that is to say, “Mr. Pilcher told me (meaning the defendant) that he (meaning the plaintiff) had given my child (meaning the said child of the defendant) too much mercury, and poisoned it, (meaning the said child) otherwise it (meaning the said child) would have got well,” (meaning thereby that the plaintiff had, either from ignorance or inattention and want of caution, administered to the said child of the defendant thereinbefore mentioned, such an excessive quantity of mercury that the said mercury acted as a poison, and caused the death of the said child). By means, &c., concluding with an averment of general damage.

Pleas; fifthly, as to the speaking and publishing the following words in the first count mentioned, that is to [1093] say, “he killed my child, it was the saline injection that did it,” actio non; because before the speaking and publishing of the several words in the introductory part of that plea referred to, to wit, on, &c., he, the plaintiff, professed himself to be an apothecary, duly entitled and qualified to act as such, and the defendant, on the faith of his, the plaintiff’s, being so duly entitled and qualified, and knowing nothing to the contrary, did suffer and permit the plaintiff to attend the said child of the defendant, who was then sick and disordered, for the purpose of administering to the said child such medicines as might, under the circumstances, be proper, and the plaintiff did then injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a certain saline injection to the child of the defendant; and the said child thereupon, and immediately after the aforesaid injection had been administered as aforesaid, was thrown into violent convulsions, and then lost and was deprived of his speech, sight and hearing, and effusion upon the brain and locked jaw then also supervened, so that the aforesaid child shortly after died; and that the death of the said child was then caused and occasioned, or greatly accelerated, by the aforesaid saline injection so administered to him by the plaintiff as aforesaid; wherefore the defendant did afterwards, to wit, on the day and year in the first count mentioned, speak and publish the said words of and concerning the plaintiff in the introductory part of that plea referred to, as he lawfully might for the cause aforesaid.—Verification.

Sixth, as to the speaking and publishing so much of the words in the second count mentioned as imputes to the plaintiff the having administered to the child of the defendant improper medicines, actio non; because before the speaking and publishing, &c., he, the plaintiff, professed himself to be an apothecary, &c. (as [1094] in the fifth plea); and the plaintiff did then improperly, and contrary to his duty in that behalf, administer to the aforesaid child of the defendant, divers large quantities of medicine, the same being then of an injurious nature and unfit for the complaint under which the said child then suffered, as in the said second count mentioned; wherefore the defendant did afterwards, to wit, on, &c. speak and publish, &c. Verification.

Seventhly, as to the speaking and publishing of so much of the words in the last count mentioned, as imputes to the defendant the having given to the aforesaid child too much mercury, actio non; because before the speaking and publishing, &c. the plaintiff professed, &c. (as in the fifth plea); and the plaintiff did then wrongfully, &c. administer to the said child of the defendant divers large quantities of mercury, to wit, fifty grains, the same being an excessive quantity thereof, having reference to the then state, condition and disorder of the said child; wherefore the defendant did afterwards, to wit, on, &c. speak and publish, &c. Verification.

Demurrer to the fifth plea, assigning for causes—that the said fifth plea was no answer to the first count, or to the speaking and publishing of the words therein mentioned, in the sense and meaning therein and thereby imputed; but that the said fifth plea assumed to answer the words to which it was pleaded in a different sense from that in which in the first count they were alleged to have been spoken; that the defendant could not, by the rules of pleading, sever and disjoin the sense and meaning imputed in and by the innuendo therein contained from the words themselves, to which that innuendo was annexed; that the first count charged the defendant with having imputed to the plaintiff the crime of manslaughter by administering certain medicines with gross ignorance and gross want of caution; whereas the [1095] said

fifth plea did not justify such charge, but set up as answer only the alleged circumstance of the said medicines having accelerated the death of the child therein mentioned, &c.

Demurrer to the sixth plea, assigning for causes, that it was not pleaded to, nor did it assume to justify, the words mentioned in the second count in the sense and meaning in which they were therein alleged to have been spoken; that the charge in the said second count mentioned was not divisible, and the defendant could not, by the rules of pleading, assume to answer a part thereof only; that the said sixth plea did not in any way justify the speaking of the words in the said second count mentioned, or the complaint of the plaintiff therein contained; and that such complaint could not be split and severed in the mode attempted in and by the said sixth plea, &c.

There was a similar demurrer to the seventh plea, assigning also for causes, that the complaint of the plaintiff in the said last count, was, not that the defendant spoke and published that the plaintiff had given to the child of the defendant too much mercury, but that the defendant falsely spoke and published that the plaintiff gave to the said child of the defendant so much mercury that the said child was poisoned; that the said last plea did not confess that the words mentioned in the introductory part of it were spoken of and concerning the plaintiff as such apothecary as therein mentioned, &c.

Joinder in demurrer.

Channell Serjt. for the plaintiff. It is perhaps intended to be urged as an objection to the first count, that it is not stated therein that the plaintiff was an apothecary at the time he administered the saline injection to the defendant's child; but such an averment was not necessary, as the words impute a distinct charge [1096] of manslaughter. [Talfourd Serjt., For the defendant, intimated that he should not raise any objection to the first count.] Then the fifth plea contains no answer to that count. It justifies using the words in a sense different from that attributed to them by the innuendo. If the words were not used in the sense imputed by the plaintiff, the defence would be open to the defendant under the general issue; *Mountain v. Watton* (2 B. & Ad. 673).

The sixth plea to the second count attempts to justify only a portion of the words which does not charge the plaintiff with any crime punishable by law. It may be argued indeed that the whole of the words in the second count do not charge any such crime; that the words therefore are not actionable per se, and that there is no special damage of which the court can take notice. But it is submitted that it does charge an offence of which the law will take cognizance; for it states in substance that the plaintiff knowingly and wilfully made up and administered to the child wrong medicines. It is true it is not stated in that count that the child died in consequence. [Tindal C. J. It is not even said that the child got worse. Maule J. For any thing that appears, it may have got better. The administering a wrong medicine even with a wrong intention, may have done no harm; for the child's condition may have altered, and the medicine may have done good. There is no distinct charge, indeed, of any administering in the second count; it speaks only of a making up of the medicine.] It is submitted that, taking the innuendo and the introductory averments together, the second count does charge the plaintiff both with the making up a wrong medicine and administering it. [Coltman J. Would that be a crime punishable at law? How could the party be indicted for it?] Perhaps technically it might be treated as an [1097] assault, though the patient consented; *Rex v. Rosinski* (1 Moo. C. C. 19). If death had ensued from a wilful, or even a negligent, administering of a wrong medicine, the plaintiff would have been indictable for manslaughter; an attempt, therefore, to commit that offence would be a misdemeanor; or even an attempt to commit a misdemeanor is a misdemeanor; *Rex v. Meredith* (8 C. & P. 589). The wilful administering of a wrong medicine is therefore indictable, though death may not be the consequence. The direct consequences of an act cannot be the proper criterion of its criminality. [Maule J. There is no averment of any intention to do mischief. A warehouseman, who carelessly lets fall a bale of goods into the street, whereby a passer-by is killed, might be indicted for manslaughter; but would he be indictable at all, if no one was passing by, and no harm was done by the bale?] Probably not; but here, an intentional breach of duty is charged. A wrong

administering is alleged, in a case where the law requires competent skill ; and that amounts to the allegation of a wrong.

The seventh plea does not profess to answer the gist of the charge in the third count, which is a charge of poisoning ; and it is bad, as giving the words a different sense from that laid in the innuendo.

Talfourd Serjt., for the defendant. The words in the first count are sufficiently justified in the fifth plea. They amount to no more than charging the plaintiff with causing the child's death by administering the saline injection. [Tindal C. J. The words are "he killed my child." The word *killed* of itself might be of doubtful import, but as explained by the innuendo, it means a felonius killing. And this is admitted by the fifth plea.] A justification may be good without refer-^[1098]ence to the sense ascribed to the words by the innuendo ; *Cromwell's case* (4 Co. Rep. 12 b.), where it is said, "sensus verborum ex causâ dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam ;" and again, "although he (the defendant) varies from the plaintiff in the name and quality of the words, yet it is no cause to drive him to the general issue ; as in maintenance, the plaintiff charges the defendant with unlawful maintenance, the defendant may justify by reason of a lawful maintenance." [Tindal C. J. *Cromwell's case* was an action for scandalum magnatum, in which it was not necessary to allege the exact words.] If the words do impute a felony, they are justified by the plea. For it would be manslaughter to administer a medicine so indiscreetly that death was occasioned thereby ; *Rex v. St. John Long* (4 C. & P. 398, 423).

The second count is clearly bad, as the words there alleged do not charge any offence punishable by law. No indictment could be maintained on such a charge. If that count is considered good, it is submitted that the sixth and seventh pleas are also good, as it is not necessary to justify the whole of the slanderous matter ; *Clarkson v. Lawson* (6 Bingh. 266, 587 ; 3 M. & P. 605 ; 4 M. & P. 356). [Maule J. No cause of complaint is admitted by those pleas, unless they are considered as admitting that it is a cause of action to charge the knowingly administering of improper medicines.]

Channell Serjt. was heard in reply.

TINDAL C. J. The objection raised to the first count in the declaration has not been insisted on. The words alleged to have been spoken, as explained by the innuendo, clearly amount to a charge that the plaintiff had been guilty of manslaughter, in causing the death of the ^[1099]defendant's child by administering an injection with gross ignorance, and with culpable want of caution. Then the question is, whether the answer set up by the fifth plea is sufficient, whether it confesses and avoids the use of the words in the sense suggested by the plaintiff. I think the defendant must be taken to admit that he used the words in the sense imputed by the plaintiff, that is, as conveying a charge of manslaughter. Now to justify such a charge, it is not sufficient to shew mere want of care and caution ; there must be gross negligence and want of that degree of skill which every one, who undertakes the exercise of any particular art or profession, is bound to bring to each particular case. But all that the plea here charges is, that the plaintiff "injudiciously, indiscreetly, and improperly, and contrary to his duty," administered the saline injection ; and "that the death of the child was caused and occasioned, or greatly accelerated, by the aforesaid saline injection." Now this is no more than a simple statement of, at most, want of judgment on the part of the plaintiff ; and does not amount to the crime with which the defendant has charged him. The plea is therefore bad as confessing the use of the words in the sense imputed to them by the plaintiff, and not avoiding or justifying them in the same sense, by shewing the truth of the charge.

I have had considerable doubt whether the words alleged in the second count amount to the charge of a crime, or a legal offence. Perhaps, by construing them very closely, they might be considered as approximating to a criminal charge—but that is not sufficient ; for where a party makes a charge of slander, it is for him to shew that the words bear a slanderous sense. Upon the whole I do not think that the words in the second count convey any charge of an indictable offence. The words are, "he made up the medicines wrong through jealousy, ^[1100]because I would not allow him to use his own judgment." There is no innuendo that the defendant meant to impute that the medicines occasioned any injury to the child ; so that whether they were noxious or perfectly innocent is left entirely in doubt. An indictment for mala praxis could not be supported without shewing that there had been gross and

culpable negligence, or that the party knew that great mischief would be likely to result from what he did, or from the medicines he was about to exhibit. I think, therefore, that the defendant is entitled to judgment on the second count.

As to the third count, the charge contained in it is either negligence or want of proper knowledge of medicine. No objection is made to this count. In the plea to it (the seventh), the defendant does not sever one distinct portion of the slander from another, and profess to answer such portion, as in *Clarkson v. Lawson*; but he abstracts certain words found in the third count, and only professes to answer the charge conveyed by those words, namely, the administering of an excessive quantity of mercury, but not such an excessive quantity as poisoned the child. The plea is bad, therefore, as neither confessing nor avoiding the alleged slander.

Upon the whole, therefore, the plaintiff is entitled to judgment on the demurrers to the fifth and seventh pleas, and the defendant, on the demurrer to the sixth plea, by reason of the insufficiency of the second count.

COLTMAN J. I am of the same opinion. *Cromwell's case*, upon which it is sought to support the fifth plea, is very different from the present. In that case the court could see that the words were not used in the sense charged; but here the defendant must be taken to admit that he imputed felony to the plaintiff; and all that he alleges in his plea to justify that charge is, that [1101] the plaintiff treated the child injudiciously. As to the second count, I cannot see that any thing was imputed which could legally subject the plaintiff to a criminal charge, and the court cannot add to the meaning of the words.

ERSKINE J. I also am of opinion that the fifth plea is no answer to the first count, which is admitted to be good, as containing a charge of manslaughter. The plea must be taken to confess the speaking of the words in the sense attributed to them by the plaintiff; and it justifies the use of them, because the plaintiff had injudiciously, indiscreetly, and improperly, and contrary to his duty, administered a certain medicine to the defendant's child, by means whereof it died. The words impute felony; but the plea shews nothing to justify such a charge. In *Cromwell's case* it was shewn that the words were not spoken in the sense imputed by the declaration. There is nothing in the plea to rebut the interpretation which the plaintiff had given to the words by his innuendo. I think, therefore, the plea is bad.

The second count does not shew that the defendant meant to impute any intention to injure the child by administering the medicines, or that any injury resulted from administering them. To make this a good count, some fact should have been stated shewing that the plaintiff was liable to an indictment.

There is no objection to the third count, and I agree that the plea to it is bad, as affecting to justify only so much of the words charged in that count as does not amount to a cause of action.

MAULE J. I am of the same opinion. As to the first and third counts, it is not necessary to add any thing to what has already fallen from the court.

I also think the second count bad. It only states that [1102] the defendant charged the plaintiff with making up the medicines wrong, through jealousy; and the innuendo is, that the defendant thereby meant that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines which he had administered to the child in a wrong and improper manner. And I am disposed to think that the charge of making up the medicines, coupled with the innuendo, may in effect amount to a charge of administering the medicines. But that is all. It is not said that the plaintiff did, or intended to do, any harm to the child; and if no harm was either done or intended, I do not see how it would be an offence to make up and administer medicines in a wrong and improper manner. A wrongful act, without any intention to injure, and where no injury results from it, is no offence. It has been argued that the administering of medicines improperly might be considered as an assault; but I cannot agree to that as a general position; as the administering does not necessarily imply any personal contract.

With regard to the fifth plea, how does it profess to answer the words alleged to have been spoken in the first count, amounting to a charge of felonious killing? It does not even profess to answer them in the sense in which they are used; and upon that ground it is clearly bad. Indeed, as it is pleaded, it does not set out any thing contained in the first count, which amounts to a cause of action; and it would, in my opinion, be bad upon that ground. The rule in *Cromwell's case*, it may be observed,

is not very consonant to the rule of pleading in modern times. The plea there seems to be of that species which is considered to give implied colour. But the plea in this case is of a very different character. It professes to justify a charge of manslaughter by administering improper medicine. It alleges merely a want of judgment and discretion on the part of the [1103] plaintiff. But an injudicious and indiscreet administering of medicine will not make a man guilty of manslaughter. There must at least be gross negligence on his part; and the plea does not allege that. It is therefore, I think, clearly bad.

The seventh plea is also, I think, bad. It merely selects a part of what is charged by the words set out in the third count, namely, the giving of too much mercury, and is pleaded to that. There might be nothing in that amounting to an offence; and it appears to me that a defendant in an action for defamation cannot pick out of a slanderous sentence certain words, which have no slanderous effect, and justify them alone. It is not stated in the plea that any wrong was done in reference to the then state of the child.

I agree with the rest of the court, therefore, that judgment should be given for the plaintiff upon the demurrers to the fifth and seventh pleas, and for the defendant upon the demurrer to the sixth plea.

Judgment accordingly (a).

End of Michaelmas Term.

[1104] IN THE HOUSE OF LORDS.

(In Error.)

JONES v. WAITE. July 1, 1842.

[S. C. 9 Cl. & F. 101; 8 E. R. 353 (with note); 5 Scott, N. R. 951.]

A promise to pay money if the promisee will execute a deed of separation between himself and his wife, is not void for illegality of consideration.

Error, upon a judgment in the Exchequer Chamber, affirming a judgment of the court of Common Pleas.

The declaration stated that, on the 19th of October 1833, Jones, the defendant below, signed a memorandum in writing, whereby he agreed to pay Waite, the plaintiff below, 160*l.* by eight half-yearly payments, towards Horne and Gates's demand of 366*l.* 4*s.* 9*d.*, Waite taking the whole of such demand on himself; and to pay 20*l.* towards liquidating certain outstanding debts, and 220*l.* towards certain household expenses, one half at Michaelmas day then next, and the other half at Lady day 1835; and by the said memorandum it was stated that Jones agreed to the above in consideration of Waite's executing a certain deed of separation between Waite and his wife, and agreeing to pay H. and G. the outstanding debts and the household expenses in full. Mutual promises. Averment: that Waite, confiding in the agreement, was induced to, and did execute the deed of separation; and agreed to pay H. and G. their said demand of 366*l.* 4*s.* 9*d.*, and the said outstanding debts and household expenses, in full, and then took upon himself the payment of the said demands, debts, and expenses; whereof Jones had notice; yet Jones neglected and refused (although often requested so to do) to make the first payment of the said sum of 220*l.*, so agreed to be paid by the defendant towards the household expenses, which first payment thereof, amounting to a certain sum of money, to wit, 110*l.* under and by virtue of the said memorandum be-[1105]-came due, and ought to have been paid by Jones, at Michaelmas day last, and the same still remained wholly unpaid; and Waite, by reason thereof, was forced and obliged to pay the same out of his own moneys.

Pleas:—first, the general issue; secondly, that at the time of the signing by the defendant of the memorandum, and before and at the time of the commencing of this

(a) The judgment for the defendant though founded upon pleadings terminating in a demurrer and joinder, would be expressed to be, in respect of the insufficiency of the count and not in respect of the sufficiency of the plea as asserted by the defendant in his joinder in demurrer.

suit, the plaintiff was solely liable to make to H. and G. the payments, the agreement by the plaintiff to make which was by the memorandum stated to be in part the consideration for Jones's agreeing, as was alleged; and that Waite was at the time of the signing by the defendant of the said memorandum, and before and at the time of the commencing of this suit, solely liable to pay the said expenses and outstanding debts in full, the agreement by the plaintiff to pay which debts in full was by the said memorandum stated to be in part the consideration for Jones's agreeing, as was alleged. Verification.

Special demurrer to the second plea for duplicity.

The demurrer was argued in the court of Common Pleas in Easter term 1835 before Tindal C. J., Gaselee J., Vaughan J., and Bosanquet J., when that court unanimously held that there was nothing upon the face of the record to shew that any part of the consideration for Jones's promise was illegal (1 New Cases, 656; 1 Scott, 730; Hodges, 166)

Jones having brought a writ of error in the Exchequer Chamber, the errors were argued on the 4th of February 1836, before Lord Denman C. J., Lord Abinger C. B., Littledale J., Alderson B., and Patteson J. That court, on the 11th of February 1839, affirmed the judgment of the court of Common Pleas, dissentientibus Lords Denman and Abinger, who were of opinion that the consideration disclosed upon the face of the declaration was illegal (5 New Cases, 341; 7 Scott, 317).

[1106] Jones having brought a writ of error returnable in parliament, the case was argued on the 1st of July 1842, in the presence of Tindal C. J., Williams J., Parke B., and Alderson B. upon the question, whether that part of the consideration for the agreement which is not answered by the plea, viz. the execution of the deed of separation, was sufficient to support the promise, or whether it was an illegal and void consideration.

T. F. Ellis (with whom was Sir W. Follett S. G.), for the plaintiff in error, cited the cases of *Worrall v. Jacob* (3 Meriv. 268), *Wilkes v. Wilkes* (2 Dick. 791), *Tenant v. Brice* (Toth. 78), *Key v. Bradshaw* (2 Vern. 102), *Lowe v. Peers* (4 Burr. 2225), *Brown v. Peck* (Eden, C. C. 140), *Allen v. Hearn* (1 T. R. 56), and *Hartley v. Rice* (10 East, 22), to shew that the consideration was illegal; and he relied upon *Fletcher v. Fletcher* (2 Cox, 99), *Legard v. Johnson* (3 Ves. 352, 361), *Lord St. John v. Lady St. John* (11 Ves. 526), *Westmeath v. Westmeath* (1 Jac. 126; 1 Dow & C. 547; 5 Bligh, N. S. 339), *Durant v. Tilley* (7 Price, 577), and *Lee v. Thurlow* (2 B. & C. 547; 4 D. & R. 11), as authorities shewing the agreement to be void for the want of mutuality.

R. V. Richards (with whom was Peacock), contra, cited *Hindley v. The Marquess of Westmeath* (6 B. & C. 200; 9 D. & R. 351), 2 Roper on Husband and Wife (Jacob's edition), pp. 269, et seq. *Wilson v. Mushett* (3 B. & Ad. 743), *Hill v. The Manchester and Salford Waterworks Company* (2 B. & Ad. 544), and *Potts v. Sparrow* (1 New Cases, 594; 1 Scott, 578).

The opinion of the judges was delivered by

TINDAL C. J. We are of opinion that no illegality is disclosed upon this record. One part of the consideration for the promise of the defendant below was the execution by the plaintiff below of the deed of separation, which, as appears from the declaration, had been previously agreed upon and drawn up. The second part of the consideration was the discharge of Horne and Gates's demand, and the payment of the household expenses and certain debts in full. In this there is no illegality. The only question, therefore, is, whether the deed of separation which the plaintiff below agreed to execute was illegal. We are of opinion that nothing is disclosed upon this record whence we can discover that there was any illegality in that deed.

Lords Brougham and Campbell expressed their concurrence with the opinion of the learned judges; and the judgment of the court below was

Affirmed with costs.

PHIPPS v. AKERS. August 1, 1842.

[See S. C. 9 Cl. & F. 583; 8 E. R. 539 (with note).]

A. being seised in fee of lands at W., devised "his real estate at W." to B., when and so soon as B. should attain his age of twenty-one years; but in case B. should die

under the age of twenty-one years, then he directed "that his said estate at W. should sink into his residuary real estate," and he devised all the residue of his real estates to C., subject to various limitations and provisions. A. died seised in fee of the lands at W., leaving an infant.—Held, that B., on the decease of A., took an estate in fee in the lands at W., subject to be divested in the event of his dying under twenty-one and without issue.

In this case the following question was submitted by the House of Lords for the opinion of the judges;

"A. B. being seised in fee simple of certain lands and hereditaments at W. by his will duly executed, &c. gave all his real estates at W. to his godson G. H. A., when and so soon as he should attain his age of twenty-one years; but in case his said godson should die under the age of twenty-one years, then the testator directed that his said [1108] estate at W. should sink into and form part of his residuary real estate. And by his said will he gave all the residue of his real estates to J. C., subject to various limitations and provisions affecting the same.

"The testator continued seised in fee-simple of the said lands and hereditaments at W. until his death, and he died without revoking or altering his will, leaving G. H. A. an infant of the age of twelve years.

"The opinion of the judges is desired as to what estate G. H. A. took in the estate at W."

The case was argued on the 10th of May last. The judges took time to consider, and on the 30th of June their unanimous opinion was delivered by

TINDAL C. J. In order to answer this question it is not necessary for us to say what would be the legal effect of a simple devise to A. and his heirs, when or if he shall attain twenty-one, without any concomitant provisions calculated to shew whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent. In such a case Mr. Fearne may be right in the opinion, found among his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But, whatever may be the true meaning of such a devise, if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favour of some other person. And the cases upon this subject appear to be resolvable into two classes; first, cases in which the courts have relied on the circumstance that the estate prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle dem. Hayward v. Whitby* (1 Burr. 228); or for the benefit of some other persons to endure during the minority, as in *Boraston's case* (3 Co. Rep. 16), and *Mansfield v. Dugard* (1 Eq. Ca. Abr. 195); secondly, cases in which the estate is given over in the event of the devisee's dying under twenty-one, as in *Edwards v. Hammond* (3 Lev. 132), *Bromfield v. Crowder* (1 New Rep. 313), and *Doe dem. Hunt v. Moore* (14 East, 601).

The first class of cases proceeds on the ground, that the estate given to the devisee on his attaining twenty-one, is, in fact, only a remainder taking effect in its natural order on the determination of the preceding estates, and that the attaining of the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates.

The second class of cases goes on the principle that the subsequent gift over on the event of the devisee's dying under twenty-one, sufficiently shews the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the devise over is not entitled to; which, of course, gives him the immediate interest, subject only to the chance of its being divested on a future contingency.

Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory is a point which we need not discuss. It is sufficient to say, that it clearly has been established and recognised as a settled rule of construction, not only in the courts below, but also in your lordships' House. And that rule appears to us clearly to govern the case put to us by your lordships. In conformity

with which rule, therefore, we beg leave to state that on the question put to us, we are of opinion that G. H. A., on the decease of [1110] the testator, took an estate in fee simple in the lands and hereditaments at W., subject to be divested in the event of his dying under twenty-one, and without issue.

The House, on a subsequent day (the 11th of August), gave judgment in accordance with this opinion.

Judgment affirmed.

**CASES ARGUED and DETERMINED in the COURT
of COMMON PLEAS. By JAMES MANNING,
Serjeant at Law, and T. C. GRANGER, of the
Inner Temple, Esquire, Barrister at Law. Vol. V.
From Hilary Term, 1843, to Easter Term, 1843,
both inclusive. With the REGISTRATION
APPEAL CASES of Michaelmas Term, 1843, and
Hilary Term, 1844. London, 1845.**

[1] CASES UPON APPEAL FROM THE DECISIONS OF REVISING BARRISTERS, ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS(a), IN MICHAELMAS TERM AND VACATION, AND EASTER TERM, IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA (b).

WEST RIDING OF YORKSHIRE.

AUTEY, *Appellant*; TOPHAM, *Respondent*. Nov. 7, 1843.

[S. C. 7 Scott, N. R. 402; 1 Lutw. Reg. Cas. 1; Barr. & Arn. 1; 13 L. J. C. P. 39; 7 Jur. 995.]

Where the statement of the case by the revising barrister and the notice of intention to prosecute the appeal have not been sent to the masters within the four first days of Michaelmas term, the court will not, except under peculiar circumstances, allow the appeal to be entered.—The statement in writing by the revising barrister is duly transmitted to the masters, but the notice of intention to prosecute the appeal is not sent in time: Held, that the appeal cannot be entered.—An affidavit by the clerk of the attorney to the appellant, stating that the notice which is required to be signed by the appellant, had by mistake not been sent, cannot be received as a substitute for such notice.

Shee Serjt. applied, on behalf of the appellant, that the appeal in this case might be entered by one of the masters, under sect. 62 of the registration act (c). By [2]

(a) Under the provisions of the registration act, 6 & 7 Vict. c. 18.

(b) These cases are reported in this place in order to render them available at the next revision of the lists of voters.

(c) Enacting, "That every appellant who shall intend to prosecute his appeal shall, within the first four days in the Michaelmas term next after the decision to which such appeal shall relate, transmit to the masters of the said court of Common Pleas the statement in writing so signed by the said revising barrister as aforesaid, and shall also therewith give or send a notice, signed by him, stating therein his intention to prosecute the said appeal; and the said appellant shall also give or send a notice, signed by him, to the respondent in the said appeal, stating his said intention duly to prosecute such appeal in the said court; and one of the masters of the said court, to be nominated for that purpose by the Lord Chief Justice of the said court, shall forthwith enter every appeal of which he shall have received due notice from the appellant as aforesaid, in a book to be kept by him for that purpose."

that section, the appellant was required within the four first days of Michaelmas term, to transmit to the masters the case, as stated by the revising barrister, together with a notice to prosecute the appeal.

The affidavits stated that the case and notice had only arrived from Leeds by that day's post, and that the delay had been merely accidental. [Tindal C. J. referred to sect. 64 of the act (a)¹.] The learned serjeant submitted that the statute had been virtually complied with. The appellant is not required to enter the case within the four first days of the term, but merely to transmit it to the masters. The statement was, in fact, transmitted by yesterday's post.

Dowling Serjt., for the respondent, was willing to consent that the appeal should be received and entered. [3] The words of the act are directory, and not compulsory. In the case of *Simpson, Appellant*, and *Wilkinson, Respondent*, the court yesterday—the fourth day of the term,—granted leave to extend the time for sending the notice to the masters under the sixty-second section, upon an affidavit of the clerk to the agents of the appellant, that the case had been received by that morning's post, but that the notice of prosecution did not accompany the case; and that, as the appellant resided at Peterborough, in Northamptonshire, his signature to the notice could not be obtained in time to file the appeal and give the notice within the time specified.

TINDAL C. J. The sixty-second section of the act requires the case to be transmitted, together with notice of intention to prosecute the appeal, within the first four days of the term. The sixty-fourth section expressly provides that no appeal shall be heard unless the requisite notice has been given. The notice not having been given in this case, the court has no authority to order the appeal to be entered. Possibly a case may arise, where in consequence of circumstances of an inevitable nature having occurred, the court would think it right to interfere; but none such are suggested here. In the case referred to of *Simpson, Appellant*, and *Wilkinson, Respondent*, the sixty-fourth section was not brought before the notice of the court. We shall probably have to review that decision (a)².

(a)¹ By sect. 64 it is enacted, "That no appeal or matter of appeal whatsoever shall in any case, except where the conduct and direction of the appeal, or of the answer thereto, shall have been given by order of the court of Common Pleas, or of any judge thereof, to any person, be entertained or heard by the said court, unless notice shall have been given by the appellant to the masters of the said court at the time and in the manner hereinbefore mentioned; and no appeal shall be heard by the said court in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days at least before the day appointed for the hearing of such appeal: provided always, that if it shall appear to the said court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the said court to postpone the hearing of the appeal in such case, as to the said court shall seem meet."

(a)² Northern Division of the county of Northampton.

Simpson, Appellant; *Wilkinson, Respondent*.—After the decision in the principal case, the master intimated that this case would be struck out of the list of appeals,

Whereupon Byles Serjt. for the appellant, prayed the court that the appeal might be retained on the list. He distinguished it from the principal case, inasmuch as the statement had been sent within the first four days of term, although the notice had not accompanied it; whereas in the principal case neither had been sent. He submitted, that by the sixty-fourth section a power was reserved to the court to make an order as to the conduct and direction of the appeal. And that by the proviso at the end of that section, the court might postpone the hearing of the appeal where there had not been reasonable time to give or send the requisite notice. The notice was not required by the sixty-second section to be under the hand of the appellant. It was required to be signed by him. A signature by an agent would be sufficient. And the affidavit upon which the application had been made might be treated as a notice signed by the agent of the appellant.

Tindal C. J. The proviso at the end of the sixty-fourth section clearly refers to the notice therein last mentioned, which is the notice to the respondent, required to be given ten days before the day appointed for the hearing. The notice to the master is like the delivery of the writ of error with the transcript of the record to the

[4] It is said that the words of the act are only directory ; and if the case stood on the sixty-second section alone, possibly we might so have held ; but the words of the sixty-fourth section are not to be got over.

As to the consent on the part of the respondent, that the appeal may now be entered, the court cannot attend to that. The question is, whether we have any jurisdiction to entertain the case. The jurisdiction is a new one conferred by the legislature ; and the more wholesome course will be, not to extend that jurisdiction, even with the consent of parties ; otherwise we might be called upon in the next, or some future term, to [5] entertain a case which ought to have been entered in this term.

The other judges concurring, the application was
Refused.

CITY OF BRISTOL

TUDBALL, *Appellant* ; THE TOWN-CLERK OF BRISTOL, *Respondent*. Nov. 20, 1843.

[S. C. 7 Scott, N. R. 486 ; 1 Lut. Reg. Cas. 7 ; Barr. & Arn. 8 ; 13 L. J. C. P. 49 ; 7 Jur. 1041. Affirmed, *Bright v. Devenish*, 1866, L. R. 2 C. P. 102.]

A notice of objection was served by a party, whose name was on the list of freemen, and who in that list was described as "of the parish of C." In the notice the objector was described as "of H. Road, on the list of voters for the parish of C." Held, that this notice (although it strictly followed the form given in 6 & 7 Vict. c. 18, sched. B. No. 11) was inaccurate, such form being applicable only to parties on the list of household voters.

William Tudball objected to the name of John Jenkins being retained in the list of the freemen entitled to vote in the election of members for the city of Bristol.

Notice of objection was proved to have been duly served ; which notice was signed "William Tudball, of Hotwell Road, on the list of voters for the parish of Clifton."

The name of William Tudball was not upon either the householders' or freeholders' list of voters for the parish of Clifton, but his name was upon the alphabetical "list of the freemen of the city of Bristol," and there, under the letter T., he and several others were consecutively stated as "all of the parish of Clifton" (a).

It was objected, on behalf of the said John Jenkins, that William Tudball, instead of stating himself in the notice, to be on the list of voters for the parish of Clifton, ought to have stated himself to be on the list of freemen of the city of Bristol ; and we, being of that opinion, decided that the notice was insufficient, and did not require the said John Jenkins to prove his qualification, but retained his name upon the said list.

(Signed) J. T——, }
G. G. K——, } Revising Barristers.

[6] The case then stated that the revising barristers had come to the same decision upon similar notices served upon seven persons in the list of freemen, and upon forty-five persons in the lists of various parishes ; and that the barristers ordered all these cases to be consolidated and that the town-clerk of the city of Bristol should be the respondent. The case then proceeded thus :—

Should the court of Common Pleas be of opinion that the notices in these several cases were insufficient, then the names of the several persons so objected to will remain upon the register ; but if the court be of a contrary opinion, their names should be expunged therefrom.

(Signed as above.)

clerk of the court, which is necessary in order to give jurisdiction to the court of error. An affidavit by an attorney's clerk, that the notice had not arrived, can hardly be treated as a substitute for the notice itself.

Maule J. The exception in the sixty-fourth section, as to the conduct and direction of appeals, applies to appeals consolidated under the forty-fifth section.

The other judges concurring, the case was struck out of the list of appeals.

(a) The list of freemen was sent with the statement to the revising barristers, as forming part thereof.

The case further stated, that as there was no person who engaged for the respondents to appear and answer the appeal, the names of such respondents would in such case (sic) have been written under such engagement, with true particulars of their qualification set forth; the barristers annexed two other lists, wherein were accurately set forth the qualifications opposite to each name, to enable the master of the Common Pleas to give distinct and accurate instructions as to any alterations or corrections that the court might direct to be made.

(Signed as above.)

Cockburn for the appellant. The question in this case turns upon the construction of the 17th section of the registration act, and of the schedule therein referred to. By that section it is enacted that any person whose name is inserted in any list of voters for a borough, may object to any other person as not being entitled to appear in that list; and it requires that notice of the objection shall be given to the overseers, or to the town-clerk, being the parties who respectively make out the lists of householders and freemen. This notice is to be in the [7] form numbered (10) in schedule B, or to the like effect; it is further required that notice of the objection should be given to the party objected to, according to the form numbered (11) in the schedule above referred to.

The 14th section enacts, that the town-clerk shall make out and publish a list of freemen of the city or borough entitled to vote according to the form numbered (5) in the above schedule, together with their places of abode.

In this case the name of the objector was published in the list of freemen, he being therein described as "of the parish of Clifton." According to the form of the notice given in schedule B, No. (11) it is required to be signed "A. B. of (place of abode) on the list of voters for the parish of ———." This form is not strictly applicable to the case of a freeman, as the name of a freeman would appear in the list of freemen for the whole city, and not in the list of voters for any particular parish; but it is to be observed, that in every other case where a notice is required by the act, and the form of such notice is given in the schedule, the words "or to the like effect" are introduced. These words occur in the 17th section with reference to the notice required to be given to the overseers or the town-clerk; but they do not appear in the latter part of the section which relates to the notice required to be given to the party objected to. The form given in the schedule B, No. (11) has been strictly adhered to; and it would appear that from the circumstance of the qualifying words "or to the like effect" being omitted, the legislature intended that the precise form given should be adopted. [Maule J. It is required by the 14th section that the places of abode of the freemen shall be given. But a freeman entitled to vote may reside within seven miles of the city or borough; so that residence within any parish of such city or borough is not necessary (a).] The place of residence of the objector must be stated in the notice of objection; and that has been done in this case; the same strictness is not required in these notices as in pleadings, and if any thing unnecessary has been stated, it may be rejected as surplusage; the residence might have been omitted, but the notice will not be vitiated by its insertion, the legislature clearly intended that the party objected to should have the means of identifying the objector. [Maule J. The legislature probably intended that the party objected to should have an opportunity of knowing whether the objector was on the list of voters. The words in question in this notice apply to parties whose names are inserted in the parish lists; the notice therefore cannot be read as though the words were not there. The notice in fact refers the party objected to to the list of parish voters. To this he would look if he wished to ascertain who the objector was; but he would not find the name there, and might therefore be misled.] At most the objector has only made a statement in his notice which it was not necessary for him to make; but he has not lost his right to object, by having done so.

Austin, for the respondent, was stopped by the court.

TINDAL C. J. I think that the objecting party has been misdescribed. The form given in the schedule B (No. 11) has been followed more closely than was necessary, whereby the party objected to would either be misled, or there would be thrown upon him greater inconvenience in examining the different lists than the act of parliament

(a) See 2 W. 4, c. 45, s. 32.

contemplated. I think the notice of [9] objection was bad, and therefore that the party objected to was not called upon to prove his right to vote.

Per curiam. Decision affirmed.

BOROUGH OF WENLOCK.

THOMAS CHARLTON WHITMORE, *Appellant*; WILLIAM BEDFORD, *Respondent*.
Nov. 20, 1843.

[Referred to, *Morrish v. Harris*, 1866, 12 Jur. 627.]

A cow-house or stable is a "building" within the 2 W. 4, c. 45, s. 27, the occupation of which will confer the franchise for a borough.—No order for altering the register pursuant to the decision of the court need be drawn up.

In a list of persons entitled to vote in the election of members for the borough of Wenlock, in respect of property situate within the said borough, on the 31st day of July 1843, appears the following entry, namely,

Name.	Place of Abode.	Nature of Qualification.	Where situate.
Thomas Charlton Whitmore.	Beckbury Brook.	Building and land.	Beckbury Brook.

The said Thomas Charlton Whitmore having been duly objected to by William Hedford, appeared in support of his vote, and proved that he was in all other respects a duly qualified voter for the said borough; the only question was, whether the building for which he claimed to vote, was sufficient, within the statute.

The building, to which the objection applied, consisted of a cow-house or stable, substantially built of stone, the roof of which was tiled, having a door with a lock and key. It was proved also, that the building was substantial and suitable for the purpose for which it was [10] erected and used, and conveniently placed for the occupation of the claimant's land.

The case then stated that, after hearing arguments on both sides, the revising barrister decided that the building was not one to which the words "other building" in 2 W. 4, c. 45, s. 27, would apply, and expunged the name of the voter; which was to be restored if the court of Common Pleas were of opinion that the building was such as entitled the claimant to vote.

The case of another party claiming to vote in respect of the occupation of a stable and land within the said borough was consolidated with the above case.

(Signed) T. G. P——, Revising Barrister.

Austin, for the appellant, was stopped by the court.

Manning Serjt., for the respondent. The question here is whether the "building" mentioned in the case is within the meaning of the first part of the 27th section of the reform act (2 W. 4, c. 45) which confers the right of voting in cities and boroughs on the occupier of "any house, warehouse, counting-house, shop or other building, being, &c., of the value of not less than 10l. per annum." If the court confirm the opinion of the revising barrister that the building in question is not of the nature described by the act, the appellant will not be disfranchised, as he will still be entitled to vote for the county, if the building should be considered as auxiliary to the land occupied by the party; but he will not be entitled to vote for the borough.

The "other building," contemplated by the 27th section, must be *ejusdem generis* with those that are previously mentioned. The rule for construing all statutes, as laid down by the court in *Sandeman v. [11] Breach* (7 B. & C. 96, 100; 9 D. & R. 796), is, that where particular words are followed by general ones, the latter are to be held as applying to persons or things of the same kind with those which precede. *Kitchen v. Shaw* (6 A. & E. 729, 1 N. & P. 791) is to the same effect. Now, in this section, the

particular words comprise dwelling-houses, and buildings used for the purposes of trade, and it is probable that a brew-house or a malt-house would be considered ejusdem generis as a "warehouse, counting-house or shop;" but this cowhouse or stable appears to have been built for the purpose of being used in conjunction with the land; for the case states that it "was conveniently placed for the occupation of the claimant's land." [Maule, J. As I understand the case, the building was not only convenient for the occupation of the land, but also "suitable for the purpose for which it was erected," that is, as a cow-house or stable. Would it be contended that a building used by a cow-keeper or livery-stable keeper in London, if of sufficient value, would not give a qualification?] The keeping of a livery-stable is a trade. [Tindal C. J. That may be doubtful (c).] The learned serjeant referred also to *Sewell's case* (d).

TINDAL C. J. I think that the word "building," in the twenty-seventh section of the reform act, is satisfied by the building, described in this case as a "cowhouse or stable." The passage under consideration begins, it is true, with the enumeration of "house, warehouse, counting-house or shop;" and when we are told, that the "other building" which follows these words must be ejusdem generis with those that precede [12] it, I am disposed to think that the building under consideration falls under that description. There certainly are buildings which do not come within the meaning of the act; for example, a bridge, or a drain made for agricultural purposes; both of which may, in one sense, be termed "buildings," but certainly are not of the kind referred to in the act. If we were to exclude the building now under consideration, we must necessarily exclude many other buildings of a similar kind, such as a room erected for the purpose of obtaining a prospect; or a dairy standing detached from other buildings; both of which I should consider would fall under the general description of "building."

I think, therefore, that the decision of the revising barrister ought to be reversed.

COLTMAN J. I am of the same opinion. The building in question is one that may very properly be occupied with land; but I do not think that it is thereby taken out of the operation of the act, which seems to be less restricted than has been contended for. I think the act embraces all buildings erected for the purposes of dwelling or business; and agriculture is certainly a business.

ERSKINE J. I am of the same opinion. There is nothing in the act to limit the meaning of the term "building" to one used for the purposes of trade. A house may be used either for trade or habitation. Even if the term were so limited, there is nothing in this case to exclude the building under consideration. A cowhouse or a stable may be used for the purposes of trade. I think the building in question is ejusdem generis with those specified in the act. A building may be erected for the purposes of a reading-room—that is [13] neither for trade nor habitation—but that would, I think, be sufficient to give a qualification.

MAULE J. I agree that the term "building" in this act is not to be taken in its largest acceptation; but that it must be explained by the accompanying words; and therefore such buildings as the Lord Chief Justice has referred to would be excluded from the act. So a wall inclosing a space of ground might be a building worth 10l. a year; but it would give no qualification. It is contended that the buildings specified in the act are such as are generally used for trade; but it does not follow that the act is limited to buildings erected solely for that purpose. The building under consideration might become a warehouse, if goods were stored in it; or it might become a shop, if they were sold there. I have no doubt whatever, that this building is sufficient under the twenty-seventh section of the reform act.

Decision reversed (a).

(c) See 6 G. 4, c. 16, s. 2, *Martin v. Nightingale*, 3 Bingh. 421, 11 J. B. Moore, 305; *Cannan v. Deneu*, 10 Bingh. 292, 3 Moo. & Sc. 761.

(d) Manning's Proceedings in the Courts of Revision, edition of 1836, pp. 150, 154.

(a) In each of the following cases (which were decided by the same revising barrister), the counsel for the respondent admitted they could not distinguish it from the principal case.

Borough of Ludlow.

Peale, Appellant; Downes, Respondent.

In this case the building was described as a stable substantially built of stone.

Austin applied to the court for an order directing the register to be altered by inserting the claimant's name, under the 6 & 7 Vict. c. 18, s. 67.

[14] TINDAL C. J. There is no necessity for any formal order on the subject. It will be done of course.

NORTHERN DIVISION OF THE COUNTY OF WARWICK.

JOHN WEBB, *Appellant*; THE OVERSEERS OF THE PARISHES OF ASTON JUXTA BIRMINGHAM, AND OF BIRMINGHAM, *Respondents*. Nov. 23, 1843.

[S. C. 7 Scott, N. R. 545; 13 L. J. C. P. 57; 7 Jur. 1090.]

In an appeal from the decision of a revising barrister under the 6 & 7 Vict. c. 18, the appellant has the right to begin.—Where in the statement of a case by the revising barrister a material fact is omitted, the court will not allow it to be supplied by consent.—Where a case is remitted to the revising barrister (under sect. 65), in order that it may be more fully stated, the course is for the master to return it to the appellant with a note of the facts to be supplied, and for the appellant to transmit the same to the revising barrister.—A lessee of several houses (all locally situate within a borough) for the residue of a term of not less than sixty years, one such house being of sufficient value to confer a vote for the borough under 2 W. 4, c. 45, s. 27, if the remaining houses are each of less than that value, but collectively of more, is not deprived by sect. 25 of his right to vote for the county under sect. 20, in respect of such remaining houses.

This was a consolidated appeal under the 6 & 7 Vict. c. 18, s. 44.

Mellor, for the respondents, when the case was called on (Monday, November 13), claimed the right to begin, comparing it to a special case from sessions.

Tindal C. J. In a case from sessions, the party who seeks to set aside the order of the justices, is in the situation of a party shewing cause against a rule. This is more in the nature of an appeal to the Privy Council, where the appellant always begins.

F. Robinson, for the appellant, then read the case as follows:—

[15] William Hickman was objected to as not being entitled to have his name retained upon the list of voters for the division, in respect of property situate within the parish of Aston juxta Birmingham. The revising barrister retained the name, subject to the opinion of the court of Common Pleas upon the following case.

William Hickman was the lessee of a term originally created for ninety-nine years, of which three years had expired. The lease comprised several houses, the aggregate annual value of which was 220l. All the property was situate within the parish of Aston juxta Birmingham, and also within the borough of Birmingham. One house was worth more than 10l. a year, and the remainder were each respectively worth less than 10l. a year. Each house was occupied by a distinct tenant, and in no case was any land occupied jointly with a house.

The particulars of the qualification were stated to be "lease of houses and buildings for years." Hickman was examined, and stated that he relied (a) upon those which individually would be worth less than 10l. a year, but collectively were worth more

The roof being tiled and the door having a lock; and as being conveniently placed for the occupation of the claimant's lands.

Cockburn, for the respondent.

Borough of Bridgnorth.

Peele, Appellant; Williams, Respondent.

This was a consolidated appeal. The buildings were severally described as a stable and cow-house, substantially built with foundations and walls of brick or stone; the roofs being tiled, and the doors having locks; and as being conveniently placed for the occupation of the claimant's lands.

W. R. Cooke, for the respondent.

(a) Quære, whether the claim, which is the act of the party, does not import the assertion of a title to county registration in respect of all the houses.

than that amount. It was contended, on the part of the objector, that under the 2 W. 4, c. 45, s. 25, Hickman had no right to a county vote, because one of the houses comprised in the lease was of sufficient annual value to confer upon the occupier a vote for the borough of Birmingham; that the county vote was given in respect of the estate and interest which Hickman had therein as lessee; that he was possessed, not properly of the land, but of the term of years, which is the estate and interest that passes for that time; that the term of years was an entirety, extending over the whole property comprised in the lease, [16] and inasmuch as it comprehended the house of 10l. annual value, the same came within sect. 25 of the act.

The revising barrister held, that as it is said in sect. 20 of the act, "Every person who shall be entitled as lessee to any lands for the unexpired residue of any term," &c., the word "term," was used in its popular sense as applicable to "time," rather than in its legal sense; and the more so as the word "term" is not used in sect. 25, and that the claim here was for property to which "he is entitled as lessee for a term" (or time), and which does not confer a vote for the borough, and which, therefore, does not disqualify him from being upon the county register.

(Signed) J. D. B——, Revising Barrister.

The case then stated that the claims of five other parties depended upon the same question, and that they were consolidated with the case of Hickman; and that the overseers of Aston juxta Birmingham and of Birmingham were named respondents.

(Signed as above.)

Tindal C. J. The case does not distinctly state that the other houses were collectively of not less than 10l. annual value; nor does it state that the party objected to had been in possession twelve calendar months before the 31st of last July.

Robinson stated that he was prepared to admit these facts.

Tindal C. J. I think they must be supplied by the revising barrister from his notes. They are material facts in the case, and we cannot allow them to be supplied by the admission of parties. The case must be [17] remitted to the revising barrister under sect. 65 of the registration act (a).

The case having been remitted to the revising barrister, was returned with the following amended statement:

After reciting that the statement of the matter of the appeal had been remitted to him to be more fully stated on these points, that is to say,

First, whether the residue of the houses respectively under 10l. were proved to be together of the value of 10l. clear;

Secondly, whether it was proved that the claimant had been in possession twelve calendar months prior to the last day of July preceding;

The revising barrister found that the residue of the houses respectively under 10l. were proved to be together of the clear yearly value of not less than 10l. over and above all rents and charges payable out of and in respect of the same:

And that the said William Hickman had been in receipt of the rents and profits thereof to his own use, for twelve calendar months previous to the last day of July preceding.

(Signed as above.)

Robinson now (November 23d) argued the case for the appellant. The question raised in this case is, whether a party, who is lessee of several houses for the residue of a term of not less than sixty years, all such houses being situated within the limits of a borough, is entitled to vote for the county, one of the houses being [18] of sufficient value to confer a vote for the borough, and the remaining houses being each of less than that value, but collectively of more, over and above all rents and charges.

By the 2 W. 4, c. 45, s. 20, the right of voting for a county is conferred upon persons who are entitled, whether as lessees or assignees, to any lands or tenements, for the unexpired residue of any term of not less than sixty years, of the annual value of 10l., over and above all rents and charges. The party objected to in this case would undoubtedly be entitled to vote if that section stood alone. But by sect. 25 it is enacted, that no person shall vote for a county in respect of his estate or interest as

(a) It was ultimately decided that the statement of the case should be returned by the master to the appellant, and that it should be remitted by him to the revising barrister, with a memorandum of the facts that were required to be supplied.

such lessee or assignee, &c. in any house, &c. such house, &c. being of such value as would, according to the provisions of sect. 27, confer on him or on any other person, the right of voting for any city or borough.

The party objected to here has clearly such an estate or interest as lessee in one house, as would confer on the occupier thereof the right of voting for the borough; and it is submitted that he is therefore excluded from voting for the county in respect of the residue of the property; the whole being held by him for the same term.

As a matter of history, it may be stated to have been clearly the intention (vide post, 26) of those who framed the reform act, to exclude persons in the situation of the present party from voting for counties; and the better opinion appears to be, that such intention has been effectuated by the words of the act. In Elliott on the Qualification and Registration of Electors, there is the following passage (page 135, 2d ed.): "It has been said that it was the intention of the framers of the reform act to prevent a leaseholder, [19] for any term of years, of premises situate within a borough, from voting, in respect of such lease, for a county, if any part of the property comprised in the lease would confer the right of voting for the borough, and this probably was so. In the debate on the reform bill (Mirror of Parliament, 24th May 1832), Lord Brougham said, 'The twenty-fifth section deals with the right now conferred for the first time, viz. copyholders who hitherto had no right, and leaseholders who now acquire it for the first time; accordingly they are deprived of the right of voting for the county in respect of property in the borough, or rather they have it not; this twenty-fifth clause prevents them from acquiring it.' See also the debate on an explanatory clause, moved by Sir James Graham, on the 22d of June 1836. It has however been contended, upon the wording of this section, that a double right of voting in respect of property, comprised in one lease may be created thus, and that the practice exists in large boroughs to some extent: A. B. is the lessee of a term for ninety-nine years of a piece of land within a borough, on which has been erected a house and two other separate buildings; the house is occupied by himself, and being of the annual value of 10l., gives him a right to vote for the borough; the two other buildings, separately of less value than 10l., are let to two different tenants; the rent of the two together amounts to more than 10l. Upon these facts it is said that the original leaseholder has also a right to vote for the county in respect of his interest in these latter buildings, being of the annual value of 10l., but not occupied in such a manner as would confer on any one the right of voting for the borough. It does not appear at all clear that this would be the proper construction of this clause; at all events it cannot be a point of much practical importance."

The case, however, will most properly be argued [20] upon the words of the statute. The franchise is thereby conferred upon a party in respect of his estate or interest, as representing the term, in the legal sense of that word, which is not used in its popular sense, as applicable to time, as the revising barrister has supposed. In Co. Litt. 45 b. a "term" is thus defined—"Terminus, in the understanding of the law, doth not only signify the limits and limitation of time, but also the estate and interest that passeth for that time. As if a man make a lease for twenty-one years, and after, make a lease to begin, a fine et expiratione prædicti termini xxi annorum dimissi; and after, the first lease is surrendered, the second lease shall begin presently; but if it had been to begin post finem et expirationem prædictorum xxi annorum, in that case, although the first term had been surrendered, yet the second lease should not begin till after the twenty-one years be ended by effluxion of time; and so note the diversity between the term for twenty-one years, and twenty-one years." And in 2 Blac. Com. 143, it is said—"Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, terminus; because its duration or continuance is bounded, limited, and determined."

It seems clear from the proviso at the end of the twentieth section—which speaks of the right to vote "in respect of any such term"—that the legislature intended to confer the franchise with reference to the term, as implying an estate of a certain quality. The whole enactment relates principally to the length of the time for which the term is created, and though reference is made to the value of the premises, yet that is but a secondary consideration. The important matter is the length of the original term without reckoning how much longer it has to run; the franchise being given propter dignitatem of the original estate. If this be the true con-[21]-struction

of the act, the twenty-fifth section limits the operation of the twentieth, and excludes the right now contended for. The true test cannot be the time during which the party is entitled to the property; inasmuch as it is immaterial how much of the term remains. A sixty years' term with only one year to run, will give the franchise, though the annual value be but 10l.; whilst a twenty years' term with nineteen years to run, will not confer the right unless the annual value be 50l. It has been considered, therefore, that two terms cannot be joined together for the purpose of making out the requisite estate, as the statute speaks of "any term" in the singular only (vide *Hopkin's case*, Delane, 202). In Elliott on Registration (page 117, 2d ed.) it is said, "There does not appear to be any thing in the wording of this section which would warrant the supposition, that two leases may be joined together for the purpose of making up the value." [Maule J. Might not two different leases of the same property be joined together for that purpose?] The argument has reference to leases of different premises. [Tindal C. J. Would you say that a party could not join a present lease and a lease in reversion?] Probably he could not (ante, vol. iv. 1018). Where it has been intended that two or more terms might be joined together, the legislature have employed apt language to express that intention; as in the 22 & 23 Car. 2, c. 25, s. 3, conferring a qualification to kill game upon persons "having lease or leases of ninety-nine years," &c.

If these two terms cannot be joined together for the purpose of conferring the franchise, neither can one term be divided for that purpose. The term must be one and entire. There is nothing in the twentieth or twenty-fifth section to authorise the registration of the assignee, or sub-lessee of part of the premises. A party [22] entitled to vote in respect of an office, would, by assigning a part of such office, lose his vote though he might retain a sufficient qualification in value. And a termor who assigns part of his term stands in a similar position. He is no longer entitled in respect of his estate or interest as lessee. [Maule J. Would he not have an estate, as lessee, in the premises?] It is submitted that he would not have such an estate as is contemplated by the act. [Tindal C. J. If the property was divided into twenty tenements, and one of them was of sufficient value to confer the franchise for the borough, your argument would be, that the party would not have a vote for the county, the franchise being exhausted upon the borough vote?] The argument undoubtedly must go to that extent. And this would not impose any hardship peculiar to the leaseholder, whose elective franchise is but a new creation of the law; for, by the twenty-fourth section of the reform act, the ancient right of the freeholder is equally cramped. By that section, no person can vote for a county in respect of any freehold house, &c., or of land occupied with a house, &c., which would confer on him a vote for a borough (a). So that though he might have a freehold estate within a borough which might be worth five hundred times 40s., still, if he also occupied a house within the borough of the value of 10l. and had the land in his own occupation, he could not vote for the county. [Tindal C. J. Then you would say, that if a party had 1000l. in land, held together with a house of 10l. annual value situate within the borough, he would not have a vote for the county?] It appears from the very words of the act, that he undoubtedly would not. [Maule J. It seems that, by the twenty-seventh section of the reform act, land can only be joined to a [23] house in a borough for the purpose of making up the requisite value, in cases where they are jointly occupied "as owner" or "as tenant under the same landlord."] Committees have held that, under the twenty-seventh section, a party might join a house held by him as owner, with land also held by him as owner, though under a different title, and that this would give him a vote for a borough. But if they were both held by the same title, and the house were of sufficient value to confer a vote for the borough, he would be deprived of his vote for the county in respect of the land, by the twenty-fourth section. And the right of the leaseholder is equally modified by the twenty-fifth section.

The argument amounts briefly to this. If any part of the term gives a vote for the borough, the termor cannot have a vote for the county in respect of any other part of it; inasmuch as the term must necessarily comprehend all the premises. [Maule J. A tenant in fee is tenant of the whole and of every part. It is the same with a tenant in tail. Why should not the same rule prevail with respect to a tenant

(a) See Manning's Proceedings in Courts of Revision, p. xix.

for years?}] A freehold may be acquired at various times. A term, on the contrary, is acquired at one and the same time.

In the present case, the nature of the qualification is described as "a lease of houses and buildings:" this cannot, of course, refer to the indenture or instrument of demise. [Maule J. There is no objection taken upon that point.] It is not pointed out as an objection; but the remark is made to shew that, by the word "lease," the term or estate was intended. In the schedule (H.) to the act, No. 3, a "lease" is mentioned as an instance of the qualification. [Maule J. The right of voting can hardly be limited by the schedules to the act.] Still, upon the principle that *juncta juvant*, they may assist in shewing the intention of the legislature.

It appears clearly to have been a governing object of [24] the act to keep the county voters separate from those for the borough. A great mischief would accrue from giving the franchise to a person who has not the whole term. It is manifest that the legislature never contemplated an indefinite sub-division of the title to vote. It was intended that two parties only should vote in respect of a term—the lessee, or assignee of a term—and the sub-lessee, or his assignee, who is in actual occupation of the premises demised. But it would follow from the construction contended for on the other side; first, that the lessee would be entitled to vote; secondly, that he might parcel out the premises, by assignment, to numerous parties, each of whom would be entitled to vote; and, thirdly, that each of such assignees might grant numerous sub-leases to tenants who, if they were in actual occupation, would also have the right to vote. In Russell on the Reform and Boundary Acts, p. 25, the author commenting upon the twentieth section of the reform act, says: "The due operation of this section would seem to prevent all persons from voting in respect of the same lease, excepting two, viz. the party first taking from the ground landlord, and the occupying under-lessee. The policy of such a provision is obvious, as, but for some such check, the creation of long terms might be made the means of fraudulently multiplying votes; for a lessee for seventy years might grant an under-lease for sixty-nine years to another, and he again for sixty-eight years to a third, and so on." [Maule J. If a man had a long term for 999 years, and were evicted by title paramount from a part of the premises of the annual value of 1s., would you argue that he would lose his vote, though he might retain property to the annual value of 1000l.?] There may perhaps be a difference in that respect between an eviction and an assignment. In the latter case, the lessee parts with the possession by his own voluntary act. But the [25] eviction would shew that the land from which the lessee was evicted, never legally formed part of his term (a).

It cannot be said that the party objected to here is not registered "in respect of his estate or interest as a lessee in a house of such value, as would confer the right of voting for the borough" within the words of the twenty-fifth section of the reform act, that is, registered in respect of his estate in the house found to be of the annual value of 10l.; for if, as is contended, the "term" means the whole estate; he is in law registered in respect of all the premises, including the other houses as well. [Maule J. If he had sent in a claim to be registered as a voter for the county in respect of so many houses, without mentioning the one that would give him a vote for the borough (b), could it be said that he had claimed in respect of that house?] Such it is submitted would be the effect of his claim, inasmuch as he has the entire estate in the whole of the premises.

But it is not necessary in the present case to contend that the termor will lose his vote for the county if he has assigned any part of his estate. It is sufficient to say that the revising barrister must judge of the estate or interest of a party from what he has in him at the time. Here the whole estate is in him; and if it appears that any portion of such estate is sufficient to confer the right of voting for the borough, he cannot vote for the county. He would clearly be entitled to apportion the rent and charges reserved by the lease over all the houses contained in the demise; *M'Kee's case* (Alcock, Reg. Ca. 256). He has the benefit therefore of the other houses in

(a) In the case of a partial assignment, or of a partial eviction, after the period for giving notice of objection had expired, there would be no means of testing the sufficiency of the qualification, or of ascertaining whether the yearly value of the residue was above or was below ten pounds.

(b) That would appear to be the correct mode of claiming, vide *supra*, 15, n.

ascertaining the value of the 10l. house; and he cannot ob-[26]-ject to being clogged with that house as a burden, as forming part of his entire estate or interest.

It is submitted, therefore that—looking at the precise words of the twenty-fifth section; at the obvious intention of the legislature to keep separate the two classes of voters for the borough and for the county; at the principle that the franchise is given in respect of the dignity of the estate from the original inception of the term, and not of the time it may have to run; at the mischief that would follow from the possible creation of an indefinite number of voters out of the same estate, and to the circumstance that a leaseholder will be no worse off than a freeholder—the decision of the revising barrister in this case ought to be reversed.

Mellor for the respondents. The intention of the legislature can only be gathered from the language of the statute, and is not to be sought for by reference to extrinsic matters, such as debates in parliament (ante, 18. And see Mann. Proceed. 2d ed. 156, 157). And the statute is to be construed according to its plain meaning without having recourse to subtle distinctions and refinements. The franchise is clearly and distinctly conferred by the twentieth section of the reform act, and the only question is, whether it is taken away, in such a case as the present, by the negative words of the twenty-fifth section.

In the twentieth section there is nothing said as to the estate or interest of the party. It enacts that "every person, &c. who shall be entitled, either as lessee, or assignee, to any lands, &c. of any term originally created, &c. shall be entitled to vote for a county." This language is sufficiently clear and precise. And that of the twenty-fifth section is equally so in restraining the right of voting for the county in respect of the party's "estate or interest, as lessee or [27] assignee, in any house, &c.; such house, &c. being of such value as would confer on him or any other person the right of voting for any city or borough." This restriction is in terms confined to premises which would confer the right of voting for a borough.

The twenty-fourth section has been referred to for the purpose of shewing how far the right of a freeholder is affected. But by that section he is only excluded in respect of a house in a borough "occupied by himself;" and, therefore, his case has no analogy to that of a leaseholder.

If the argument contended for on the other side were adopted, a considerable bulk of property would be entirely unrepresented.

The eleventh section of the reform act for Scotland (2 & 3 W. 4, c. 65) permits two houses, &c. to be joined together for the purpose of making up the requisite franchise for a borough. Under that act some argument might possibly have been raised in favour of the position contended for upon the other side. But neither the reform act for England (2 W. 4, c. 45), nor that for Ireland (2 & 3 W. 4, c. 88), allows of such a construction (see *Sweetman's case*, Alcock, Reg. Ca. 27).

Even where the lessee had assigned part of the premises, there would still remain a privity of contract between him and his lessor in respect of such part. But it is sufficient to say that, whatever might be the effect of such an assignment, no such question arises in the present instance.

Robinson was heard in reply.

TINDAL C. J. It appears to me that the construction which the revising barrister has put upon the statute is correct, and that the party objected to is entitled to have his name retained upon the register.

[28] By the twentieth section of the act to amend the representation, &c. (2 W. 4, c. 45), it is enacted, that any male person of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 10l. over and above all rents and charges payable out of or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 50l. over and above all rents and charges payable out of or in respect of the same, or who shall occupy, as tenant, any lands or tenements for which he shall be *bonâ fide* liable to a yearly rent of not less than 50l., shall be entitled to vote for the county, &c. in which such lands or tenements shall be respectively situate; provided that no person, being only a sublessee, or the assignee

of any underlease, shall have a right to vote in such election in respect of any such term of sixty years or twenty years as aforesaid, unless he shall be in the actual occupation of the premises. Now, there can be no doubt but the property possessed by the party objected to in this case falls distinctly within the description of property in that clause, the possession whereof confers the right of voting for a county. It appears to me that the word "term" used in that section, carries with it the *interesse termini*—the interest in the whole and every portion of the estate (a). As far, therefore, as the twentieth section goes, I think it clear that the party here would have the right [29] of voting for the county in respect of the premises mentioned in the case.

But then the question is, whether—this right having been clearly given by the twentieth section,—the restriction in the twenty-fifth section as clearly takes away that right. The latter section enacts that no person shall be entitled to vote for a county in respect of his estate or interest, as a copyholder, &c., or as such lessee or assignee, or as tenant and occupier, as aforesaid, in any house, warehouse, counting-house, shop or other building, or in any land occupied together with a house, &c., such house, &c. being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions in the act after contained, confer on him, or on any other person, the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof.

Now all that is stated in this case is, that, with respect to one house, the party objected to, or rather his tenant, has a right to vote for a borough. The party is still in possession of the term, as to the remainder of the property; and I am of opinion that the restriction in the twenty-fifth section is partial, and that the one particular house falls within the predicament therein mentioned, but that as to the residue of the property, the right of the party to vote for the county remains.

COLTMAN J. I am of the same opinion. I cannot perceive any thing in the twentieth section to warrant the construction put upon it by Mr. Robinson. The effect of his argument is, that a lessee has an interest in the whole of a term—but not in merely a portion of it. But it appears to me that his interest is equal in every part as well as in the whole. Nor does it appear to me that by that section, any such entirety of the term was [30] contemplated as he has contended for. It is required that the premises should be of a certain value "over and above all rents and charges payable out of or in respect of the same." Now the rents and charges may undoubtedly be considered as payable out of the whole estate; but I think that, upon the proper construction of the statute, they would be considered as apportionable among the different tenements. Then it is clear that the twenty-fifth section only takes away the right of voting for a county, in respect of the house, &c. which would confer the right of voting for the borough.

ERSKINE J. I am of the same opinion. It appears that the party objected to in this case is possessed, as lessee, of premises, and that he would thereby be entitled to vote for the county under the twentieth section of the act. And the question is, whether this right is clearly taken away by the twenty-fifth section. For as the right is clearly given by the twentieth section, I agree that we must be satisfied that it is clearly taken away, before we can hold that the party is deprived of that right. It appears that the premises, held by the party objected to, consist of several houses situated within a borough. These premises are let by him. That fact would not take away his right to vote. And I think that the language of the act does not reach this case. (His lordship read the twentieth and twenty-fifth sections of the reform act.) If it had been intended to deprive a lessee of his right to vote for a county where any portion of his estate, having been underlet by him, would confer the borough franchise upon another party, the language would, I think, have been very different. It would perhaps have been said that "no person should be entitled to vote for a county in respect of his estate as such lessee, in any lands, &c. of which any house, &c. was of such value as would confer on him or any other person the right of voting [31] for a borough;" but the language used is that the party shall not vote in respect

(a) As to *interesse termini* in the ordinary and more restricted sense of an inchoate or embryo term, see Co. Litt. 46 b., and the cases collected, 2 Tho. Co. Litt. 403, note, (A).

of his estate or interest in any house, &c., "such house, &c. being of such value" as would confer the right of voting for a borough. Now the party here is not registered in respect of "any house" of such value as would confer a borough vote; and I think, therefore, that his original right to vote for the county, conferred by the twentieth section, is not taken away by the twenty-fifth.

MAULE J. I also think that the party whose vote is objected to in this case was entitled to be registered as a county voter. I cannot see any colour of argument against his right to vote for the county, except that which is founded upon the assumption that the word "term" in the twentieth section must comprehend the whole of the premises demised. No authority, however, has been cited to shew that such is the meaning of that word. Some doubt may possibly have been created by the expressions which the revising barrister has used in the case, as to the different uses of the word "term"; as though it possessed some peculiar legal meaning, such as has been urged in the argument upon the part of the appellant. But I am not aware that any such meaning can be attributed to the word "term." If a party who is possessed of a term in ten houses, parts with his interest in nine of them, he is still entitled to "the residue of the term" in the remaining one. He retains the same quality and quantity and nature of interest as to the residue. The first step in the argument, therefore, appears to me to fail: and, in such a case, it is the first step that costs every thing.

What then is conceded to be granted by the twentieth section? For the purposes of the franchise, the estate of the leaseholder is put upon the footing of a quasi freehold. The right to vote is conferred by that section; [32] is it taken away by the twenty-fifth? I cannot quite agree upon this point with my lord and my brother Erskine that the right so conferred must be clearly taken away before we could hold that the party was not entitled to vote. It appears to me to be sufficient, if we can see that it was intended to be taken away, although that intention may be obscurely expressed. Undoubtedly where the language of an enfranchising section is quite clear, and that of a disfranchising section is not so, the presumption would be in favour of the franchise. But in this case I think that the disfranchising clause not only does not clearly take away the right of voting, but that it clearly does not do so. (His lordship read the twenty-fifth section.)

The question, therefore, amounts to this. Is the party registered as a voter for the county, as having a right to vote in respect of his estate or interest in any house that would confer a vote for any borough? And I think it is clear from the facts that he is not so registered (a); and that the revising barrister was right in his decision.

Mellor then applied for costs under the seventieth section of the registration act (6 & 7 Vict. c. 18).

TINDAL C. J. said he did not think it was a proper case for costs, as some doubt seemed to have been thrown upon the case by the reasons given by the revising barrister.

COLTMAN and ERSKINE JJ. concurred with his lordship.

MAULE J. intimated that he thought it was a case for costs.

Decision affirmed without costs (c).

[33] BOROUGH OF STOCKPORT.

WRIGHT, *Appellant*, THE TOWN-CLERK OF STOCKPORT, *Respondent*. Dec. 6, 1843.

[S. C. 7 Scott, N. R. 561; 1 Lutw. Reg. Cas. 32; Barr. & Arn. 39; 13 L. J. C. P. 50; 7 Jur. 1112. Discussed, *Piercy v. MacLean*, 1870, L. R. 5 C. P. 259; *Thompson v. Ward*, 1871, L. R. 6 C. P. 347.]

Rooms in a factory were let to cotton-spinners separately; the rents varying according to the size of the room. The approach to the rooms was, either by a common

(a) Vide *supra*, 15, n.

(c) This case establishes, what had seldom been doubted, that a party who holds within a borough a sixty years' lease [33] of three houses, one above, and two under, 10l., is entitled to a county vote in respect of the two latter, if together amounting to 10l. yearly value. But quære whether the claim (*ante*, 15,) ought not in such case to be made in respect of the two latter houses only. An objector then would only have to

staircase leading from the entrance to the factory (to which there was a door which was never fastened), or by separate outside staircases, or by doors opening into the yard. Each tenant had his own spinning machine (which was worked by a steam-engine belonging to the landlord, it being part of each contract that the landlord should supply steam power), and also the exclusive use of his room, and the key to the door thereof:—Held, that the occupier of each room was the exclusive occupier of “a building” within the Reform Act (2 W. 4, c. 45, s. 27).—The names of the landlord and all the occupiers were inserted in the rate-book under the column headed “occupier.” The whole building was assessed under the head “gross estimated rental,” at 129l. In the same way the amount of “rate,” and the “total amount to be collected,” were stated to be 25l. The “amount actually collected” was stated to be 23l. 2s. 0d., and in the last column, headed “empty,” was inserted the sum of 1l. 17s. 6d.:—Held, that each occupier was, within the same section, duly “rated in respect of the premises” which he occupied.—It was part of the agreement with each tenant, that the landlord should pay the rates, and the rent was higher in consideration of such payment. The whole of the rate, with the exception of what had been allowed for the “empty” portions (as to which vide post, 53, n.), had been paid by the landlord:—Held, that such payment enured as a payment by each tenant.

John Wright objected to the names of 23 parties being retained on the list of voters; the appeals against the decision in respect of their being retained [34] were consolidated; and the town-clerk was ordered to be the respondent in such consolidated appeal.

There is a factory or building belonging to Elkanah Cheetham, as owner (a), consisting of four stories or floors in height, which he lets off to different persons for the purpose of cotton spinning. To each of these persons a distinct or separate portion of the building, consisting of one room, varying in size, is let, at a distinct rent; such rents varying from 10l. to 30l. per annum for a room, according to its dimensions. For these rooms each tenant has his own machines for spinning, which machines are worked by a power supplied by a steam engine belonging to and worked by and at the expense of the landlord, who also finds the main gearing or shafting, which communicates such power to the machines. It is part of the contract with each tenant that the landlord shall so supply such power.

Each tenant has the exclusive use of his room, and has the key to the door thereof. The approach to these rooms is, in some instances, a common staircase leading from the entrance to the factory, and upon which staircase the different doors to the rooms open. There is a door to such general entrance; but it is never locked or fastened. In other instances the rooms are approached by separate staircases from the ground outside the building; and in others by doors on the ground opening into the factory yard.

It is part of the agreement with each tenant that the landlord (a) is to pay the rates; and the rent is higher in consideration of such payment.

Upon the rate-books the landlord (a) and all the tenants appeared to be rated jointly, in the form following:—

shew that both these houses do not furnish an annual value of 10l., or that one of them alone is of that value; whereas the general words, “lease of houses for years” throw upon the objector the collateral burthen of shewing that the first house is of the value of 10l., or that all three do not make up that amount.

(a) Upon the rate-book, post 35, the names of the two owners appear.

[35] No.	Name of Occupier.	No. of Votes.	Name of Owner.	No. of Votes.	Description of Property rated, viz. whether Lands, Houses, Tithes, Improvements, or Appropriation of Tithes, Coal Mines, saleable Underwood.	Name and Situation of Property.	Estimated Extent.	Gross estimated Rental.	Rateable Value.	Rate at 5s. in the Pound.	Arrears Due.	Total Amount to be collected.	Amount actually collected.	Present Arrears.	Amount not recoverable, or legally excused.	Empty.
4588.	Orchard Street. Elkanah Cheetham Samuel Howard Cheetham William Clayton Aquila Taylor Thomas Higham George Hankinson Abel Hyde William Plant Samuel Birch James Fisher Peter Bailey William Bunting James Hulme James Hambleton James Clarke Thomas Bamber John Deaville Thomas Anson	...	Elkanah Cheetham and Samuel Howard Cheetham.	...	Factory, Warehouse, Steam- Engines, Steam-Pipes, Gearing and Shafting, and Gas-Pipes.	...	129 0 0	100 0 0	25 0 0	...	25 0 0	23 2 6	1 17 6	£ s. d.

[36] The whole of the rate, with the exception of what was allowed for the portions which were empty, was paid up, and had been paid by the landlord in due time. The case then stated that the points raised for the decision of the revising barrister were—

First, whether each of these rooms or floors so held was such a building as, under the 2 W. 4, c. 45, s. 27, would confer the right of voting upon its occupier.

Secondly, whether there was an exclusive occupation in each of such tenants, as required by the same clause.

Thirdly, whether each of such occupiers was duly rated in respect of such premises occupied by him.

Fourthly, whether each of such occupiers could be held to have duly paid the rate in respect of such his occupation, part of the rate having been foregone in respect of what was empty, and the whole of that which was paid having been in fact paid by the landlord.

And that upon each of these points the revising barrister decided in the affirmative, and retained the said names upon the list of voters.

(Signed) R. G. T——, Revising Barrister.

The case was argued in last Michaelmas term (Monday, Nov. 13th).

Townsend for the appellant. First, none of the floors or rooms described in this case was such a "building" as would confer the franchise upon its occupier within the twenty-seventh section of the reform act. The words of the section are, "any house, warehouse, counting-house, shop or other building." Such "other building" must be of a like kind with those previously mentioned (b), and must at least be a separate erection, such as a mill or factory; a room forming part of a building will not be sufficient. In *Brown v. Lord Granville* (10 Bingh. 69; 3 Mo. & Sc. 453) it certainly was held that the word "buildings," in a watching and lighting act, would include sheds raised for the purpose of protecting engines; but there the sheds were separate and distinct structures. It may be argued that a "shop" or a "counting-house" (both of which are expressly mentioned in the twenty-seventh section, is, or may be, only a portion of a building; but it will be sufficient to answer that these are expressly mentioned in the act, and form well known and recognised portions of a building. If a room is sufficient to satisfy the term "building," a vault or a cellar might also be so held; but the effect of such a decision would be to extend the operation of the act to a very inconvenient length. Considerable difficulty has always been entertained as to the proper construction to be put upon this sentence in the reform act. In Cockburn's Questions on Election Law, p. 37, there is the following passage—"But a question of still greater difficulty arises as to the meaning of another of the descriptions of property enumerated in this section, namely the word 'building.' Indeed, it could scarcely have been possible for the legislature to have made use of a term more ambiguous, or more likely to lead to varieties of construction. In the strict sense of the word almost every erection, however rude and unfashioned, is a building; but it is quite obvious that a limit must be placed somewhere. Not every stone placed upon another can be considered as sufficient to confer the elective franchise. The difficulty however is, where to draw the line; and it certainly is not easy to adopt any criterion which will not be liable to objection: the decisions, as might naturally be expected, have been conflicting in the extreme. Some barristers have thought that, as the words 'other building' in the statute immediately followed the more particular specification of several species of buildings there mentioned, the meaning of the word must be restricted to such buildings as were ejusdem generis with those previously enumerated. Others, on the other hand, have been of opinion that the words of the act being general, and coupled with no qualification, whatever could fairly come under the ordinary appellation of a building must be considered as within the meaning of the statute. Therefore, in the case of cattle-sheds and similar erections, upon evidence being given by land-surveyors, or other competent persons, that such buildings came within the denomination of 'farm-buildings,' they held them within the meaning of the act."

The better opinion would seem to be, that the legislature contemplated buildings which were to be occupied with land. If it had been intended that the occupation of part of a building should be sufficient to give the franchise, such intention could

(b) See *Whitmore, Appellant; Bedford, Respondent*, supra, p. 9.

easily have been expressed. Considerable mischief might ensue from holding the premises in this case sufficient to confer the franchise; as the consequence would be, that innumerable votes might be made to issue out of one building. If the occupier of one of these rooms had slept there with his family, as he had a separate key, it might have been considered as his dwelling-house, *domus mansionalis* (see 3 Inst. 65); and it would have stood upon the same footing as chambers in the inns of court, or in the universities of Oxford and Cambridge; which latter, but for sect. 78 of the reform act, would undoubtedly confer the franchise. It is true that, for the purpose of sustaining an indictment for burglary, any building where a party sleeps is considered as his dwelling-house; such, for example, as a permanent booth in a fair (b)¹; but that is an artificial meaning of [39] the word "dwelling-house," which is adopted for the purpose of protecting the occupant.

Secondly, there is not an exclusive occupation of the room in question. It appears that there is one steam-engine attached to the premises, and that engine supplies the power by which the machinery in each room in the building is worked. The power is included in the contract; its value forms part of the rental. The case does not state the value of the power. But there can be no question that it gives an additional value to each room; for the value of the room does not arise from the use of the mere building, but from the use of the steam-power. In fact, each occupier has a licence to use the engine; and that fact makes the case resemble *Regina v. The Inhabitants of Mellor* (2 East, 189), where it was held that a pauper, who had contracted with the owner of a mill for space for his carding machine, and the use of steam-power to work it, did not thereby gain a settlement. [Tindal C. J. The pauper there merely contracted for a standing-place; which, it was decided, was not a tenement.] The room in this case might possibly be considered a tenement (b)²; but that is not the word used in the reform act. The occupiers of the different rooms may be considered as tenants in common of the steam-power, as none of them had the exclusive control over it.

Thirdly, the party was not duly rated within the meaning of the twenty-seventh section, which provides that no person shall be registered for any premises, unless he "shall have been rated in respect of such premises to all rates for the relief of the poor in such parish or township during the time of such his oc-[40]-cupation." Sect. 2 of the parochial assessment act (6 & 7 W. 4, c. 96) requires that every rate shall, in addition to other particulars, contain an account of every particular set forth at the head of the respective columns, in the form given in the schedule to the act annexed, as far as the same can be ascertained. The form there given requires several particulars which are omitted in the assessment of the premises in question, as appears by the rate set out in the case (*supra*, p. 35). The schedule requires that the gross estimated rental of each occupier should be stated; but in the present assessment, the gross estimated rental of the whole of the premises is stated, although they are occupied by different parties. The same observation applies to the rateable value of the premises, and the amount at which each party is assessed. From the assessment, it is impossible to say at what sum each party is assessed; and that is a circumstance essential to give validity to the rate; *Rex v. St. Olave* (Burr. Sett. Ca. 789). If, indeed, the amount of the rate assessed upon each occupier could be collected from the other parts of the rate, it would be sufficient; and, as the rate professes to be at so much in the pound, if even the rent of each occupier were stated, it would be a good assessment; *Rex v. Inhabitants of Corhampton* (2 Dougl. 621); but here, nothing is stated except the gross rental of the whole premises. It does not even appear from the case how many rooms there are in the building; though it is alleged that the rent of the rooms varies according to the dimensions. [Tindal C. J. That would lead to the inference, that the rates upon the occupiers would also vary.] The gross amount of the rental of each party rated must appear, to give the parishioners an opportunity of appealing. The overseers have the right to inspect the rate-books; and they could not ascertain whether a party was entitled to be [41] put upon the list of voters, unless the books shewed at what sum he was rated. Nor does the rate contain any sufficient description of the premises occupied by the party. The building, or the particular room that

(b)¹ See *R. v. Smith*, 1 Moo. & Rob. 256, and note.

(b)² Vide *Westfaling v. Westfaling*, 3 Atk. 460; *Gully v. Bishop of Exeter*, 4 Bingh. 290, 12 J. B. Moore, 591.

he occupies, is in no way designated. If he were to change his occupation from one room to another, between the registration and the election, he would lose his qualification; *Regina v. Dodworth* (a)¹. [Tindal C. J. The law upon that subject appears to have been altered by the new registration act.] Not, it is submitted, as to the nature of the qualification. By the fifty-eighth section of the reform act, three questions might have been asked of the voter at the time of the election; first, as to his identity; secondly, whether he had already voted at that election; and, thirdly, whether he retained the same qualification for which he was registered. By the eighty-first section of the registration act, the two first questions are alone required to be put to the voter when he comes to the poll. A party would not now therefore be liable to an indictment, as in *Regina v. Dodworth*, for a false answer to the third question; but the objection to the right to vote is still available under the seventy-ninth section of the registration act (b); and a party who did not, at [42] the time of the election, occupy the same premises for which he was registered, would lose his qualification. [Coltman J. In what manner could the question be raised? The party would be entitled to vote as his name was on the register. Who would have the power of questioning the vote? Maule J. A committee of the House of Commons would probably strike out the vote upon a scrutiny. A registered voter, who had committed a felony, could not be prevented from voting at an election; but a committee might strike out the vote. Welsby (of counsel with the respondent). It appears that, by the seventy-ninth section, the register is to be conclusive evidence as to the existence of the same qualification. The provision as to change of qualification applies only to elections for counties; but in cities and boroughs, all that is required is a continued residence within the requisite distance up to the time of voting.] If the occupiers of this mill are rated at all, it appears from the assessment that they are rated only as joint occupiers of the whole building together with the landlord.

Lastly, the rates have not been paid by the parties objected to. By sect. 27 of the reform act it is required, not only that a party, to be entitled to be registered, shall have been duly rated, but also that he "shall have paid, on or before the 20th day of July, all the poor rates, &c. [43] which shall have become payable from him in respect of such premises previously to the 6th day of April then next preceding." The rates in this case were paid by the landlord; but that is not a payment by the party. The learned counsel referred to *Dashwood's case* (a)². [Erskine J. In *Regina v. The Inhabitants of South Kilvington* (3 Gale & Dav. 157) it was held, that a payment of a rate by a landlord, under somewhat similar circumstances to the present, would not be sufficient to confer a settlement upon the tenant.] Nor would it be sufficient, a fortiori, to give a right to vote. Again, the assessment must be taken as one whole sum; and the whole of the

(a)¹ Falc. & Fitzh. 275, n. S. C. per nom. *Reg. v. Dodsworth*, 2 Moo. & Rob. 72; 8 C. & P. 218. See also *Reg. v. Lucy*, 1 Carr. & Marshm. 511; *Reg. v. Bowler*, *ibid.* 559; *Reg. v. Ellis*, *ibid.* 564, n.; *Reg. v. Spalding*, *ibid.* 568, n.

(b) The 6 & 7 Vict. c. 18, s. 79, enacts, "That at every future election for a member or members to serve in parliament, &c., the register of voters so made as aforesaid, shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at such election: provided always, that it shall not be lawful for any person to vote at any election for a member or members for any county where the qualification annexed to the name of such person shall have appeared annexed to his name in the preceding register, and such person, on the last day of July in the year in which such register so in force was formed, shall have ceased to have such qualification, or shall not have retained so much thereof as would have entitled him to have had his name inserted in such register: provided also, that no person shall be entitled to vote at any future election for a member or members to serve in parliament for any city or borough, unless he shall, ever since the 31st day of July in the year in which his name was inserted in the register of voters then in force, have resided, and at the time of voting shall continue to reside, within the city or borough, or place sharing in the election for the city or borough, in the election for which he shall claim to be entitled to vote, or within the distance thereof required by the said recited act to entitle such person to be registered in any year."

(a)² Manning's Proceedings in Courts of Revision, 2d ed. 18. See also *Spanner's case*, *ibid.* 66; *Harvey's case*, *ibid.* 110; *Hervey's case*, *ibid.* 116.

sum assessed must be paid. It appears, however, from the assessment set out in this case, that the "total amount to be collected" (in respect of the assessment upon the whole premises) was 25l.; but that the "amount actually collected" was only 23l. 2s. 6d.; the difference of 1l. 17s. 6d. not having been collected in respect of some portions of the building that were "empty." The whole of the rate, therefore, had not been paid. In Elliott on Registration, 194 (2d edit.), the law upon the subject is thus stated—"It has generally been considered that the whole of the sum at which a party has been assessed in any rate must be paid. If, therefore, there has been a remission of the whole or any part of the rate, either by the overseers or by the magistrates, under the provisions of the 54 G. 3, c. 170, s. 11, the party so excused would not be entitled to be registered; assessment and payment being conditions imposed by the statute, upon compliance with which alone a person is entitled to the franchise." It is stated in the present case, that a part of the rate "had been [44] foregone in respect of what was empty." [Maule J. That appears to be rather in the nature of a recital. In what may be termed the statement of the case it is said, "that the whole of the rate, with the exception of what was allowed for the portions which were empty, had been paid up."] It may be inferred from that statement, that a part of the rate had been remitted by the magistrates or the overseers; but such remittance would not be equivalent to a payment by the party, and therefore he would not be entitled to vote. [Coltman J. The justices have no power, that I am aware of, to remit the rate by reason of the premises being empty. The statute 54 G. 3, c. 170, s. 11, only authorises them to excuse persons who are unable to pay on account of poverty.] Perhaps there was a composition for the whole building, as it was included in one assessment. If the party here seeks to obtain the advantage of the consolidated assessment and payment of the rate, he must also take the disadvantage of the non-payment of a portion thereof. The mill is an entire building; it is rated as such; and the whole of it must be rated; and if the whole rate is not paid, the occupier of a portion of the building cannot successfully contend that his rate has been paid.

Welaby, for the respondent. First, the term "building" in the twenty-seventh section of the reform act is sufficiently satisfied by the room in question. It is clear that the franchise was intended by the legislature to be given to occupiers of certain portions of buildings. The term "other building" being nomen generalissimum, must undoubtedly be taken to apply to subjects ejusdem generis with "warehouse, counting-house or shop," which precede it, all of which are, or may be, portions only of a building. The act requires that the party should occupy some building, in which he either resides [45] or carries on an ostensible trade or business. It is conceded by the other side, that if the room in question had been occupied for the purpose of a dwelling, it would have been sufficient, as constituting a "house"; and that concession puts an end to the case. If it is sufficient as a "house," it is sufficient as a "building." It does not the less become a "building" because it is not occupied as a "house." *Brown v. Lord Granville* is in favour of the respondent. The word "building" was there extended to charge a party with a tax; and a more limited construction cannot be contended for, where the object is to confer a right.

Secondly, the occupation of the premises by the party is sufficiently exclusive. The case expressly states that "each tenant has the exclusive use of his room, and has the key to the door thereof." It is in no way shewn that the steam-engine is in, or forms part of, the building. It is merely the source from which power is obtained; as to which, exclusive occupation is neither claimed nor required. It is as if a party had the exclusive occupation of a water mill, with the use of a stream, which was also common to others.

Thirdly, the party is duly rated. In considering whether each of the occupiers is "duly rated," the purposes of the reform act must be kept in view. It may be admitted that the rate is informal; but still the rating is sufficient, where the name of the party appears on the rate. The party so rated is *prima facie* liable as occupier. He is, in fact, rated, though it may not appear nominatim for what premises. [Maule J. It is to be observed, that the landlords are upon the rate both as occupiers and owners; and the case states that they and the tenants appear to be rated jointly.] *Rez v. Olave* does not apply here; as the question there was not upon the validity of the rate. The second section of the parochial assessment act (6 & 7 W. 4, c. 96) re-[46]quires the rate to be in the form given in the schedule to that act; but the

enactment, that "otherwise the rate shall be of no force or validity," applies only to the immediately preceding sentence, by which the declaration at the foot is required to be signed by the parish officers; but it does not apply to a case where a deviation has been made from the particulars stated in the earlier part of the section; *R. v. The Inhabitants of Fordham* (11 A. & E. 73; 3 P. & D. 95). If, on the other hand, this is to be treated as a void rate, no rate in fact having been made, then the name of the party is not required to be upon the rate. The only question is, whether the description of the party in the rate is sufficient for the purposes of identity. It is the fact of renting and occupying premises of the requisite value which confers the vote, and not the being rated. [Tindal C. J. It is also necessary that the party should pay his rates.]

Fourthly, as to the payment of the rate. There is a difference in this respect between such a payment as may be necessary to gain a settlement, and a mode of payment sufficient for the acquisition of a vote. In the former case the rating and payment of the rate are, under the 3 W. 3, c. 11, s. 6, the test of the ability of the party; but, under the reform act, the occupation of a house, &c., is, at least, the principal part of the qualification. *R. v. South Kilvington* was decided upon the authority of *R. v. The Inhabitants of Weobley* (2 East, 68) where it was held, that an exciseman who was rated for his salary (where the rate was, in fact, paid by the collector without any deduction from the salary,) did not thereby gain a settlement. The reason for this decision is given by Lord Kenyon C. J. as follows—"If the rate had been paid by him, through the medium or by the hands of another, that would have been a payment by [47] himself; but here he neither paid mediately or immediately. He was not affected by the payment at all. It was not deducted out of his salary, nor was his income diminished by it." The facts of that case are clearly distinguishable from those of the present. Here the payment does affect the party, being made on his behalf. It is, to all intents, a payment by him. The present case more nearly resembles that of *R. v. The Inhabitants of Aymouth* (8 East, 383. See also *Rex v. Okchampton*, Burr. Sett. Ca. 5); where it was held that a custom-house officer, who was rated on account of his salary to the land-tax, and in fact paid the rate himself, though the money was either given to him for the purpose or allowed to him afterwards by the collector, gained a settlement in the parish in which he was so rated and paid. In *R. v. South Kilvington*, the case of *R. v. The Inhabitants of Lower Heyford* (1 B. & Ad. 75) does not appear to have been brought before the notice of the court. It bears strongly upon the present question. The facts were these—An attorney, for the convenience of his business, allowed his clerk to occupy rent free, and as an augmentation of his salary, a cottage and land near to the attorney's residence. The clerk was rated as occupier, but the attorney sometimes paid the rates; and when the clerk paid them, the attorney reimbursed him; it was held that the clerk gained a settlement by paying the parochial taxes. *R. v. Bridgewater* (3 T. R. 550) and *R. v. Openshaw* (1 W. Bl. 463; Burr. Sett. Ca. 522) are also authorities to shew the payment in this case was sufficient. With regard to the question generally, Mr. Rogers has observed (e), as cited by Mr. Elliott (g), "A question has often arisen whe-[48]ther the payment of rates by the landlord, by an arrangement between him and the tenant, the latter being the party rated, that he should pay an additional rent in respect of the landlord paying the rates, or adding the amount of the rates to the rent, in order to reimburse the landlord, is a sufficient payment by the tenant, under sect. 27? It would certainly seem to be so. In such a case the debt is the debt of the tenant; and the parish has no remedy against any but him: whoever, therefore, pays the rate, by so doing discharges the debt due from the tenant; it is therefore a payment for the benefit of the tenant." To which Mr. Elliott adds, "In *R. v. Cozens* (2 Dougl. 426) it was decided, that if the money is tendered by any other than the person rated—as by the landlord on his tenant's account,—it must be received."

It has been contended on the other side, that part of the rate having been remitted, the whole of the rate has not been paid. That argument rests upon the assumption, that the rate is assessed upon the entire premises. The fact, however, of a part of the rate having been remitted for the empty portion rather tends to shew that each

(e) Law and Practice of Elections, p. 161, 5th edit. p. 158, 6th edit.

(g) On the Qualification and Registration of Parliamentary Electors, p. 193, 2d edit.

portion, that is, each room, was put on the footing of a separate tenement, and that the rate was charged upon each occupier separately (b).

If the question were to be determined by its reasonableness, there can be no doubt here but that each occupier does pay the poor-rate. He certainly pays an increased rent by reason of the landlord's paying the rate; and it can make no difference whether the occupier pays 10l. for rent and 3l. for rate, or 13l. for rent, in consideration that the landlord pays the 3l. for rate.

As to the argument respecting the number of votes [49] which it might be possible to create out of one building, the same objection might be applied where rooms are used for the purposes of habitation, or as shops or warehouses. No question is raised as to value.

Townsend, in reply. The building must be considered as merely auxiliary to the steam-engine. [Maule J. It would rather seem that the steam-engine is auxiliary to the building.] It cannot however be contended that there was an exclusive occupation of each room, since the taking comprised the power as well as the room; and there was clearly no exclusive occupation of the power (a). The value of the power is included in the rental of the room; and though the question as to the sufficiency of the value of the room is not distinctly raised, yet it arises incidentally. The opinions of Mr. Rogers and Mr. Elliott were cited in *Regina v. South Kelvington*, but the judgment is in direct contradiction of those opinions. The decision rested upon the construction to be given to the sixty-sixth section of the poor-law amendment act (4 & 5 W. 4, c. 76), which enacts (almost in the same words as the twenty-seventh section of the reform act), that "no settlement shall be acquired by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same in respect of such tenement for one year." The present case is much stronger as regards the occupier, since he does not constitute the landlord his agent, to pay any specific sum; the latter, being rated for the whole building, pays in respect of the whole. It was competent to the occupier to procure himself to [50] be specifically rated under the thirtieth section of the reform act.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The first question submitted for our decision by the revising barrister is, whether each of the rooms or floors, held in the manner described in the case, was such a building as, under the twenty-seventh section of the "Act to amend the representation of the people in England and Wales," would confer the right of voting upon its occupier. And we are of opinion that each of these rooms, held in the manner described in the case, was such a building as to confer the right of voting upon its occupier. It is called in the case "a room;" it is described as a distinct or separate portion of the factory; each tenant is stated to have the exclusive use of his own room, and the key to the door thereof. And we think such a description and such a mode of occupation brings it as much within the meaning of the word "building," as a "shop or counting-house," both of which are expressly specified in the act.

The second question is, whether there was an exclusive occupation in each such tenant, as required by the same clause. And to this question we answer that the finding of the revising barrister in the case, to which we before adverted, appears to us to put an end to any doubt on the point: for the case finds that "each tenant has the exclusive use of his room, and has the key of the door thereof:" and it does not appear to us, that the landlord's engagement to employ steam-power communicating with each room, in order that the tenant may work his own machinery therewith, makes the occupation of the room itself by the tenant less exclusive than if there had been no such engagement. It seems to have no further bearing on the question of [51] exclusive occupation than if the landlord had, by the agreement for the taking, contracted to furnish manual labour for the service of the occupier in their trade or business carried on in each separate room; or had contracted to provide a light in such a situation that it would illuminate equally all the rooms; observing that in the

(b) The court appear to have considered the assignment as joint in respect of the parties assessed and as separate in respect of the property rated.

(a) To constitute a joint occupation of the power, its application to some joint purpose seems to be necessary. The irrigation of several closes of separate owners, is not a joint enjoyment of a watercourse.

statement before us no question is raised as to the sufficiency of the annual value of the room itself, without the steam power, for the purpose of conferring a vote, whatever bearing that might have upon the case.

The third question submitted to us is, whether each of such occupiers was duly rated in respect of such premises occupied by him. In answer to which question it is, in the first place, to be observed that all that the act requires is, that the person claiming the right to vote, "shall have been rated in respect of such premises to all rates for the relief of the poor;" the object of this provision in the act appearing to be, that additional evidence should be thereby furnished of the actual occupation by the claimant during the twelve months made necessary by the act. And, with this object in view, we think it never could have been intended by the legislature that the rate, in order to be sufficient for the purposes of the act, must be so perfect in point of form, that it must be free from every objection which might be allowed to prevail against it in an appeal at the quarter sessions. Such a construction of the statute would place the vote of the claimant in extreme hazard from the ignorance or carelessness of the overseers; for the statute has given the claimant himself no power to correct or controul any error in the rate, but has limited his application to the overseer, by section 30, to "a claim to be rated to the relief of the poor;" and in the same section has required no more from the overseer, than "to put the name of the occupier on the rate for the time being." The claimant, therefore, has no opportunity of rectifying any error as to the particulars of [52] the rate, except by an appeal to the quarter-sessions, for which the time might not be sufficient, and the expense would be great. We think, therefore, that if the rate be in such form that the name of the occupier, the premises for which he is rated, the rateable value thereof, and the amount of the rate appear, it is a sufficient rate within the intention of the act (a). And, looking at the rate now in question, it appears that all the persons who are claimants are jointly rated by their respective names; they are rated for premises, which are therein described a "factory, warehouse, steam-engines, steam-pipes, gearing and shafting, and gas-pipes;" and it appears by the case, that the factory comprehends all the rooms which are occupied by each of the claimants respectively; so that each claimant, being rated for the whole factory, is rated for that part of it which he occupies himself; and as to the annual value of the property, that is, of the whole of the property, it is stated expressly in the rate; as is also the amount of the rate itself. We think, therefore, that each occupier is rated in respect of the premises occupied by him, within the meaning of the act.

The fourth question submitted by the revising barrister is, whether each of such occupiers can be held to have duly paid the said rate in respect of such his occupation, part of the rate having been "foregone" in respect of what was empty, and the whole of what was paid having been in fact paid by the landlord. From the statement in the case, it appears that the whole of the rate, with the exception of what was allowed for the portions which were empty, was actually paid by the landlord; so that the rate must have been paid for every part of the premises that was in the actual occupation of any one; and the real question does not arise upon the nonpayment of the rate (b), but [53] upon the payment thereof by the landlord under an agreement with the tenant. This latter question has accordingly been argued before us, and many decisions of the court of Queen's Bench have been brought in review, in which the question has been, whether a settlement has been gained by paying the public taxes and levies of a parish, in cases where the tenant has been rated, but the rate has been paid by the landlord. It appears, however, to us to be unnecessary to consider the analogy which those cases may bear to that which is now under consideration, inasmuch as there is one circumstance in the present case which essentially distinguishes it from

(a) Vide *Cowderoy's case*, Mann. Proc. 2d ed. 17.

(b) As there was no power to remit any portion of the rate on the ground of the premises being empty (*supra*, 44), this would seem to be a simple case of nonpayment by A. and B. of part of a rate to which they were jointly assessed in respect of a several occupation; and unless there were some machinery for apportioning the 25l. amongst the occupiers, and the reform act allowed of such apportionment, it would appear to be immaterial whether the "amount actually collected" was 23l. 2s. 6d., or 2s. 6d. only; the apportionment in respect of the empty house being a nugatory act. And see *Allen's case*, Mann. Proc. 2d ed. 90, *Snowden's case*, *ib.* 203. *Abethell's case*, *ib.* 204.

those cited ; for in the case now under consideration, all the claimants are rated as joint occupiers, and the rate is paid by two of them ; not by one who is a stranger to the rate, as the landlord in the cases referred to always was ; and we think it impossible to contend that, after a payment of the rate by any one of the parties so jointly rated, the fact of payment by each and every of them can be brought in question ; such payment by any of the parties so jointly rated must enure to the benefit of all, and is virtually a payment by each.

Therefore, we think, the persons rated have paid the poor-rate within the meaning of the statute ; and we come to the determination that the decision of the revising barrister was right.

Decision affirmed.

BOROUGH OF CHATHAM.

[54] WILLIAM HUGHES, *Appellants* ; OVERSEERS OF THE PARISH OF CHATHAM, *Respondents*. Dec. 6, 1843.

[S. C. 7 Scott, N. R. 581 ; 1 Lutw. Reg. Cas. 51 ; 13 L. J. C. P. 44 ; 7 Jur. 1136. Discussed, *Fox v. Dalby*, 1874, L. R. 10 C. P. 291. Followed, *Smith v. Seghill Overseers*, 1875, L. R. 10 Q. B. 422.]

A., the master rope-maker in a royal dock-yard, had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. The house was stated in the case to belong to the lords of the admiralty (a). If A. had not had it, he would have had an allowance for a house in addition to his salary.—Held, that A. occupied the house as tenant, within 2 W. 4, c. 45, s. 27.—A. was rated to the poor-rate as occupier. The rates were paid by the paymaster general, also in part remuneration for A.'s services. If he had paid the rates the admiralty would have repaid him :—Held, that as the payment was of a rate for which A. was liable, and as it was made on his account, and he gave value for it, there was a sufficient payment of rates by him within the same section.

William Hughes duly objected to the name of James Burton (and several others), being retained on the list of voters for the parish of Chatham, within the said borough.

The facts of the case of James Burton were as follows :—

The party objected to occupied a house in the dock-yard at Chatham, of the value of 40l. per annum from July 1836, to September 1842, when he removed to a house in Milton Terrace, Chatham, about a mile from the dockyard, where he now resides. The house in Milton Terrace he hires of the landlord in the usual manner, and pays a rent of 50l. per annum. He is rated for it, and pays such rates in the ordinary way ; and no question arises in respect of that house. With regard to the house in the dockyard, it belongs to the lords commissioners of the admiralty (a). The person objected to was master ropemaker in the dockyard, and as such he had the house as his residence. He paid no rent in money for it, but had it as part remuneration for [55] his services. He had the exclusive use and occupation of the house for himself and family, and no part of it was used for public purposes ; the office in which he performs his public services being away from it. He had the keys of all the doors, and no person but himself had any control over the house. He was rated to all the poor-rates and assessed taxes in respect of the house, in his own name as the occupier. Such rates and taxes were paid by the paymaster-general's clerk, at the pay-office at Chatham. They were so paid as part remuneration for his services. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary ; and now that he has not a house in the dockyard, he is allowed one guinea per week by the admiralty in lieu of rent and rates, under the name of "lodging money." If he had paid the poor-rates himself in respect of the house in the dockyard, instead of their being paid for him as above, the admiralty would have repaid him.

The case then stated that the revising barrister had disallowed the objection, and retained the name upon the list of voters, deciding that J. Burton occupied within

(a) Quære, if not to the Queen

the borough of Chatham, as tenant, a house of the clear yearly value of not less than 10l., and had duly paid all the poor-rates and assessed taxes which had become payable from him in respect of such premises previously to the 6th day of April then next preceding.

And the seven other cases were consolidated with the principal case.

(Signed) J. D. C——, Revising Barrister.

The case was argued in last Michaelmas term (Monday, Nov. 13, and Thursday, Nov. 16), by

Kinglake, for the appellant. The question here is, whether officers or servants of the government occupying government premises, are entitled to vote in respect of such occupation. It will depend upon the construction of the twenty-seventh section of the reform act, which requires the party, entitled to vote, to be the occupier of premises "as owner or tenant." In this case the party is clearly not the owner; neither can it be said that he was tenant to the lords of the Admiralty; the occupation of the house being merely ancillary to the performance of the services of the party as master ropemaker to the dockyard. Possibly the revising barrister may have imagined, that as no part of the public services was carried on in the house in question, the occupation would be sufficient; but if the party occupied the house merely in the character of servant, it would not be sufficient, though such occupation were of a separate building, and beneficial to the occupier. There is a numerous class of cases where servants, occupying, in respect of their services, houses which belonged to their master, have been held not to gain a settlement under the poor-law, although there was no personal occupation by the master; *R. v. Minster* (3 M. & S. 276), *R. v. The Inhabitants of Kelstern* (5 M. & S. 136), *R. v. Bardwell* (2 B. & C. 161, 3 D. & R. 369), *R. v. Cheshunt* (1 B. & A. 473). In the latter case, Bayley J. observed, "The case of *The King v. Minster* only decided that the occupation of a tenement, which was wholly unconnected with the service, would confer a settlement, but that the occupation of one connected with the service would not." These cases, it is submitted, are not distinguishable from the present. *Ferrar's case* (Alc. Reg. Ca. 248. And see the Irish reform act, 2 & 3 W. 4, c. 88) is still stronger. There, it appeared that the claimant, who was book-keeper to a distillery, exclusively occupied an entire house, the property of his [57] employers, which communicated through a door, by a private passage outside, but not in front, into the distillery yard, besides having a hall door to the street. The claimant exclusively kept the keys of both these doors; his employers kept the house in repair and paid the taxes; and it appeared that if the claimant ceased to be book-keeper he would have to give up the possession of the house: and eleven judges held unanimously that the claimant was not entitled to be registered as a householder, under the Irish reform act. *R. v. The Inhabitants of South Kilvington* (3 G. & D. 157), *R. v. The Inhabitants of Snape* (6 A. & E. 278) are also in point. In *Bertie v. Beaumont* (16 East, 33), it was held that a servant, occupying a cottage, with less wages on that account, did not occupy as tenant, but that the master might properly declare on such occupation as his own, in an action on the case for disturbance of a right of way over the defendant's close to such cottage. All these cases establish the principle that such an occupation as the present is not an occupation as tenant.

R. v. Lady Emily Ponsonby and Others (1 G. & D. 713) may be relied upon by the other side. The court of Queen's Bench there held that the occupiers of apartments in Hampton Court Palace, under the circumstances there stated, had such an exclusive occupation as to render them liable to be rated to the poor-rate, upon the ground that they had a beneficial occupation; but no question was raised as to their occupation "as tenants." Upon that subject the law is clear. A servant is not ratable where his occupation is strictly for the benefit of his master; but where the occupation of the servant is beneficial to himself, independently of his master, then the servant is considered the occupier, within the statute of Elizabeth. In that case there was this important fact. The only servant of the Crown who had rooms in the [58] palace was the housekeeper. Her husband had been included in the rate; and it was agreed by the counsel on both sides that he was not ratable, and that the case should be argued with reference only to the ratability of the other parties (see 1 G. & D. 713, n. and 727.)

There is another class of cases with respect to the proper method of describing

the possession of a house in an indictment for burglary. It has undoubtedly been held in certain cases, that where a servant is in actual and exclusive possession of a house it may be laid in an indictment for burglary as his dwelling house; but no conclusion with reference to the present question can be drawn from these cases. The general rule however is plain, that where a party employed in a public office is allowed to reside upon the premises belonging to the government, such premises cannot be considered as the dwelling house of such party; *William's case* (1 Hale, P. C. 522, 527), *Burgess's case* (Kel. 27), *Peyton's case* (1 Leach, 324; 2 East, P. C. 501). The same rule applies where the occupier is servant of a public company; *Hawker's case* (e). The decision in *Margett's case* (2 Leach, 930) undoubtedly seems to be at variance with these authorities. It has been doubted, however, whether that case can be considered as law (see 2 Leach, 931, n.). But it has been recognised and acted upon in the recent case of *R. v. Witt* (1 Moody, C. C. 248). The prosecutor there was secretary to an insurance company, and lived with his family in the house, used as the office of the company, who paid the rent and taxes. The burglary consisted in breaking into a room in the house which was used for the business of the company. The house was laid as [59] the dwelling house of the prosecutor; and the recorder, upon the authority of *Margett's case*, thought the indictment was correct, but reserved the point for the judges; who were of opinion that the house was rightly described as that of the prosecutor, as his family and servants were the only persons who dwelt there, and they were the only persons who were disturbed by a burglary. The judges however would not say that the house might not have been described as the house of the company, but they considered that it might, with equal propriety, be stated to be that of the prosecutor. That, it is submitted, is the real distinction; the question in cases of burglary not being, as here, whether the party occupies the premises "as tenant," but whether he has such an occupation as is sufficient to support the averments in the indictment; for which purpose it is sufficient if he be actually in the occupation of the premises; the object of the law being to protect the actual occupier. [Tindal C. J. The indictment describes the premises as the dwelling house of the prosecutor.] That averment is satisfied by proving that the party dwelt in, and had exclusive occupation of, the house. *Brown's case* (2 East, P. C. 501), and *R. v. Stock* (2 Taunt. 339; 2 Leach, 1015; 1 Russ. & Ry. 185) are to the same effect. In *Rees's case* (7 C. & P. 568), indeed, where a gardener lived in a house of his master, quite separate from the dwelling house of the latter, and had the entire control of the house he lived in, and kept the key, it was held, that it might be laid either as his house or his master's. So, in *Jobbing's case* (Russ. & Ry. 525), the prosecutor G., a collier, resided in a cottage built by the owner of the colliery, for whom he worked. He received 15s. a week as wages, besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary in the dwelling [60] house of the prosecutor, Holroyd J. was of opinion that, though the occupation and enjoyment of the cottage were obtained by reason of G. being the servant of the owner, and were co-extensive only with the hiring, yet his inhabiting the cottage was not, correctly speaking, merely as the servant of the owner; nor was it, either as to the whole or any part of the cottage, as his (the owner's) occupation, or for his use or business, or that of the colliery, but wholly for the use and benefit of G. himself, and his family, in like manner as if he had been paid the rent and taxes; and though the servant's occupation might, in law, at the master's election, be considered as the occupation of the master, and not of the servant, yet, with regard to third persons, it might be considered either as the occupation of the master or servant. The point was, however, reserved for the opinion of the judges, who held that the cottage might be described as the dwelling house of G.

The rule therefore deducible from these cases is, that where the servant is in the actual and exclusive occupation of a house, it is sufficient to describe the house as that of the servant in an indictment for burglary, though the legal occupation of the master would also have been sufficient to sustain an indictment in which the premises had been laid as the dwelling house of the latter.

Secondly, the payment of the rate, not having been made by the party himself, was not a sufficient compliance with the requisition in the twenty-seventh section of

(e) 2 East, P. C. 501; Foster, 38. See also *Pickel's case*, 2 East, P. C. 501; *Maynard's case*, *ibid.*; *Wilson's case*, Russ. & Ry. 115.

the reform act, that the party before he can be put upon the register, "shall have paid all the poor-rates which shall have become payable from him in respect of such premises" in his occupation.

The cases relating to the obtaining a settlement by being rated and paying the rates (many of which were brought before the court in *Wright and Stockport* (ante, p. 33)), [61] are important upon this question. It is material to consider the origin of that kind of settlement. The rating and payment of rates were substituted by the 3 W. & M. c. 11, s. 6, for the notice to the parish officers of a party's having come to reside in the parish, which was required by the 1 Jac. 2, c. 17, s. 3. It was considered that the fact of a party's being rated by the parochial officers, would shew that they had notice of his being a resident in the parish. In this view, therefore, it was of no moment whether the party was properly rated or whether he had or had not paid the rate. [Coltman J. The 3 W. & M. c. 11, requires not only that the party "be charged with" but also that he "pay his share of" the rates.] But the principal object of the act was to make the rating equivalent to notice.

In *R. v. The Inhabitants of Bridgewater* (3 T. R. 550) the tenant of a house, who was assessed to the land-tax, absconded, and the collector was about to distrain for the amount, when the tenant's daughter begged of him to go with her and the landlord to a neighbour who would, and who did, pay it. It was contended that this was not a payment on account of the tenant; but the court held that it must be considered as a payment by the tenant, as the money was advanced for his use, and the lender might have maintained an action against him for the amount: they therefore held that there was a sufficient payment by the tenant to gain a settlement. A debt was, in fact, created between the parties. In *R. v. Openshaw* (1 W. Bla. 463; Burr. Sett. Ca. 522), where the landlord agreed to pay all rates and taxes, and did pay them except upon one occasion, when being applied to for the poor rate he sent the collector to the tenant, desiring him to pay, and to stop it out of the rent, and the [62] tenant paid it accordingly, the court held that the tenant thereby gained a settlement. Lord Mansfield C. J. was there of opinion, that the agreement between the tenant and the landlord was nothing to the parish. So, in *R. v. Oakhampton* (Burr. Sett. Ca. 5), where a tidewater, who was assessed to the land tax for his salary, paid the tax, and was afterwards reimbursed by the collector, the court held that the officer gained a settlement. These cases may be relied upon by the other side, but they are readily distinguishable from the present. *R. v. Weobley* (2 East, 68) was a later decision; where, in the case of an excise officer, the collector paid the tax for him, and the amount was not stopped out of his salary; and it was held that the officer did not gain a settlement, upon the ground that the payment was not made by him, either mediately or immediately. This distinction was fully recognised in *R. v. Asmouth* (8 East, 383), and in the recent case of *R. v. South Kilvington* (3 G. & D. 157).

The time at which the payment is required to be made by the twenty-seventh section of the reform act is important to be considered. The party is to pay, "on or before the 20th day of July" in each year, "all the poor-rates payable from him previously to the 6th day of April then next preceding." And the seventy-fifth section of the registration act (6 & 7 Vict. c. 18) speaks of a party having "bonâ fide paid" the rates; and as both acts are in *pari materia*, these words may be referred to as assisting in the construction of the twenty-seventh section of the reform act.

Where premises are let to a party free of rates, it cannot properly be said that a payment of rates in respect of those premises by another party is a payment by the occupier. It may be a payment of something [63] equivalent; but that is not sufficient. If the contract between the parties is that the tenant shall pay a fixed rent, and that the landlord shall pay all rates and taxes, the tenant cannot be said to pay more than the rent—a fixed and definite sum,—instead of one that is uncertain and fluctuating, as a rate must be. A rate-payer may be supposed to take an interest in the affairs of the parish, but where the rate is not paid by him, the amount of the rate will be immaterial to him. Again, the rate is to be paid by the 20th of July. But in a case where the tenant pays a rent only to his landlord, in what manner can it be ascertained whether the rate payable by him up to the 6th of April, had been paid by him at the prescribed period? The inquiry then would be, whether the tenant had paid his rent. The landlord might have paid the rate, but if the tenant had not paid his rent, there could not possibly have been any payment of rate by him. [Tindal C. J. If the tenant's name was on the rate-book, he might pay the rate and deduct the

amount from the rent.] But in the present case there has been no payment by the occupier, either direct or indirect.

Cockburn, for the respondents. The occupation of premises to entitle a party to vote must, undoubtedly, be in the character either of owner or tenant. The occupation here clearly is not as owner, but as tenant. It is perhaps rather a question of fact than of law. [Tindal C. J. If the question is, whether, under a given state of facts, the legal relation of landlord and tenant exists, that is surely a point of law.] It is submitted that the question is not as to the existence of such legal relation,—not whether the party here was actually tenant to the lords of the admiralty,—but whether he occupied the house in that character, instead of as a servant, and for the purposes of the services to be per-[64]-formed by him. If he did occupy in the latter capacity, it may be conceded that it would not be sufficient.

In most of the cases the party was unquestionably a servant, either domestic, menial or predial, and occupied the premises with reference to his service. In *R. v. Keldern*, for example, the party was a common farm-labourer. So, in *R. v. Cheshunt* (which comes perhaps a little nearer to the present case), the party was also a common labourer, employed by the board of ordnance, in a gun-powder manufactory. It appeared that the board had several other houses in the parish, which they allotted to their labourers. The house therefore appears there to have been occupied for the purposes of the service. There is nothing in the statement of the present case to shew that the occupation is ancillary to the service; and the court will not carry the case further than the statement warrants, against the party's vote, and the barrister's decision. It is stated expressly that the house constituted part of the remuneration for the services of the party, and that he would have had more wages if he had not occupied the house. In *R. v. Bardwell* the holding of the party was expressly found by the court to be subservient to the service. But where the occupation is, as here, a part of the remuneration for services, it has been held that the party occupies in the character of tenant. As in *R. v. Melleridge* (1 T. R. 598), where a party was permitted by several commoners to occupy a tenement as a reward for his services as a herd, it was held that such occupation conferred a settlement. The court said, that the services of the pauper were equivalent to a payment of rent; the commoners, instead of paying him so much money by way of wages, having permitted him to occupy the house. The terms of the occupation are the [65] same here—it can make no difference that here, the permission to occupy constitutes only a part, and that in *R. v. Melleridge* it formed the whole, of the remuneration.

One way of testing the case is, to consider whether the occupier could maintain an action of trespass. A servant living in his master's house could not do so; but where a party is taken into the service of another at a certain amount of salary, and instead of receiving the whole in money he is put in the exclusive possession of a house, the rent of which is deducted from his wages, he might bring trespass against a wrong doer. [Tindal C. J. Mere possession would be sufficient for that purpose.] But the question is, whether the Crown or the lords of the admiralty, could bring the action.

In *R. v. Snape* it was distinctly found by the sessions that the occupation of the pauper was an occupation by him in the character of servant, and connected with the hiring, and not an occupation as tenant. The court would be bound by that finding; and Williams J. expressly relied upon it in his judgment. In *R. v. Langrville* (10 B. & C. 899; 5 Mann. & Ryl. 726) the question was, whether a pauper had gained a settlement who had been hired as a confined labourer, and was to have a house, &c.; and after the bargain he was allowed to have the milk of a cow, which was fed on his master's close. The value of the house, &c. was less than 10l. a year, but with the keep of the cow upon the land, amounted to more than that sum; and it was held that the pauper did not gain a settlement by the occupation of a tenement of the yearly value of 10l.; first, because it was no part of the original contract that the pauper should have the milk of a cow; and, secondly, assuming it to be so, it was not part of the contract that the cow should be pasture fed. Lord Tenterden C. J., in giving the judgment of the court, [66] observed, "It has been established by a series of cases, which were considered and confirmed in that of *The King v. Benneworth* (2 B. & C. 775; 4 D. & R. 355), that it was a sufficient occupation of a tenement, if the pauper had an interest in a part of the profits of the land by perception by the mouths of his cattle. But it is essential, whether the subject of occupation be the land itself,

or a part of its profits, that the pauper should have an interest as tenant or occupier,—a possession by mere licence without that interest is not enough. If a person were permitted by the owner of a pasture to feed his cow or sheep upon it for a time, without any valuable consideration, and without any reference to any contract between them, but by a mere act of charity or favour, no settlement would be gained by such a permissive enjoyment of the produce of the land. But if there had been a contract with the owner for a sufficient consideration, by which the pauper had a right to part of the profits of the soil to be taken by his cattle, he would have had an interest; and his occupation with that interest (if these profits were of the requisite annual value) would confer a settlement after a residence of forty days." The present case falls precisely within that principle, by merely substituting the advantage of occupying a house rent-free, for the perception of the profits of land by the mouths of cattle. The party here, occupies a house under a contract for a valuable consideration—namely his services—and he has therefore an interest in the premises.

The rule deducible from all these cases may be thus laid down:—Where the relation of master and servant exists, but the occupation of the premises of the latter is solely with a view to the better performance of the service, such occupation will not confer either a settlement under the poor laws, or a vote under the reform [67] act; but where the occupation, though it may be convenient for both parties, constitutes, either wholly or in part, the consideration for the services, in such case the occupation is sufficient, as well for the purpose of settlement as for that of voting. If a servant were hired for a twelvemonth at certain wages, with the right to occupy exclusively a house belonging to the master, such contract not being determinable during that period except through the misconduct of the servant, the latter would be a yearly tenant; and the principle is the same where the contract is to continue in force during the will and pleasure of either party; the servant in such case being a tenant at will.

With regard to the analogy said to exist between the present case and the occupation necessary to support an indictment for burglary, it has been argued that if the house in question had been broken into, it must have been laid in the indictment as the dwelling-house of the Crown, or of the lords commissioners of the admiralty. It is submitted, however, that it is not so. In all the cases cited in support of that view, the servant was under the control of the master. In *Roscoe on Criminal Evidence* the rule is thus laid down: "Where a servant occupies a dwelling-house, or apartments therein, as a servant, his occupation is that of the master, and the house is the dwelling-house of the latter. But it is otherwise where the servant occupies *suo jure*, as tenant" (page 321, 2d edit.). And in *Russell on Crimes and Misdemeanours* it is said, "But the rule does not apply where a servant lives in a house of his master's at a yearly rent; and such house cannot be described as the master's house, though it be upon the premises where the master's business is carried on, and though the servant have it because of his services" (vol. i. p. 811, 3d edit.). The cases cited on the other side all belong to the former class; but there [68] are several which support the latter proposition, and which are applicable to the present case. In *R. v. Jarvis* (Ry. & Moo. C. C. 7), the rent was paid in money; but in order to constitute the relation of landlord and tenant it is not essential that there should be such actual payment; the performance of service being a sufficient rent. Sir William Russell goes on to say, "And though a servant live rent-free for the purpose of his services, in a house provided for that purpose, yet if he has the exclusive possession, and it is not parcel of any premises occupied by his master, the house may be described as the house of the servant, especially if it does not belong to his master, but to some person paramount to his master" (*Russ. Crimes & Misd.* 812, 3d edit.). Thus in *R. v. Camfield* (Ry. & Moo. C. C. 42) the tolls at a gate between Leeds and Wakefield were let to W., who employed E. at a weekly sum to collect them, the latter living for that purpose with his family in a house belonging to the trustees, and built by them for that purpose. A burglary having been committed in the house, it was described in the indictment as the house of E., and upon a case reserved, the judges were unanimously of opinion that it was rightly described, E. having exclusive possession; it being unconnected with any premises of W.'s, and W. not appearing to have any interest in it. That case is analogous to the present in this respect, that the lords of the admiralty here let the premises (for a service rent) to the occupier, and the Crown

is paramount (d) to them. *Margett's case* (Leach, C. C. 130), cited on the other side, is a strong authority for the respondent. In all these cases the question is, whether the occupier can be turned out against his will; if he cannot, he occupies as tenant, notwithstanding the performance of services by him.

[69] Secondly, as to the sufficiency of the rating. It is important to consider, in the first place, whether the party here is legally liable to be rated. It is contended on the other side, that a party is not rated because he is tenant of the premises, but because he is the beneficial occupier; and *Regina v. Lady E. Ponsonby* is relied upon in support of that proposition. The court, however, seemed to consider the parties there to have been tenants at will. But a tenancy at sufferance would have been sufficient for the purposes of that decision, as it would also be in the present instance. In that case Williams J. said, "With respect to the quantity of interest which the appellants have in their apartments, it is immaterial whether they have a permanent occupation or not; even if it be conceded,—and it is a large concession,—that their occupation was not permanent, they are still ratable." Suppose a burglary had been committed in the apartments occupied by Lady Emily Ponsonby, it might certainly have been laid as having been committed in her dwelling-house.

Lastly, as to the payment of rates. The rates have, in fact, been paid; and it is certainly more convenient to the parish to obtain the payment from the landlord than from the tenant. At all events, the payment comes ultimately out of the pocket of the tenant. He is primarily liable to the payment; which is made on his account, with his authority, and under a contract with his employer. It may be considered that the lords of the admiralty are his agents for the purpose of making the payment. If a stranger had expressly contracted with the tenant of a house that he would pay the rates for him, a payment made in pursuance of such a contract would surely enure as a payment by the tenant. If the overseers accepted such a payment, they could not enforce it a second time against the tenant; *Rez v. [70] Cozens* (2 Dougl. 426). There is no foundation for the supposition on the other side, that the object of requiring the voter to be rated and to pay his rates was, to give him an interest in the affairs of the parish. The intention clearly was, to confer the franchise upon the party who contributes to the public burdens; and in this view it is wholly immaterial whether the tenant pays the rates with his own hands, or through the medium of another party with whom he afterwards settles the account. In *Rez v. Fulham* (Burr. Sett. Ca. 488), where the tenant being assessed to the land-tax paid it and the landlord allowed him to stop it out of his rent, it was held that the tax was sufficiently paid by the tenant to enable him to gain a settlement. *Rez v. Chidingfold* (ib. 415) is to the same effect. *Regina v. Openshaw* and that class of cases relied upon by the other side, are authorities for the respondents. The payment in those cases was held sufficient, within the statute of William and Mary, without reference to the notice to the parochial officers. [Maule J. Payment by the landlord was held sufficient in those cases, even though notice was also required. Payment alone is required by the reform act.] *Regina v. Armouth* also shews that there may be a constructive payment. In *Regina v. Weobly* the circumstances were very different from those of the present case. There was no arrangement between the parties in that case with regard to the payment of the rate; nor was the salary of the party, who was an excise officer, in any way reduced by the payment. Upon the authority of that case, *Regina v. South Kilvington* was decided; and *Regina v. Lower Heyford* does not appear to have been referred to.

It is clear that the seventy-fifth section of the registration act applies merely to cases where there have been [71] inaccuracies in the rate; and it provides that where a party has bona fide paid the rate, he shall be deemed to be rated notwithstanding such inaccuracies.

Kinglake in reply. From the circumstance of the party having been allowed a certain sum by the admiralty in lieu of rent and taxes, since he has occupied a house out of the dockyard, the inference is attempted to be drawn by the other side that he occupied the house in the dockyard as tenant; the case, however, states that such allowance is made under the name of "lodging money;" and the fair conclusion from this is, that the house he formerly occupied was in the nature of lodgings found him by the admiralty.

(d) Quære, whether this term, as used by Russell, is meant to include the relation in which the principal stands to his agent.

It is contended on the other side that *Rex v. Minster*, and that class of cases, being merely cases of labourers, the principle there laid down cannot be extended to a public officer under government. The party here, however, is only a master rope-maker, and stands upon the same footing as the shepherd in *Rex v. Bardwell*. It is suggested that there is nothing to shew that the occupation of the house was ancillary to the performance of the service; the case, however, expressly states that the party, being master rope-maker in the dockyard, "as such" had the house as his residence. That must mean that he had the house as master rope-maker, and for the purposes of his service in that capacity. It is also said that the Crown could not maintain an action for a trespass committed in the house in question; that, however, is an assumption of the very point in dispute: for if the Crown has not parted with the possession of the house in question—as it is submitted it has not—the Crown may maintain trespass.

It is not disputed that the occupiers of the apartments in Hampton Court Palace in *Regina v. Lady Emily Ponsonby* were tenants at will. That however was the case [72] of an occupation without reference to any service to be performed by the occupiers; and that is the very distinction taken between their case and that of the house-keeper, whose occupation was connected with service, and who therefore was admitted not to be ratable.

Rex v. Terrott (3 East, 506) it was thought would have been cited on the other side. In that case a commanding officer in barracks, having distinct apartments allotted to him, was held to be ratable to the relief of the poor for the same, he having a beneficial enjoyment of them beyond his necessary accommodation as an officer for the purpose of public service. Lord Ellenborough C. J. in giving the judgment of the court in that case, observed, "The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building or other subject matter of the rate, as a mere servant of the Crown or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of, or emolument resulting from it, in any personal and private respect, then he is not ratable." *Rex v. Hurdiss* (3 T. R. 497) is to the same effect.

There is no doubt that the tender of the rate by a properly constituted agent will be sufficient to exonerate the occupier, and upon that principle alone can *Rex v. Cozens* be supported; there is however no such agency here. The language of the sixty-sixth section of the poor law amendment act, under which *Regina v. South Kilvington* was decided, is nearly identical, as to the payment of rates, with that of the twenty-seventh section of the reform act.

From some remarks which have fallen from the bench during the argument in this case, it seems to have been taken for granted that the payment of the rates by the [73] landlord was held, in the cases referred to, as equivalent to the notice to the overseers required by the former statutes; but it is submitted that is not so. It was not the payment of the rate which constituted the notice, but the fact of the party being rated; it being the duty of the overseers to insert in the rate-book the name of every person liable to be rated, such insertion was tantamount to notice. The payment of the rate was a mere subsequent acknowledgement of the validity of the rate and of the liability of the party to be rated.

The other side appear to have treated the argument of the appellant as putting forward the proposition, that in case of a burglary committed in the house in question, it must have been laid in the indictment as the dwelling-house of the Crown. This, however, is a misapprehension; for it was admitted that a house in the exclusive occupation of a servant, might be laid as his dwelling. In this respect, *Rex v. Jarvis*, which has been relied on by the other side, does not differ from the cases cited by the appellant; the distinction being, that if the parties have entered into a contract for rent, then the relation of landlord and tenant will be constituted.

Cur. adv. vult.

THE CASES OF CHARLES ALEXANDER PARKER AND SIX OTHERS were Consolidated by the Revising Barrister.

Charles A. Parker was lieutenant-quarter-master of marines at Chatham. The case substantially resembled that of James Burton (ante, 54; post, 77), but it contained an additional statement by the revising barrister as follows—

Officers are frequently obliged to reside out of government houses from the want

of a sufficient number of such houses at Chatham; and in all such cases an [74] allowance is made to them by the Admiralty for rent and rates under the name of "lodging money." He (sic) is not compelled to live in the house, but is at full liberty to reside elsewhere if he choose, but in such case, unless he did so at the request of the Admiralty, in order that they might have the house for another purpose, he would have no allowance made to him for lodging money.

In this case also the names of the parties objected to had been retained by the revising barrister.

Kinglake for the appellant.

Cockburn for the respondents.

No argument was offered in this case; it being admitted by the counsel on both sides that it stood upon the same footing as the last.

Cur. adv. vult.

THE CASES OF WILLIAM BROOK AND TWO OTHERS were also Consolidated by the Revising Barrister.

William Brook was clerk of the works in the engine department at Chatham. This case also resembled that of James Burton (ante, 54; post, 77); but it was stated that Brook occupied a house in Chatham Lines, of the value of 20l. a year, rent free, as part remuneration for his services, by an agreement when he entered the service.

The names of the parties objected to had been retained by the revising barrister.

Kinglake, for the appellant, offered no argument, admitting that the case stood upon the same footing as *Burton's case*.

[75] Cockburn, for the respondents, submitted that the only difference was, that in this case there was an agreement that the party should occupy the house rent-free, and that the house was not situated within the dockyard.

Cur. adv. vult.

THE CASES OF THOMAS SMITH AND TWO OTHERS were also Consolidated.

The facts of this case were also very similar to those of James Burton (ante, 54; post, 77). The case stated that Thomas Smith was barrack-master at Chatham barracks, and had the exclusive occupation of a house, rent-free, in remuneration for his services. The only difference between the two cases was, that in the present case the tenant paid the rates and taxes himself, and charged them in his account with the board of ordnance, who allowed them to him in such account.

The names of the parties objected to had been retained by the revising barrister.

Kinglake, for the appellant. The only difference between the present case and Burton's is, that here the rates and taxes were paid by the party himself, though they were afterwards allowed to him in account by the ordnance. The question is, whether there has been a bona fide payment (vide ante, vol. iv. 160, 170) by the party within the 6 & 7 Vict. c. 18, s. 75. [Maule J. There is no suggestion of mala fides in the case.] Although the money here passes through the hands of the party, there is no payment by him, inasmuch as the board of ordnance have agreed to pay the rate, and ultimately do so. The party does not [76] deal with the payment as one made by him on his own account, for he charges the board with it. He is merely their agent in making the payment. [Erskine J. referred to *Rex v. Openshaw* (1 W. Bla. 463, Burr. Sett. Ca. 522), and that class of cases (vide ante, p. 70), where a payment by a landlord had been held sufficient to confer a settlement on the tenant.] The law as to settlement is distinguishable in this respect. A settlement originally depended upon a residence within the parish for forty days. The settlement by payment of rates was of subsequent introduction; its object being, to shew that the party was a resident in the parish. The party here is wholly indifferent to the amount of the rate, as he does not himself bear the burthen.

Cockburn, for the respondents. The real question is, who is liable to pay the rate. It is clear that the occupier, being the party rated, is the party liable to the payment. It is of no importance from what quarter he obtains the money for the purpose of payment. If it be given to him, it is sufficient. He referred to *Regina v. Lower Heyford* (1 B. & Ad. 75, ante, 47).

Kinglake, in reply. It is by no means immaterial where the party obtains the

money for the purpose of paying the rate ; *Regina v. The Mayor of Bridgenorth* (10 A. & E. 66; 2 Perr. & Dav. 317). It was there decided, that a payment of rates, to entitle a party to be put upon the burgess list under the ninth section of the municipal corporation act (5 & 6 W. 4, c. 76), must be a payment by his own act ; and that a payment for him by another person, without his authority, is not sufficient.

Cur. adv. vult.

[77] TINDAL C. J., now delivered judgment in the foregoing cases :—

CASE OF JAMES BURTON AND OTHERS.

In this case two questions were raised before the revising barrister, and were argued on the appeal to this court ; first, whether the occupation by James Burton was an occupation as tenant, within the twenty-seventh section of the statute 2 W. 4, c. 45 ; secondly, whether, upon the facts stated, he had paid the poor-rates, as required by the proviso in that section.

As to the first question, the facts are, that the house occupied by the claimant is situated in the dockyard at Chatham ; that the claimant is master rope-maker, and, as such, had the house as his residence ; that he paid no rent in money for it, but had it in part remuneration for his services, and that no part of it was used for public purposes, the office in which he performed his public services being away from it. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary.

Upon this state of facts the revising barrister has found that the claimant occupied as tenant ; and the question in effect is, whether the statement of facts shews that the decision is wrong ; that is, whether it shews the occupation not to have been in the character of tenant.

On the argument, several cases were cited, bearing on the question whether the house could be called the dwelling-house of the claimant in an indictment for burglary. But that question is so different from the one now in dispute, viz. whether there was a tenancy or not (a), that we think it unnecessary to notice those decisions.

But the cases chiefly relied on were those settlement cases in which the question has arisen, whether a servant came to settle on a tenement belonging to his master [78] within the meaning of the statute 13 & 14 Car. 2, c. 12. The language and object of that act are very different from those of the statute now under consideration ; and, therefore, no similarity of facts in a case arising on the one act can make it in point upon a question raised on the other. But as the court, in deciding those cases, has considered that the settlement turned on the question, whether the pauper occupied as tenant to his master, the decisions are very important on the present inquiry.

In those cases, as in this, there was no doubt of the right to exact, and the liability to render, service ; but in those, as in the present case, the doubt was, whether the relation of landlord and tenant subsisted between the same parties. There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest ; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration.

But it may be, that a servant may occupy a tenement of his master's, not by way of payment for the services, but for the purpose of performing them ; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases, cited in argument, established, and proceeded on, this distinction. We think it applicable to the present question ; and as there is nothing in the facts stated, to shew that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services ; and, as the case expressly finds that he had

(a) The words of the twenty-seventh section are " who shall occupy as (owner or) tenant."

the house as part remuneration for his ser-[79]-vices, we cannot say that the conclusion at which the revising barrister has arrived is wrong.

The case, indeed, stated that the claimant was master rope-maker, and as such had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope-maker, or occupied it for the purpose of performing them.

The fact also of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may well happen that something in the service which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants. But in the present case, upon the grounds above stated, we think the juster inference is, that there is an occupation as tenant.

On the second question, it appears that the claimant was rated to the poor-rates and assessed taxes, and that they were paid for him in part remuneration of his services. Upon this question it appears to us that the payment, being one to which the claimant was liable, and having been made on his own account by those whom he procured to make it, by giving value for it, is sufficient within the twenty-seventh section of the statute. Whether it would or would not have been sufficient within the 3 W. & M. c. 11, s. 6, in which rating and payment are made to confer a settlement, by way of substitution or equivalent for notice to the parish; or under 4 & 5 W. 4, c. 76, s. 66,—where the payment, being for a similar purpose (that of conferring a settlement) with [80] in the 3 W. & M., may perhaps require to be made in a similar manner,—is a different question from that before us. The present question arising upon an act of parliament conferring a franchise in respect of property or ability, we think the payment, having been made in a manner equally indicative of these qualifications, is as effectual, within the spirit of the enactment, as if made by the hand of the claimant. The words of the act which require that “such person shall have paid the rate,” do certainly, in their largest ordinary sense, comprehend payments made in discharge of, and procured by, such persons, as well as those made by his own hand: and the largest ordinary sense is that in which words ought to be construed, where there is nothing in the occasion on which they are used, or in the context, to restrict them.

We think therefore the decision of the revising barrister is right on both points.

Decision affirmed.

CASE OF C. A. PARKER AND FIVE OTHERS.

This case does not materially differ from that of the vote of James Burton, and the decision of the revising barrister must be affirmed, on the grounds stated in giving judgment in that case.

Decision affirmed.

CASE OF W. BROOK AND TWO OTHERS.

There is no substantial difference between this case and that of James Burton; the decision of the revising barrister must therefore be affirmed.

Decision affirmed.

[81] CASE OF THOMAS SMITH AND TWO OTHERS.

In this case also we think the decision of the revising barrister must be affirmed, on the grounds stated in the judgment in the case of James Burton's vote. The rate being paid by the voter's own hand is a circumstance not unfavourable to the vote; but we think it makes no substantial difference either way.

Decision affirmed (a).

(a) And see *Rex v. Iken*, 2 A. & E. 147; 4 N. & M. 117.

BOROUGH OF LEWES.

ALFRED PLAYSTED BARTLETT, *Appellant*, AND JOHN GIBBS, *Respondent*.
Dec. 6, 1843.

[S. C. 7 Scott, N. R. 609 ; 1 Lutw. Reg. Cas. 73 ; Barr. & Arn. 98 ; 13 L. J. C. P. 40. Distinguished, *Bendle v. Watson*, 1871, L. R. 7 C. P. 168. Applied, *Porrett v. Lord*, 1879, 5 C. P. D. 71. Distinguished, *Ford v. Hoar*, 1884, 14 Q. B. D. 512. Approved, *Foskett v. Kaufman*, 1885, 16 Q. B. D. 279. Applied, *Hureum v. West Ham Town Clerk*, [1894] 1 Q. B. 582 ; *Soutter v. Roderick*, [1896] 1 Q. B. 94.]

A party whose qualification consists in the occupation of several premises in immediate succession (under the 2 W. 4, c. 45, s. 28), ought to be registered in respect of all such premises.—If a party so qualified is registered only in respect of the premises in his occupation at the time of making out the list of voters, it is such a misdescription of his qualification as the revising barrister has no power to correct under the 6 & 7 Vict. c. 18, s. 40.

The name of the appellant was inserted in the list of persons entitled to vote in the election of members for the borough of Lewes, in respect of property occupied within the parish of All Saints, as follows :

Christian Name and Surname.	Place of Abode.	Nature of Qualification.	Name of the Street where Situate, &c.
Bartlett, Alfred Playsted	East Street.	House.	East Street.

It was proved at the revision that the appellant had occupied, as tenant, a house, No. 10, East Street, in the parish of All Saints, within the said borough since (from) the 25th of December, 1842 : that he had, for consider-[82]ably more than six months previously, occupied also, as tenant, a house, No. 16, West Street, in the parish of St. John, within the said borough ; that he had removed from the latter to the former house immediately, without any interval of time ; that each house was of more than the value of 10l. per annum ; that he had been rated in respect of both houses to all rates made during the period of his occupation of them ; and that all the rates and assessed taxes due from him in respect of them had been duly paid within the time limited by 6 & 7 Vict. c. 18, s. 75 (reciting 2 W. 4, c. 45, s. 27).

The case then stated, that an objection was taken that the appellant's qualification consisting not of one house, No. 10, East Street, but of two houses, No. 16, West Street, and No. 10, East Street, occupied by him in immediate succession, the description of his qualification in the list should have corresponded with this fact, and that he ought to have been registered for both the houses which constituted his qualification ; that the revising barrister decided that where a person founds his qualification upon different premises occupied by him in immediate succession, conformably to the provisions of the 28th sect. of 2 W. 4, c. 45, it is required that he should be registered in respect of all those several premises, and that they should be specifically set forth in the description of qualification ; and that the appellant being registered for one only of the houses occupied by him, and that house having been occupied by him only for a period of six months, he had not proved that he was entitled to have his name retained in the list of voters in respect of the qualification described in the list ; that an additional objection was taken that there was an insufficient or inaccurate description of the appellant's qualification, which the revising barrister had power (b) to correct [83] under the provisions of the 40th sect. of 6 & 7 Vict. c. 18. That the revising barrister decided that where a party was objected to, he the revising barrister had no such power, but that he was bound, by one of the provisions of the same section, to require such party to prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in such list ; and that the

(b) Quære, no power.

appellant having, in the judgment of the revising barrister, failed to do so, he accordingly expunged the name of the appellant from the abovementioned list of persons entitled to vote for the borough of Lewes.

The case then proceeded as follows :

The question for the opinion of the court is, whether, under the circumstances mentioned in the above statement of facts, the name of the appellant was rightly expunged from the said list of voters.

If the court shall be of that opinion, the said list is to stand without amendment : if the court shall be of a contrary opinion, then the said list is to be amended by inserting therein the name of the appellant.

(Signed) R. R———,
One of the Revising Barristers for the
Borough of Lewes.

The case was argued in last Michaelmas Term (November 20th) by

Creasy for the appellant. The points for consideration are ; first, whether, in a case of successive occupation, all the premises successively occupied must be stated as constituting the qualification of the voter ; and, secondly, supposing such statement necessary, whether the revising barrister had power to amend the list,—in which the premises, in the actual occupation of the party objected to, are alone stated,—by inserting the premises previously occupied by him.

[84] It is contended, on the part of the appellant, that it is not necessary that all the premises should be inserted in the list ; but, that if it be so, then the revising barrister has the power to make the insertion.

There is a fallacy in that part of the case which states that a person “founds his qualification upon different premises occupied by him in immediate succession.” The qualification, it is submitted, is founded on the occupation of a house of the annual value of 10l. By the twenty-seventh section of the reform act, the right of voting is conferred on the occupier of any house, &c. of that value, if he is duly registered according to the provisions thereafter contained. Three conditions are imposed, which must be complied with before the party becomes entitled to be put upon the register ; first, that the party shall have occupied the premises for twelve months previously to the last day of July ; secondly, that he shall have been rated to all the poor-rates made during the year of his occupation, and shall have paid the rates and assessed taxes due from him, by a certain time ; and, thirdly, that he shall have resided for six months in the borough, or within seven miles thereof. Unless those conditions are complied with a party, it is true, cannot be registered ; but they form no part of, and are quite distinct from, the qualification itself. The twenty-eighth section provides for the case of successive occupation ; by that section it is enacted that the premises in respect of the occupation of which the party is entitled to be registered, need not be the same, but may be different premises, provided they have been occupied in immediate succession during the twelve calendar months, and the rates have been duly paid in respect of all of them. The successive occupation of different premises is therefore equivalent to, or a substitute for, the continuous occupation of the same premises. It is clearly not requisite that it should appear on the register [85] that the claim to vote is in respect of the continuous occupation of the same premises for twelve months ; neither is it necessary that the successive occupation of different premises should be stated.

In the present case, the ground upon which the party rested his qualification, viz., the occupation of a house in East Street, did appear in the list.

The meaning of the sections in the reform act and registration act may be explained by the forms given in the schedules to the acts ; and these forms correspond with the list in this case. The form in schedule (I.) to the reform act, No. 1, is more full than the corresponding form in schedule (B.), No. 3, to the registration act ; but, in both instances, the examples are given in the singular number only, such as “house,” “warehouse,” &c., or “street,” “lane,” &c. [Tindal C. J. Probably the reason for inserting the premises in the list, is, to enable other parties to ascertain whether they are of sufficient value. Would not the reason be the same, or even stronger, for inserting the premises which had been previously occupied by the voter ?] That is, perhaps, the only argument which can be suggested in support of the view of the case which has been taken by the revising barrister : and that is at best merely an argument

ab inconvenienti. [Maule J. The notice of claim given in schedule (I.) to the reform act, No. 4, is also in the singular number.]

The overseers of the parish in which the premises are situated are the parties required to make out the lists. They have no means of ascertaining what premises a party may have previously occupied in another parish. They are without the means of obtaining the necessary information; nor is it any part of their duty to seek it. The overseers are not required to publish the name of every person who has occupied premises in their parish. [Coltman J. By the thirteenth section of the registra-^[86]-tion act, the list which the overseers are to make out, is, of persons entitled to vote in respect of premises "situate wholly or in part" within their parish.] That expression has reference only to the local description of the premises.

The fifty-eighth section of the reform act furnishes a strong argument. Under that section three questions were required to be asked of the voter at the time of the election. The third was, "Have you the same qualification for which your name was originally inserted in the register of voters, now in force for the city, &c. (specifying in each case the particulars of the qualification as described in the register)." To entitle a party to vote he must, at the time of the election, have been able to state that he was in the occupation of the same premises as those for which his name was inserted in the register. If his name might have been inserted for two or more houses occupied successively during the year, he would have been in the occupation of only the last house, at the time of the election. It is true, that under the new law (a), this third question is no longer to be asked at the poll. The old law, however, remains in force, so far as relates to the description of the premises in the register.

Secondly, it is submitted that, at all events, the revising barrister had the power, under the fortieth section of the registration act (b), to correct the list by ^[87]

(a) See 6 & 7 Vict. c. 18, ss. 79, 80, 81.

(b) Enacting "That the revising barrister shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and wherever the christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described, be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list: Provided always, that, whether any person shall have been objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be; nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same; and where the name of any person inserted in any list of voters, shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself, or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled, on the last day of July then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists: provided always, that where any person whose name appears on any list of voters for any county shall be objected to on the ground of having changed his place of abode without having sent in a fresh notice of claim, it shall be lawful for the barrister, on revising the list, to retain the name of such person on the list of voters,

inserting the different premises successively occupied by the voter. In the barrister's construction of that section, he appears to have considered that he could only remedy those errors in the list of voters which should have been discovered by himself; but that as to those which had been discovered and pointed out as grounds of objection by other parties, he had no power of amend-[88]-ment. This could not, however, have been the intention of the act.

It cannot be disputed that the party, whose case is under consideration, was legally entitled to vote, provided he were properly registered; and surely his title cannot be invalidated merely by the overseers omitting by mistake to insert the whole of his qualification in their list of voters. Under the fortieth section the revising barrister may supply an omission of a party's christian name, or of the qualification, if furnished with satisfactory materials for doing so before the revision is completed. In the present case, the omission is of part only of the qualification; and surely he may supply a part, if it is competent to him to supply the whole, of the qualification. He cannot insert a different qualification; but that is not asked for here. Neither can the power of the revising barrister to amend be limited by the circumstance of another party having made an objection. [Coltman J. You do not rely on the last provision of the fortieth section.] That appears to apply only to county voters.

R. C. Hildyard for the respondent. The revising barrister has decided in this case consistently with the manifest intention of the legislature, expressed by the words of the act.

It is suggested on the other side, that the right to vote being in respect of a twelve months' occupation of a 10l. house, it would be equally necessary to state the fact of a twelve months' occupation as a part of the qualification. The legislature, however, has pointed out the degree of particularity required in describing the qualification. The schedules to the reform act contain no mention of any period of occupation, but they do furnish the form of statement of the premises in respect of which the party claims to vote. And this dis-[89]-tinction is a reasonable one; for it would convey no information to state that the premises had been occupied for twelve months (a). Under the twenty-seventh section they must have been so occupied to entitle the party to be put upon the register at all. This is the case also with respect to being rated, the payment of rates, and the six months' residence. All these facts must exist to entitle a party to be put on the register; but they are not required to be stated in the register. The schedules comprise but a small portion of the ingredients of the qualification. They do not mention "a house and land," which may be joined together in certain cases, in order to confer the franchise; nor do they mention any "other building," besides those which are especially enumerated in the act. No argument can be deduced from the scantiness of the schedules, to justify the omission of the various premises occupied in succession. Stress has been laid upon the heading of the column being in the singular number, such as "street," "lane," &c. It speaks also of "this parish," in the singular; but in the case of a house and land, the house may be in one parish and the land in another.

In such cases there would exist a sufficient qualification; but it must be correctly described (b). In the interpretation clause to the registration act (6 & 7 Vict. c. 18, s. 101) it is declared, that "where the subject or context requires it, every word importing the singular number only, shall extend and be applied to several persons and [90] things as well as one person or thing." The schedules, therefore, cannot be considered as limited to the singular number. It was one of the principal objects of the reform act, as stated in the preamble, "to diminish the expense of elections" by

provided that such person or some one in his behalf, shall prove that he possessed, on the last day of July, the same qualification in respect of which his name has been inserted in such list, and shall also supply his true place of abode, which the said barrister shall insert in such list."

(a) If all the premises held in succession must be mentioned, the insertion of one house only would imply that a twelvemonth's occupation of that house was relied on.

(b) Where the house was in parish A. and the land in parish B., there would not appear to be any obligation on the overseers of either parish to insert the name of the party in the list of voters, inasmuch as the party would not have a perfect qualification in either parish. It seems to follow from the decision in the principal case that a party so situated would be driven to make his claim.

shortening the period of their duration; and, with this view, the discussion of the claims of parties to vote was fixed to take place at the time of the revision instead of the time of election; and ample time is allowed to parties to sift and test such claims. But there would be no advantage in this, if a party might be put upon the list for a qualification in respect of which he was not entitled to vote. He would appear to be on the list for a good and valid qualification. An objector might know that the qualification was insufficient; but before the barrister, the voter might set up a supplemental qualification, which the objector would have no means of testing.

With regard to the power of the revising barrister to amend the list it is to be observed, that the fortieth section of the registration act (6 & 7 Vict. c. 18) differs from the corresponding section of the reform act (2 W. 4, c. 45, s. 50). The registration act draws a distinction between cases where there is an objection to a party and where there is not. The party objected to must prove his right to vote in respect of the particular qualification inserted in the list. The revising barrister cannot alter that qualification. Where the qualification is stated to be in respect of a house only, the barrister has no power to add land to it; for that would be to alter the nature of the qualification. So, in the present case he cannot add other premises to those stated in the list. It is urged that in the case of a successive occupation of different premises, it will be difficult for the overseers to ascertain what premises the party has occupied; there is however no such difficulty; [91] for where the name of the party is not inserted at all, or is inserted with an insufficient qualification, he may claim to have his name and qualification properly inserted, under the fifteenth section of the registration act, by which the forty-seventh section of the reform act is superseded. The object of these provisions as to making out the lists of persons claiming to vote, is, to facilitate their identification; but this object would be in a great measure frustrated by the adoption of the argument on the other side. If the decision of the revising barrister is upheld, it will in no way affect the franchise; it will merely point out the course to be adopted in the registration hereafter.

But if the court should hold that the insertion of all the premises successively occupied is not necessary; or that the omission may be supplied by the barrister at the time of the revision, questions of great difficulty may arise as to whether it will be necessary to add to a house, an adjoining garden, or field, or land situated in another part of the borough, but constituting part of the qualification, or whether such addition may be made by the barrister.

Creasy, in reply. The claim to vote arises here under the twenty-seventh section of the reform act; and the twenty-eighth section merely states that the premises in respect of which a party claims to vote may be different premises, provided they have been occupied in immediate succession for a period of twelve months, such successive occupation being an equivalent for the continuous occupation of the same premises for that period.

The twenty-ninth section, which relates to the joint occupation of the same premises by different parties, supports this view of the case. It is not necessary that such joint occupation should be stated in the list. The case of the occupation of a house in one parish and of [92] land in another, is provided for by the thirteenth section of the registration act; for the overseers are required to make out a list of persons entitled to vote in respect of premises "situate wholly or in part" within their parish. The fifteenth section of that act is in favour of the appellant; the claimant is thereby required to give notice of his claim according to the form in the schedule, which, as before noticed, does not apply to a case of successive occupation. [Erskine J. There is a difference in the form of the notice of claim given in the schedules to the reform and registration acts. In the former the form states, that "My qualification consists of a house in Duke Street in your parish;" and in the latter it states "that the particulars of my qualification and place of abode are stated in the columns below," and the fourth column is headed "Street, &c. in the parish, &c. where the property is situate," &c.] The schedules, it is submitted, must be read in conjunction with the sections that refer to them.

As to the power of amendment by the revising barrister, that is only limited, by the fortieth section, as to the nature of the qualification; but that is not the amendment required in this case.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

In this case the name of the appellant had been inserted in the list of persons entitled to vote in the election of members for the borough of Lewes, in respect of property occupied within the parish of All Saints. And the appellant's qualification, described in the list, was a house in East Street. An objection having been made to the appellant's name, he was required, by the revising barrister, to prove that he was entitled to have his name inserted in such list, in respect of the qualification therein [93] described. And the case states that it was proved that the appellant had occupied, as tenant, a house, No. 10, East Street, in the parish of All Saints, within the borough, since the 25th of December 1842; and that he had removed into that house immediately, and without any interval of time, from another house, situate in West Street, in the parish of St. John, within the said borough, which he had occupied as tenant for considerably more than six months previously to his removal, and that each of those houses was of the clear yearly value of more than ten pounds.

It was objected, that upon this evidence it appeared that the appellant's qualification consisted of the occupation by him of the two houses in immediate succession, and not merely of the house in East Street, described in the list, and it was therefore contended that his name should be expunged from the list. It was answered by the appellant, that his qualification was correctly described; and that, even if it were not, the description might be amended by the revising barrister under the provisions of the stat. 6 & 7 Vict. c. 18, s. 40 (*supra*, p. 86, n.). The revising barrister decided that it had not been proved that the appellant was entitled to have his name inserted in the list of voters in respect of the qualification described in such list; and that he had no power to make the amendment suggested by the appellant; and thereupon he expunged the name of the appellant from the list.

The question submitted to the opinion of this court is, whether, under the circumstances stated in the case, the name of the appellant was rightly expunged from the list; and we think that it was.

By the statute 6 & 7 Vict. c. 18, s. 40 (*supra*, p. 86, n.), it is enacted, that whether any person shall be objected to or not, no evidence shall be given of any other qualification than [94] that which is described in the list of voters, or claim; and that where the name of any person inserted in any list of voters shall have been objected to, and notice of the objection given, the revising barrister shall require it to be proved that the person so objected to, was entitled, on the last day of July then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, he shall expunge the name of such person from the list. The question, therefore, is, whether the appellant was entitled to have his name inserted in the list, in respect of his occupation of the house in East Street, without any evidence of any other qualification; or, in other words, whether his qualification to vote consisted of his occupation of the house in East Street, or of his occupation in immediate succession of the two houses described in the case.

By the stat. 2 W. 4, c. 45, s. 27, it is enacted, "that every male person of full age, and not subject to any legal incapacity, who shall occupy within the borough, as owner or tenant, any house of the clear yearly value of not less than ten pounds, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of members to serve in parliament for such borough." Now, if the clause had stopped here, the occupation by the appellant of the house in East Street would have entitled him to vote. But the section proceeds, "Provided always, that no such person shall be so registered in any year unless he shall have occupied such premises as aforesaid, for twelve calendar months next previous to the last day of July in such year." Under this section, therefore, the appellant would not be entitled to have his name inserted in the list of voters in respect of his occupation of the house in East Street; for he had not occupied that house for twelve calendar [95] months. But by section 28, it is enacted, that the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person during the twelve calendar months next previous to the last day of July in such year.

Under this section the appellant was clearly entitled to have his name inserted in the list of voters; and the first question is, whether he was entitled to have it inserted in respect of his occupation of the house in East Street alone, or whether his occupa-

tion of the house in West Street formed a part of his qualification, and ought to have been described in the list.

On the part of the appellant it was insisted that the right to vote for a borough was given to the occupier of premises of the description and value mentioned in the early part of the twenty-seventh section, without reference to the duration of his occupation, provided the occupier's name and qualification were duly registered: and that, although by the proviso added to that section, and by the enactments of the twenty-eighth section, a condition precedent to the registration of such occupier's name and qualification, was introduced—that he should have occupied, for twelve calendar months, either the premises in respect of which he claimed a right to vote, or those premises and some other similar premises within the borough, in immediate succession—yet that the premises in respect of which he was entitled to vote, and therefore the premises to be described as his qualification, were the premises occupied by him on the last day of July. And it was urged that this view of the case was confirmed by the circumstance, that it is not required that the period of the occupation should be stated in the list; and that the forms prescribed in the schedule are [96] not adapted to the description of any other premises than those in the occupation of the voter at the time of the registration, especially where the earlier occupation was of premises in some other parish.

But we think that the decision of this question ought not to depend upon a critical examination of the forms in the schedule, which are inserted merely as examples, and are only to be followed implicitly, so far as the circumstances of each case may admit. And looking at the whole scope and object of the different enactments relevant to this question, we consider that the appellant's title to have his name inserted in the list of voters, rested upon his occupation of the two houses in immediate succession, and that he ought to have been registered for both those houses, the occupation of which in succession constituted his qualification to vote; for we think that the legislature intended that the registration list should afford such information of the nature and situation of the premises, in respect of the occupation of which each person claimed a right to vote, as would enable the other voters to ascertain, by inquiry, the sufficiency of the occupation and value of each of the premises. And it is obvious that for such a purpose, in cases of successive occupation, the description of the premises formerly occupied by the claimant would be, at least, as necessary as the description of the premises still in his occupation; for without such information it might be difficult to prevent surprise and fraud on the one hand, or to avoid groundless opposition on the other. And we think the language of the fortieth section of the statute 6 & 7 Vict. c. 18, and of the twenty-eighth section of the statute 2 W. 4, c. 45, sufficiently explicit to carry this intention into effect. We are therefore of opinion that a description of all the premises occupied in succession during the twelve calendar months should be inserted in the list as forming the voter's qualification.

[97] And as the whole object of the notice would be defeated if the omission of any part of such qualification could be remedied at the court of revision, we are also of opinion that the addition of the premises in John Street to the qualification inserted in the list, would have been a change in the description of the qualification not warranted by the provisions of the fortieth section, and that the revising barrister was right in refusing to make such alteration, and in expunging the name of the appellant from the list.

Decision affirmed (a).

(a) The fortieth section (*supra*, 86 (b)), relates to two classes of defects only. The first class consists of cases in which there is a total omission of "the christian name, or the nature of the qualification, or the local or other description of the property." Here, the omission of "the nature of the qualification" was not total. The second class embraces cases of insufficiency of description "for the purpose of being identified." Here, the description, such as it is, was sufficient for the purpose of identification. The defect was, not total omission or misdescription, either of which might have been amended; it was a case of partial omission, which is unamendable.

[98] BOROUGH OF BRADFORD.

COOPER, *Appellant*; COATES, *Respondent*. April 30, 1844.

Practice as to delivery of paper-books.—The duties of a postmaster in receiving and forwarding notices of objection under the registration act, are merely ministerial, and may, in his absence, be performed by a clerk.

This was a consolidated appeal. When the case was called on for argument (Monday, November 13th), Tindal C. J. remarked that no paper-books had been delivered to the judges; and stated that a similar practice must be observed in regard to these appeals, as in special cases; viz., that the appellant must deliver copies of the case to the two senior judges, and the respondent, to the two junior judges.

The case, the facts of which are stated below, therefore stood over for some days, when it was argued by Bompas Serjt. for the appellant, and J. L. Adolphus for the respondent.

Robert Waterhouse, whose name was inserted in the list of voters for the borough of Bradford in the county of York, objected to the name of William Allan being retained in the list of voters for the said borough, as not having been entitled, on the 31st day of July 1843, to have his name inserted in any list of voters for the same borough in respect of a house alleged to be occupied by him at Westgrove Street, in the town of Bradford.

On behalf of the objector it was shewn that all the requisitions of the 6 & 7 Vict. c. 18, s. 17, as to the delivery of the proper notice to the overseers had been complied with, and all the directions of sect. 100 of the same act (*b*) were also proved to have been strictly adhered to, except that the notice directed to the party whose name was objected to was delivered open and in duplicate to the postmaster's managing clerk, instead of the postmaster himself, who was proved to have been

(*b*) 6 & 7 Vict. c. 18, s. 100, enacts "that it shall be sufficient in every case of notice to any person objected to in any list of county, city or borough voters, and in the livery of the city of London, and also, in the case of county voters, to the occupying tenant whose name and place of abode appears in such respective list as aforesaid, if the notice so required to be given as aforesaid, shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters; and whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate to the postmaster of any post-office where money-orders are received or paid, within such hours as shall have been previously given notice of at such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed two-pence over and above the ordinary rate of postage), as shall from time to time be made by the postmaster-general in that behalf; and in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence (as to which, vide post, 103), of the notice having been given to the person, at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered to such place: provided also, that if no place of abode of the person objected to shall be described in the said list, or if such place of abode shall be situate out of the United Kingdom, then it shall be sufficient if notice shall be given to the said overseers, and to such occupying tenant as aforesaid (if any) in the case of a county voter, or, in the case of a city or borough voter, to the overseers or to the town clerk, or in the case of a liveryman of the city of London, to the secondaries and clerk of the particular company to which the person objected to shall belong, as in each of the cases hereinbefore required."

absent from Bradford at the time such notice was delivered; and that the duties as to comparing the notice with the duplicate, and stamping and returning the latter to the party bringing the same, were performed by the managing clerk, and not by the postmaster himself. On the production of the stamped duplicate by the party [100] who posted such notice, the barrister decided that this was evidence of the notice having been given to the person, at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered at such place. The agent for the party objected to contended that the notice should have been delivered to, and examined by, the postmaster himself; and thereupon the party objected to having declined to attempt to substantiate his right to be retained in the list of voters, the barrister expunged his name from such list.

(Signed) E. E. D——, Revising Barrister.

The case then stated that Cooper (the appellant) who was an attorney-at-law, on behalf of the above-named William Allan, and also on behalf of all the other persons interested, as appellants, in this matter, appealed from the above decision.

(Then followed the names of twenty-eight other parties.)

And that Coates (the respondent), on behalf of Robert Waterhouse, agreed to appear and answer the appeal.

Bompas Serjt. for the appellant (Thursday, November 16th.) The question depends upon the construction of the 100th section of the registration act (*supra*, p. 98, n.), whereby an objector is empowered to send a notice of his objection, by post, to the party objected to; but it is required that the notice so sent, shall be delivered open, and in duplicate, to the postmaster of any post-office where money-orders are received or paid, within certain hours to be notified. The postmaster is to compare the notice and the duplicate; and on being satisfied that they are alike in their address [101] and contents, he is to forward one of them to its address by post, and to return the other duplicate, duly stamped, to the party who brings it. The question therefore is, whether these duties are imposed on the postmaster himself, or whether they may be performed by any clerk in the post-office. The objector is not compelled to post the notice of objection. He may resort to the mode of service pointed out in sect. 17, and either personally serve the notice on the party objected to, or leave it at his place of abode. It is an important protection to the party who has to exercise the franchise, that the notice of objection should be properly served; a wrong would be done to him if his name were improperly struck off the list. The intention of the legislature was, to ensure the receipt of the notice by him. With this view they have fixed upon the postmaster as the person who is to receive and compare the notices of objection that are to be transmitted by post. But it is not every postmaster who is competent to perform these duties. The legislature has specially fixed upon the master of a post office where money orders are received and paid (see 3 & 4 Vict. c. 96, s. 38). This shews that he must be a responsible party. His duties are not merely ministerial; he has to compare the notices, to see that the addresses are correct, and to take care that one notice is actually sent by post. He is in fact to exercise his discretion and judgment. The production of the stamped duplicate is not the only evidence of the notice having been sent; for the 100th section requires that such production shall be "by the party who posted such notice." He may therefore be examined as a witness. If the clerk who performed the duties in this instance might lawfully do so, any other clerk would be equally competent. The clerk here is not even a deputy postmaster; nor does it even [102] appear that he was specially appointed to perform the duties of postmaster. The absence of the principal is no answer to the objection, as certain hours, within which the notices are to be delivered, are to be specially fixed by the postmaster-general. [Maule J. If the provisions of the section apply to the principal office in London, is it requisite that the postmaster-general should be there to receive the notices?] It is not necessary that the party should post the notices at the principal office. [Maule J. But suppose he does post them at that office, there being nothing in the section to prevent him from so doing.] There may be a postmaster at that office. If not, the objector could not post the notices there under this section.

In the interpretation clause (sect. 101) various instances are given of clerks or officers to whose deputies or representatives the provisions of the act are declared to apply; thus the words "clerk of the peace" "shall comprehend and apply to any

deputy, or other person exercising the duties, of such clerk of the peace." There are similar provisions as to a town-clerk and overseers; but no mention is made of a postmaster. The inference from this strengthens the argument that he cannot act by deputy; but that he must himself be satisfied that the copy which is to be posted is correct. [Maule J. That does not seem inconsistent with the duty being merely ministerial.] The duty depends upon an exercise of judgment, and is therefore, at least, quasi judicial. If a mere obedience to written directions were all that was required, that would be a ministerial duty. [Maule J. The case of a post-office being kept by a postmistress does not appear to be provided for.] In such a case the masculine gender would probably be considered to include the feminine; but if not, the consequence would merely be [103] that the party could not post the notices at that particular office, but must either serve them, under the 17th section, or post them at some other office where there was a postmaster. An additional reason why the postmaster may have been considered the proper party to be selected for this office is, that he is precluded from voting at an election; but a clerk in the office is not disqualified.

J. L. Adolphus for the respondent. As to the last observation, the stat. 22 Geo. 3, c. 41, enacts that no "postmaster, postmaster-general or his or their deputy or deputies, or any person employed by or under him or them, in receiving, collecting or managing the revenue of the post-office, or any part thereof, &c., shall be capable of giving his vote" at any election. Every person therefore employed as "managing clerk" in a post-office would be disqualified (a).

But it was not competent to the revising barrister to entertain the question as to the sufficiency of the posting. By the 100th section the production of the stamped duplicate is made statutable evidence of the notice having been given to the party objected to. The section says that "the production by the party who posted such notice of such stamped duplicate, shall be evidence (b) of the notice having been given to the person at the place mentioned in such duplicate," &c. [Tindal C. J. The postmaster is required to return the stamped duplicate to the party who brings the notices.] But the postmaster is not required to stamp the duplicate himself. He is to return the duplicate "duly stamped with the stamp of the said post-office;" and the words "such stamped duplicate" in the next sentence must refer to the condition previously [104] mentioned, viz., that the duplicate must be duly stamped. The production of such stamped duplicate is all that the barrister can require as proof that the party objected to has received the notice. The case here states that all the directions were observed, except that the notice was delivered, to the clerk, and that he performed the functions of comparing, stamping and returning the duplicate. It is not said that the objecting party knew that all the requisite functions were not performed by the postmaster. It was not intended by the act to let in inquiries before the revising barrister as to the proceedings in the post-office, or as to the title of the postmaster or his agent. If there has been found a negligence in the case, it might be a ground for an indictment or an action; but that will not bear upon the question of evidence. Any evidence before the barrister as to the party who received or compared or returned the duplicate was superfluous. There are analogous cases where instruments required to be stamped have been stamped after their execution, upon payment of a penalty, and the courts have refused to allow any inquiry as to the time when the stamp was affixed: as in *Rex v. The Inhabitants of Preston* (5 B. & Ad. 1028, 3 N. & M. 31. See ante, vol. iv. 178, n.), where an indenture of apprenticeship, without premium, was executed on the 27th of April, 1825, but was not stamped till July, 1832, when a 1l. stamp was put on it, and a 5l. penalty paid. Afterwards a double duty (2l.) was paid. The indenture was offered in evidence to prove the settlement of a pauper by service under it; and it was held that as it was not within the statute 8 Ann. c. 9, which limits the time for stamping indentures, the court was not called upon to notice the circumstances under which the stamps were affixed. [Tindal C. J. The stamp acts merely require the courts not to receive in evidence instruments which are not duly stamped.] [105] In *Doe dem. Duncan v. Edwards* (9 A. & E. 554. 1 P. & D. 408) it was held that where a document was produced with a seal purporting to be a seal of the insolvent debtors' court under the

(a) See *M'Symon's case*, *Glasgow*, 1 Peckw. 352.

(b) Ante, 99, n. It is not said that it shall be conclusive.

7 Geo. 4, c. 57, s. 76 (b), it was not necessary to prove that the seal was actually the seal of the court. In that statute there are particular directions that the proper officer shall affix the seal; but upon the document being produced with a seal that merely purported to be the seal of the insolvent court, the court of Queen's Bench would not inquire into the duties of the officer. It was clearly intended, by the 100th section of the registration act, to obviate the necessity of going into any question before the barrister as to the previous acts required to be performed at the time of posting the notice.

If, however, the question as to the compliance with the statute is to be entertained, it is submitted that all has been done that was necessary. The postmaster has performed his duties *per alium*. The acts performed by his clerk might be taken advantage of either by, or against, the postmaster. The interpretation clause provides for acts, not to be performed by agents, but by persons who stand in the place of the parties specially named in the act. The legislature must be presumed to have had in view other statutes relating to the post-office. By the post-office management act, sect. 9 (7 W. 4 & 1 Vict. c. 30), it is enacted that the postmaster-general may appoint sufficient deputies, agents and servants under him for the better managing the post-office revenue; "and whenever the postmaster-general is, by the post-office laws empowered [106] or required to do any act, all such deputies, &c. according to the nature and extent of their commission or deputation or appointment, shall be construed to be so empowered or required, unless the contrary be expressed therein." The 100th section of the registration act may be considered as incorporated with the laws relative to the post-office; but there is nothing in that section to prevent the performance of the specified acts by deputy. The "postmaster" is, properly, the postmaster-general. The local postmaster is his deputy; and the postmaster's clerk is the servant of the local postmaster, or his deputy to do particular acts. The act of the servant is the act of the postmaster. There is nothing in the registration act to annex the duty to the person of the postmaster. The general rule of law is, that where a party is required to do any act which is not judicial or inseparable from his own person, he may do it by deputy; *Bac. Abr. tit. Offices and Officers (L), Com. Dig. tit. Officer (B)*. In *Medhurst v. Waite* (3 Burr. 1259), it was held that a high constable might appoint a deputy for the purpose of billeting soldiers; though it was contended that that was a judicial act, as it was the effect of the judgment of the agent, and an appeal was given from his act. Lord Mansfield C. J. there said, "It is taking the definition too large to say that every act where the judgment is at all exercised, is a judicial act: a judicial act is supposed to be done *pendente lite* (of some sort or other)." In that case the high constable had to exercise some discretion and judgment, as the postmaster has here; but the duties required in either case might be efficiently performed by deputy. The requisition that the postmaster is to be "satisfied" that the notice and duplicate are alike, is not sufficient to raise judicial functions; for he is to be "satisfied" [107] merely by an inspection of the document. It does not follow because a particular person is mentioned in an act of parliament, that his servant or deputy is excluded. Thus, in *Phelps v. Winchcombe* (3 Bulst. 77; 1 Roll. Rep. 274; Sir F. Moo. 845; 2 Danv. Abr. 482, pl. 1), it was held that a deputy-constable was within the stat. 7 Jac. 1, c. 5, which gives double costs to a "constable" against whom an unsuccessful action is brought for any thing done in the execution of his office. Lord Coke in that case observed, "In divers places the custom is, that they do use in such cases to make a deputy, as in London; the writ is *vicecomiti*, he makes his deputy, the under-sheriff" (3 Bulst. 77). And again, referring to the statute under consideration, Lord Coke added, "by this statute double costs are given to a constable; and a deputy-constable is within the intent and meaning of it, for that he is a constable *pro tempore*; so a sheriff is named therein, and his under-sheriff shall have benefit of this also" (3 Bulst. 78). So, in *Medhurst v. Waite*, which turned upon the mutiny act, in which a constable is the party mentioned. [Erskine J. By the 100th section of the registration act, certain hours are to be fixed during which an objector may post

(b) By which copies of the schedule, &c. purporting to be copied by the officer, &c. "and sealed with the seal of the said court," are to be admitted in evidence without any proof, "further than that the same is sealed with the seal of the said court." See 1 & 2 Vict. c. 110, s. 105.

his notice.] Probably that was for the purpose of ensuring the attendance of some person competent to perform the requisite functions.

The doctrine that the postmaster must perform all the acts personally, would give rise to great inconvenience. And if there is any doubt as to the construction of the statute, an argument *ab inconvenienti* (vide Co. Litt. 11 a. 66 a.) is entitled to consideration. Would it be considered necessary to prove before the revising barrister, that the party who examined the notices, &c. was the postmaster himself, and not a clerk? It would be almost [108] impossible to prove the identity of the party. In *Leak v. Howel* (Cro. Eliz. 533) it was held that, where a deputy *de facto* exercised the place in the custom-house, although he were not so *de jure*, it should not prejudice the merchants who made certain compositions with him. Here, the clerk is acting as the postmaster, and may be considered as the postmaster *de facto*. So, in *Parker v. Kett* (1 Ld. Raym. 658; 1 Salk. 95; Ld. Holt. 221; 12 Mod. 467), it was held that a surrender taken by one who was steward of a manor *de facto*, though not *de jure*, was good. And it was there laid down that a deputy may do whatever his principal might have done, except making a deputy.

Bompas Serjt., in reply. The cases of a sheriff, a constable and a steward of a manor, are all instances of well-known officers. In such and other cases, custom has given the principal a power to appoint a deputy; but it can only be for specific purposes. In *Miles v. Bough* (3 Queen's Bench Rep. 845; 12 Law Journ. N. S. Queen's Bench, 74), which was an action for calls under the Clifton suspension bridge act (11 G. 4 & 1 W. 4, c. lxix.), by the 109th section notices were required to be signed "by any three or more of the trustees, or by the clerk or clerks, for the time being, to the said trustees, by their order;" and it was held that a signature to notices by an attorney, who acted for the clerks, and was deputed by them to make such signatures, was not sufficient.

Inconvenience may follow whichever way the act is construed; it must nevertheless be construed according to its plain and expressed meaning. The object of the enactment is, to protect against fraud; and for that purpose the party selected to examine the notices is a responsible officer. As to the production of the [109] stamped copy being conclusive evidence before the revising barrister,—the words of the section are "the production of such stamped duplicate shall be evidence," &c.; the word "such" refers to the whole preceding sentence. The question in this case is not with respect to a party acting as postmaster—if the case so stated it might probably be sufficient; but it is expressly stated that the party who performed the functions was the managing clerk, and that the postmaster was absent.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The question before us in this case was, whether the delivery of the notice directed to William Allan, the person whose vote was objected to, was a sufficient delivery within the meaning of the hundredth section of the 6 & 7 Vict. c. 18.

The objection taken before the revising barrister was, that the notices, both open and in duplicate, were delivered to the postmaster's managing clerk instead of being delivered to the postmaster himself, who was proved to be absent from Bradford at the time such notice was delivered; and that the duties, as well of comparing the notice with the duplicate, as of stamping and returning the latter to the party bringing the same, were performed by the managing clerk, and not by the postmaster himself. And, whether this was a sufficient compliance with the requisites of the hundredth section of the statute, was the question. The revising barrister held that it was; and, upon consideration, we think his decision is right.

I must confess that my mind was at first strongly inclined to the opinion that the proper construction of the statute required the several acts specified in the hundredth section to be performed personally by the post-[110]-master; founding my opinion principally on the ground that the postmaster is named in the section without any mention of a deputy or assistant and that the interpretation clause (s. 101), which in some instances authorises acts, directed to be performed by principals, to be performed by subordinate officers, is silent as to the office of postmaster. But, upon further consideration, I agree with my brethren in thinking that the intention of the legislature was, to authorise these acts to be done by a clerk or servant of the postmaster at his office, acting in his aid and assistance, and under his direction and control.

That the term "postmaster" where it first occurs in the section cannot be strictly

and literally confined to the postmaster personally, seems necessarily to follow from the extreme inconvenience that must result if such construction should be adopted. According to the terms of the act, the notice and its duplicate are to be delivered to the postmaster. The delivery, therefore, even to a clerk or servant at the office, although all the subsequent duties were performed by the postmaster himself, would, upon that construction, be no compliance with the statute. The very hand of the postmaster himself must be that into which the notice is delivered. But the postmaster may be personally unknown to the party who brings the documents. What evidence is he to furnish himself with, that the delivery was made to the real postmaster, if that point should afterwards be contested? In what state of uncertainty must the party who sends his notice by the post be left, if, at the time when he means to avail himself of it, he is liable to be defeated by evidence that it was not the postmaster himself, but a clerk who took it from his hands? The same difficulty would equally apply to the performance of the other duties imposed on the postmaster; for it would [111] be dangerous and inconvenient that, after the objecting party has complied with the requisites of the statute so far as he was able, evidence might be given that the postmaster was disabled by illness from attending personally at the time, or that he was absent from some other unknown cause, and that the duties were performed (as in this instance) by his managing clerk. And, further, if the statute meant, that in every case, the comparison of the two documents must be made by the postmaster himself, it is obvious that, in populous places—take London for example, where a great number of these notices might come at the same time, and immediate transmission might be necessary—a compliance with the statute would be absolutely impracticable, if the eye and mind of the postmaster himself was essential to give validity to the notice, and the assistance of a clerk or servant inadmissible.

That the duty required by the act may as well be performed by an assistant managing clerk as by the postmaster himself, is undeniable. It cannot be said, with any ground of reason, that comparing the two documents together, and pronouncing them to agree, is a judicial act; the receiving of the documents, the stamping and returning of one of them to the persons bringing them, it is needless to say, are ministerial acts, and those of the lightest order. We must therefore think, if the legislature had, for any reason, intended to confine the performance of the duty to the postmaster personally, there would have been an express provision to that effect; and that all that was required by the legislature was, that the party should deliver the notice open and in duplicate at the proper post-office for examination, within the hours properly notified under the act; that he should pay the proper fee for its registration, and wait for, and receive back, one of the duplicates stamped [112] with the post-office stamp; after which the production of such stamped duplicate is made sufficient evidence of the service of the notice. And, as this appears to have been substantially complied with in the present case, we hold that the objection to the notice fails, and that the decision of the revising barrister is right and must be affirmed.

Decision affirmed.

BOROUGH OF GREENWICH.

DOBSON, KNIGHT, *Appellant*; JONES, *Respondent*. 1844.

[S. C. 8 Scott, N. R. 80; 1 Lutw. Reg. Cas. 105; Barr. & Arn. 243; 13 L. J. C. P. 126. Applied, *Fox v. Dalby*, 1874, L. R. 10 C. P. 291; *Smith v. Seghill*, 1875, L. R. 10 Q. B. 428.]

A., the surgeon of Greenwich Hospital, occupied, as such, a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the commissioners of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money. By the regulations of the commissioners of the hospital, no officer of the hospital is allowed to make any exchange of apartments.—Held, that A. did not occupy the house “as tenant,” inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon.

William Jones objected to the name of Sir Richard Dobson, Knight, being retained in the list of persons entitled to vote in the election of members for the borough of

Greenwich, in respect of property situated within the said borough ; in respect of the qualification for which his name was inserted in the list, that is to say,

House.	Infirmary.	Greenwich Hospital.
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The facts of the case were as follows :—

The appellant, who is the surgeon of Greenwich Hospital, has occupied a house at the infirmary in the hospital for the last nineteen years and upwards. It is a house appropriated for the surgeon of the hospital, [113] and he occupies it as such. He took possession of the house upon being appointed surgeon, and has occupied it ever since. The house is of the clear yearly value of 10*l.* and upwards. The furniture in the house belongs to him. He did not pay for any fixtures on going into the house, and if any repairs are required, he applies to the commissioners of the hospital, by whom whatever is necessary is done. The name of the appellant is upon the rate-books, as rated for the house, and the rates and window-taxes in respect of it have been paid. No poor-rates or window-tax have ever been demanded from the appellant, nor has he ever paid or tendered the amount of any rate or tax for the said house, but the rates and the window-tax have always been paid by the commissioners of the hospital. It was stated by the appellant that he had never had any communication with the lords commissioners of the admiralty, by whom he was appointed surgeon of the hospital, upon the subject of the payment of the rates. The appellant also stated, that he had a written appointment, but he did not produce such appointment, nor did he shew by what tenure he held the office of surgeon. A printed paper, purporting to be particulars of a part of an order in council of the 23rd of January 1805, containing certain rules and regulations, was produced by the appellant, and which he stated he had received from the office of the inspector-general of hospitals at the admiralty-office, containing the following order :—

“Surgeons of hospitals, when not provided with a residence within the hospital, to be allowed fifteen shillings a week, lodging money.”

A book was also produced, copies of which had been furnished by the government to the different officers of the hospital, containing “Regulations established by the lords commissioners of the admiralty, for the govern-[114]-ment of Greenwich Hospital,” dated the 4th of June 1829, and one of those regulations is as follows :—

“All officers and others, having separate apartments, are to inhabit those assigned to them ; and no exchanges or other appropriation, of apartments or alterations therein are to be made without our express permission. They are to use their best endeavours to preserve them unimpaired, and in a neat and proper state of cleanliness and repair ; and they will be required to make good any loss or injury arising from negligence or inattention on their part.”

The regulations above referred to were made by the lords commissioners of the admiralty under and by virtue of an act of parliament, 10 G. 4. c. 25, intituled “An Act to provide for the better management of the affairs of Greenwich Hospital ;” by sect. 3 of which act it is enacted, “That the whole of the affairs of the said royal hospital, and the commissioners of Greenwich Hospital hereby appointed, and their successors to be appointed as hereinafter directed, and all other the officers and persons appointed to the said hospital and to any situations connected therewith, and to the schools of the said hospital, shall be under the authority, control and direction of the lord high admiral, or commissioners for executing the office of the lord high admiral, for the time being ; and the appointment of all officers of the said hospital, civil and military, (except the governor, lieutenant-governor and commissioners of the said hospital, who shall be appointed by His Majesty, His heirs and successors) and the appointment of the chaplains thereof and of the rectors, vicars and perpetual curates of the livings and chapelries belonging, or which may belong, to the said hospital, and the establishing of rules, orders and regulations for the guidance of the commissioners of Greenwich Hospital and their successors, in the management of the estates and property of the said [115] hospital and the admission of officers, pensioners and nurses into the said hospital, and the salaries to be paid to all such officers and persons respectively, shall be exercised by, and vested in, the lord high admiral, or commissioners for executing the office of lord high admiral, for the time being, who shall

have full power to remove from the said hospital, and from any situation connected therewith, any officer or other person as aforesaid (except the governor, lieutenant-governor, and such commissioners, rectors, vicars and curates) who shall be guilty of any misbehaviour in their said respective situations of officers."

The case then stated that the revising barrister was of opinion, upon the facts above stated,—

First, that the appellant did not occupy as owner or tenant, within the meaning of the statute 2 W. 4, c. 45, s. 27; and

Secondly, that he had not paid the rates and taxes pursuant to the enactment in the same section :

That consequently he was not entitled to have his name retained in the list.

And that the revising barrister therefore allowed the objection, and expunged the name of the appellant from the list accordingly. (Signed) J. E. _____,

Revising Barrister.

The case was argued in last Michaelmas term (Monday, November 20th, 1843).

Byles Serjt., for the appellant. The questions in this case differ in some points from the Chatham cases (b), and are, first, whether the appellant occupied the house in question "as owner"; secondly, whether he occupied, "as tenant," and, thirdly, whether he has paid the rates and taxes.

[116] First. By the statute 10 G. 4, c. 25, ss. 2 and 21, all the real property connected with the hospital is vested in the commissioners; the strict legal estate of the appellant's house is therefore in them. Although the nature of the appointment held by the appellant is not stated, it is not material; the third section of the act specifies the terms on which he holds; and it appears that the appointment is in the lords of the admiralty; they are the only parties who have the power to remove the appellant for misbehaviour; it is therefore in effect an appointment for life; *Bac. Abr. tit. Offices and Officers, H.(a)*. The case states in effect that the residence is annexed to the appellant's office, being "appropriated for the surgeon of the hospital." The appellant is the owner of the house, in the ordinary and popular sense of the term. If he had claimed to vote for the county, he would have shewn that he had an office for life, and that he was the occupier of the house annexed to such office. He would have been entitled to a vote, as in the case of a parish clerk or schoolmaster, &c. *Rogers El. 129, et seq. Elliot Reg. 22, et seq.* Two parties must concur, before the appellant could be legally turned out of possession. The commissioners of the hospital, in whom is the legal estate, are the only parties who could eject him, but they could not do so, unless he were dismissed by the lords of the admiralty. The twenty-seventh section of the reform act does not require the occupier to be the legal owner of the premises, but merely that he should occupy them "as owner." If the legal owner were intended, neither a mortgagee nor cestui que trust in possession, could vote; nor a parish clerk or a dissenting minister, where the legal property was vested, as is usual, in trustees. [*Coltman J.* The right to vote is in such case generally annexed to the office.]

[117] Secondly. The appellant is at least tenant at will to the commissioners of the hospital, who are the strict legal owners. He has sufficient interest to maintain trespass against a wrong doer. It is not necessary to contend that he could bring trespass against the commissioners; for if he is tenant at will to them, their entry would determine the will. But the question is, could the commissioners bring trespass or ejectment against him, without a previous demand of possession? It is submitted they could not, even if the lords of the admiralty were out of the question. [*Tindal C. J.* How far would that doctrine hold, where the occupation was in respect of services? In the case of a shepherd or coachman occupying premises belonging to his master, he might perhaps maintain trespass against a wrong doer, but he would hardly be considered a tenant.] In *Rez v. The Inhabitants of Chediston* (4 B. & C. 230; 6 D. & R. 269) a pauper, who rented a farm in C. assigned it to P. upon trust to cultivate it and pay the pauper's debts, &c. The lease expired in 1817; no settlement of accounts took place; but P., without the authority of the pauper, then hired a house

(b) *Hughes, App.; Overseers of Chatham, Resp.*, ante, p. 54.

(a) Citing *Co. Litt.* 42; *Roll. Abr.* 844; *Show. Parl. Ca.* 161. And see 2 *Hayes*, on Conveyancing, &c. 38, n. 5th ed.

in H. at the yearly rent of 18l., to which the pauper and his family removed, and they resided there for more than two years. The pauper never paid any rent or taxes, but P. was rated and paid the rent and taxes; and it was held that the pauper gained a settlement in H. by the occupation of the house. In *Rex v. The Inhabitants of Lakenheath* (1 B. & C. 531; 2 D. & R. 816), the master of a charity school, who was removable from his office at pleasure, resided for seven years, rent free, in a house of the annual value of 10l., where other parish schoolmasters had resided before. Part of the house he underlet to the parish at an annual rent, and it was held that this was a coming to settle upon a tenement of the value of 10l. per annum, within [118] the meaning of the 13 & 14 Car. 2, c. 12; and that the pauper thereby gained a settlement. Holroyd J. observed in that case, "I think that the schoolmaster was tenant at will of this house. The legal possession of the house was in him, and not in the lord or receiver of the manor." *Rex v. Fillongley* (1 T. R. 458), there cited, is to the same effect. In *Rex v. Camfield* (Ry. & Moo. C. C. 42), the occupation of a house by a party who was a toll-collector, and stood in the situation of a servant to his employers, was held sufficient to support an indictment for burglary in the house which was described as the dwelling-house of the collector. The appellant would be tenant at will to the commissioners, even if their discretion were not fettered; but the case is much stronger when their will is restrained by the fact that the appellant cannot be dismissed during good behaviour. [Maule J. Where does it appear that he is appointed during good behaviour?] It is to be gathered from the third section of the 10 G. 4. [Maule J. That section does not appear to restrict the lords of the admiralty to appointments during good behaviour. Is there any necessity that a party appointed surgeon to the hospital must continue so for life? Supposing he became old or blind.] Probably he would be in the same situation as the rector, and would be compelled to perform his duties by deputy. [Maule J. The case of the rector may be provided for by the ecclesiastical law, with which we are not acquainted (c).]

(The argument upon the second point raised by the revising barrister, as to the sufficiency of the payment of the rates, is omitted, as the court did not pronounce any [119] opinion upon it. Litt. S. 334; Co. Litt. 206 a.; 18 Vin. Abr. tit. *Ratihabitio*; *Cullen v. Morris* (2 Stark. N. P. C. 577), *R. v. Lower Heyford* (1 B. & Ad. 75, ante, 47), *R. v. Openshaw* (1 W. Bl. 463; Burr. Sett. Ca. 522), and 6 & 7 Vict. c. 18, s. 75, were cited on the part of the appellant; and *R. v. South Kilvington* (3 G. & D. 157), *R. v. Bridgnorth* (10 A. & E. 66; 2 P. & D. 317), and *R. v. Melsonby* (12 A. & E. 687), on the part of the respondent).

Kinglake for the respondent. The appointment of the appellant is clearly not an office. There is nothing to distinguish this from the common case of master and servant. The appellant is similarly situated to the surgeon of any other hospital. He is paid by a salary under the act of parliament. It is not the case of an annexation of a house to an office. The lords of the admiralty may change the lodgings of the surgeons, or may provide them with a residence elsewhere and furnish them with lodging-money. A parish clerk or a schoolmaster does not vote in respect of his office. If a parish clerk is in possession of lands of the value of 40s., an old endowment will be presumed, and he is considered as a freeholder; and in that way only is he entitled to vote. So, the schoolmaster. *R. v. Lakenheath* (supra, 117), established that a parish schoolmaster, so far from having a freehold, was only a tenant at will; the case is therefore directly opposed to the doctrine set up in the first branch of the argument on the other side (i). In *Rex v. Chediston* no service was to be rendered. Here, the occupation is in respect of service only.

Byles Serjt. was heard in reply.

[120] TINDAL C. J., now delivered the judgment of the court.

In delivering our opinion upon a former case, in which Hughes was the appellant, and the overseers of the parish of Chatham were the respondents (ante, p. 54, 77), we

(c) In *The Fountains Abbey case*, M. 9 H. 6, fo. 32, pl. 3, Paston J. says, "If a man marry his mother, this is a lawful marriage with us till it be defeated; for when the banns and espousals are made in facie ecclesiæ, that is sufficient for us; and it does not belong to us to inquire whether this is a lawful marriage or not.

(i) An equitable estate being sufficient, a party who is merely tenant at will at law is often qualified to vote as cestui qui trust of the freehold, copyhold or leasehold; see 2 Hayes on Conveyancing, &c. 38, 5th ed.

laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs, ought to be decided; and we drew the distinction between those cases where officers or servants in the employment of government are permitted to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are required to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion, we declared our opinion to be that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allowed to them, have had an additional allowance for lodging-money; whilst at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made—with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant: upon the same principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to occupy as tenants, but as servants merely [121] whose possession and occupation is strictly and properly that of their masters.

In deciding, therefore, the present appeal, we have only to consider within which of the two classes the present case ranges itself.

It is found by the case that the appellant is the surgeon of Greenwich Hospital; that the house which he occupies is in the infirmary; that he occupies it as such surgeon. Now, the nature of the office of surgeon to the hospital is such, that a residence in some known and certain dwelling may reasonably be required for the due performance of the duties of his office. But it is further found that he was placed in it, when he was first appointed (nineteen years ago), and that he has continued to occupy it ever since, and that it is the house appropriated to the surgeon for the time being. And lastly it is found, by the revising barrister, that, by the regulations established by the lords commissioners of the admiralty, the officers of the hospital having apartments, are to inhabit those assigned to them, and that no exchanges, or other appropriations, are to be made, without permission.

The revising barrister, upon this state of the evidence before him, appears to have come to the conclusion that the appellant does not occupy this house, simply by permission of the government, and as part of the remuneration for his services as surgeon, but that he is required to occupy this house, with a view to the more efficient performance of the duties of his office; and, consequently, that there was no occupation by him in the legal relation of tenant to a landlord. And, upon the state of facts so brought before the revising barrister and set out upon the case, we cannot say he has come to a wrong conclusion in point of law.

One ground of argument taken by the counsel for the appellant was, that the appellant might, upon the [122] facts stated in the case, be considered as the owner. But we think the facts therein stated shew that the lords commissioners of the admiralty (a) are, within the proper legal sense of the word, the owners of the house, too clearly to admit of an argument.

As we hold the decision to be right, by giving effect to the first objection against the appellant's right to vote, that is, by holding there is no occupation as tenant, it becomes unnecessary to consider the second objection, which relates to the mode of paying the occupier's rates.

We therefore think that the decision of the revising barrister must be affirmed.

Decision affirmed.

End of Cases upon Appeal from the Decision of Revising Barristers.

(a) By the 7 & 8 W. 3, c. 21, it is recited that the Crown had granted the site of the intended hospital to trustees and commissioners and their heirs; and by the 10 G. 4, c. 25, ss. 2 and 21, all the real property of the hospital is vested in the commissioners. And see 54 G. 3, c. 110.

[123] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in bank during this term were, Tindal C. J., Coltman J., Erskine J., Maule J.

GRANT v. MOSER. Jan. 18, 1843.

[S. C. 6 Scott, N. R. 46; 2 D. N. S. 923; 12 L. J. C. P. 146.]

To a declaration for false imprisonment, the defendant pleaded that the plaintiff with force and arms came to the door of the defendant's house, and with great force and violence attempted to enter against the will of the defendant, and wilfully and wantonly rang the door bell, without lawful occasion, and made a great noise and disturbance, to the annoyance, and disturbance of the defendant, and against the peace of the Queen, and (after request to cease), continued making such noise, &c. without any lawful excuse; and thereupon the defendant, in order to preserve the peace and restore good order and tranquillity in his house, gave the plaintiff in charge to a policeman:—The plea was held bad, as not shewing that, at the time the plaintiff was given in charge, he was committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed.

Trespass for false imprisonment. The declaration, after stating, in the usual form, an assault upon, and the imprisonment of, the plaintiff, at a police station, [124] on the 9th of April 1842, proceeded to allege that the defendant detained the plaintiff in prison for a long time, to wit, &c., and until the plaintiff, in order to obtain his discharge from such custody, was afterwards, to wit, on the 10th of April, in the year aforesaid, forced and obliged to procure bail and surety for his appearance at a metropolitan police court, to wit, the Marylebone police court, on the 11th of April next, to answer a certain charge, to wit, for breach of the peace, to be then and there preferred against him by the defendant; that the plaintiff did then, to wit, on the 10th of April, in order to obtain his discharge from the said imprisonment, procure Thomas Shaw, of, &c., to be his bail and surety for his appearance at the said police court aforesaid, and did then, together with the said T. S., enter into a certain recognizance in a certain penal sum for his appearance at the said police court as aforesaid: by means of which premises the plaintiff was forced and obliged to attend, and did necessarily attend, on the 11th of April, at the said police court to answer the said charge of the defendant, and was then and there detained in waiting until the said charge could be heard, and under examination upon the said charge, for a long time, to wit, twelve hours then next following. Special damage to the plaintiff in preventing his attending to his business of a cabinet-maker, and in the expense in procuring the said bail and surety and his discharge from the said imprisonment, and in defending himself from the said charge, &c.

Third plea. As to assaulting the plaintiff, and taking him to a police station, and detaining him in prison—that, before and at the said time when, &c., to wit, on the day and year in the declaration in that behalf mentioned, the defendant was lawfully possessed of a certain dwelling-house, situate in the parish of St. Marylebone, in the county of Middlesex, and known as No. [125] 63 Mortimer Street, Cavendish Square, in the said parish; and, the defendant being so possessed thereof, the plaintiff, just before the said time when, &c., to wit, on the day and year in the declaration in that behalf mentioned, with force and arms, came to the door of the said dwelling-house, and did then, with great force and violence, attempt and endeavour forcibly to enter the said dwelling-house of the defendant, and then, with great force and violence, wilfully and wantonly rang the door-bell of the said dwelling-house of the defendant; and the plaintiff then having no lawful occasion to go into the said dwelling-house of the defendant, and having no lawful occasion to speak to or converse with any person then being in the said dwelling-house of the defendant, and having no right to demand entrance into the said dwelling-house of the defendant, made a great noise and disturbance before and at the door of the said dwelling-house of the defendant to the great annoyance and disturbance of the defendant and his family, and against the

peace of our Lady the Queen: whereupon the defendant then requested the plaintiff to cease ringing the said door-bell of the said dwelling-house, and to cease and discontinue making such noise and disturbance as aforesaid, which he the plaintiff then wholly refused to do, and continued making the said noise and disturbance, and so with force and violence wilfully and wantonly ringing at the door-bell of the said dwelling-house of the defendant as aforesaid, without any lawful excuse for so doing, for a long space of time, to wit, for the space of one hour; and thereupon the defendant, in order to preserve the peace, and restore good order and tranquillity in his said house, then gave charge of the plaintiff to a certain policeman, to wit, one John Murray, the said policeman then being a constable belonging to the metropolitan police force, and then requested the said policeman, so being such constable as aforesaid, to take the [126] plaintiff into his custody to be dealt with according to law; and the said policeman so being such constable as aforesaid, at such request of the defendant as aforesaid, then gently laid his hands on the plaintiff for the cause aforesaid, and did then take the plaintiff into his custody, in order to carry and convey him to the said metropolitan police court, to wit, the Marylebone Police Office aforesaid, to be there dealt with according to law, for his said offence and breach of the peace; and, because it was then late at night, and an unseasonable time for the said policeman to carry and convey the said plaintiff to such metropolitan police office as aforesaid, the said policeman, so being such constable as aforesaid, for that reason, and for the cause aforesaid, did necessarily and unavoidably force and compel the plaintiff to go as a prisoner and in custody into, through and along the said public streets and highways unto the said police-station in the declaration mentioned, the same being the nearest police-station to the said dwelling-house of the defendant, and, inasmuch as the day next following such taking of the plaintiff into custody as aforesaid was Sunday, did necessarily and unavoidably then and there imprison the plaintiff for the time in the declaration mentioned, and until he the plaintiff did procure such bail and surety as in the declaration in that behalf mentioned, and did afterwards, to wit, on the 11th of April in the declaration in that behalf mentioned, force and oblige the plaintiff to attend at the said police court in the declaration in that behalf mentioned, to answer the said charge of the defendant, and did there then necessarily and unavoidably detain the plaintiff for the said time in the declaration in that behalf mentioned, as he lawfully might for the cause aforesaid; which were the same alleged trespasses in the introductory part of that plea mentioned, and whereof the plaintiff had above complained against the defendant. Verification.

[127] Special demurrer, assigning for causes—that it did not appear in or by the said plea that the plaintiff was committing any breach of the peace at the time he was given in charge by the defendant to the said police constable, or that there was any reasonable ground to apprehend that he would commit any breach of the peace, or that it was necessary to preserve the peace that the plaintiff should be given into custody as aforesaid; that, for any thing that appeared in or by the said plea, the said supposed breach of the peace might have wholly ceased, and there might have been no reason to apprehend a repetition or continuation thereof at the time the defendant gave the plaintiff in charge to the said police constable; that the defendant had no authority by law to arrest or imprison or give the plaintiff in charge to a constable in order that he might be punished for a past breach of the peace, as stated in the plea, but only in order to prevent him from committing a breach of the peace (vide ante, vol. ii. 461); and it should have appeared distinctly clearly in and by the said plea that there was good and probable reason to suspect that the plaintiff would commit a breach of the peace unless he were arrested and imprisoned; that it did not appear in or by the said plea that the said noise, disturbance and ringing at the said door-bell, which it was alleged the plaintiff made after the request of the defendant in the plea mentioned, was made by the plaintiff in breach of the peace of our Lady the Queen; that it did not appear in or by the said plea that either the defendant or the police constable saw or had view or heard the said noise, disturbance, or ringing; that the said ringing of the door-bell was, at the most, a mere civil trespass, and for which the defendant could not proceed criminally against the plaintiff, and could not even require from him surety of the peace; that it did not appear that the defendant [128] attempted to justify the arrest and imprisonment of the plaintiff under any statute, but by virtue of the common law, and the common law does not give the defendant any authority to arrest or imprison the plaintiff under the circumstances

stated in the plea ; and that it did not appear that either the defendant or the constable had authority to arrest or imprison the plaintiff under any statute, since it did not appear that the supposed offence was committed by the plaintiff in any thoroughfare or public place, or within the limits of the metropolitan police district, or that the plaintiff, by ringing the said door-bell, wilfully and wantonly disturbed any inhabitant of any dwelling-house (a). Joinder.

Bompas Serjt., for the plaintiff. The question raised by the pleadings amounts to no more than this, whether the ringing at a door-bell amounts to a breach of the peace, so as to justify the arrest of a party by a private individual ; Hawk. P. C. bk. 1, c. 63, s. 11. [Tindal C. J. The defendant certainly, instead of pleading evidence, ought to have alleged that the plaintiff was committing a breach of the peace.] The plea clearly does not shew any breach of the peace. In *Timothy v. Simpson* (1 C. M. & R. 757, 5 Tyrwh. 244), the plea justifying the imprisonment of the plaintiff, alleged that an affray had been committed. [Cresswell J. And it appeared that there was danger of [129] its immediate renewal.] So in *Ingle v. Bell* (1 M. & W. 516. Tyrwh. & G. 801) the plea shewed an existing riot or unlawful assembly. [Tindal C. J. The disturbance mentioned in this plea may have taken place at midnight.] It is not stated that it did. If the ringing mentioned in the plea amounts to a breach of the peace, the ringing for one minute would equally do so ; as the time makes no difference. If a party is in the house of another and will not go out on request, the owner of the house may turn him out by force ; but he cannot give him in custody unless there has been an actual breach of the peace (see *Lewis v. Arnold*, 4 C. & P. 354). In *Cohen v. Huskisson* (2 M. & W. 477) the plea expressly alleged that the plaintiff was making a noise and disturbance in the defendant's shop, in breach of the peace. [Tindal C. J. The plea here alleges that the plaintiff was making a noise and disturbance at the defendant's house.] The slightest ringing would satisfy that averment. Suppose the plaintiff had rung to inquire if some particular person lived there : would that have justified the defendant in giving him in custody ? There is no averment of any alarm to the neighbourhood, or even that the house was situated in a public thoroughfare. [Tindal C. J. The court certainly cannot take judicial notice that Mortimer Street is a thoroughfare ; although the word "street"—via strata—would rather imply a thoroughfare. But the real vice in the plea is that it does not allege in distinct terms that there was any breach of the peace.] Nor is it averred that any was apprehended. Even if there had been a breach of the peace, a constable could not, at common law, take the offender in custody unless a repetition of the offence were apprehended.

[130] Talfourd Serjt., for the defendant. It is submitted that the plea sufficiently discloses a breach of the peace at the time of the arrest. After stating that the plaintiff "with force and arms" came to the house and violently rang the bell, and continued so doing after being requested to desist, it states that "thereupon" (which must mean *instantly*) the defendant gave him in charge. In *Baynes v. Brewster* (2 Q. B. 375 ; 1 G. & D. 669) a plea justifying the plaintiff's arrest for creating a disturbance by rapping at the defendant's door was held bad because it appeared that the disturbance was over at the time of the arrest. [Tindal C. J. And that, although the plea stated that the defendant gave the plaintiff in charge "in order to preserve the peace." Cresswell J. What allegation is there in this plea of any thing having been done in breach of the peace ?] It alleges that the disturbance took place "against the peace of our Lady the Queen." [Tindal C. J. Those are mere verba sonantia. One party cannot arrest another for a mere unlawful act. Cresswell J. Every trespass is laid as a breach of the peace. Suppose the plaintiff had blown a horn in the front of the defendant's house, that might have been a breach of the metropolitan police act (2 & 3

(a) The metropolitan police act (2 & 3 Vict. c. 47), sec. 54, enacts "that every person shall be liable to a penalty of not more than forty shillings, who, within the limits of the metropolitan police district, shall, in any thoroughfare or public place, commit any of the following offences ; that is to say.

"16. Every person who shall wilfully and wantonly disturb any inhabitant by pulling or ringing any door-bell or knocking at any door without lawful excuse : . . .

"And it shall be lawful for any constable belonging to the metropolitan police force to take into custody, without warrant, any person who shall commit any such offence within view of any such constable."

Vict. c. 47. See sect. 54, div. 14); but it would not have been a breach of the peace. Tindal C. J. To make this a good defence there should be a direct allegation either of a breach of the peace committing at the time of giving the plaintiff into custody, or that a breach had been committed, and that there was reasonable ground for apprehending its renewal.]

The learned serjeant then prayed and obtained
Leave to amend.

[131] THE WARDENS AND COMMONALTY OF THE MYSTERY OF FISHMONGERS OF THE CITY OF LONDON v. JOHN ROBERTSON, JOHN GYLLYATT BOOTH, FRANCIS WILLIAM STAINES, AND FOUR OTHERS. Jan. 19, 1843.

[S. C. 6 Scott, N. R. 56; 12 L. J. C. P. 185. Discussed, *Copper Miners' Company v. Fox*, 1851, 16 Q. B. 237. Referred to, *South of Ireland Colliery Company v. Waddle*, 1868-69, L. R. 3 C. P. 471; L. R. 4 C. P. 617. Discussed, *Kidderminster Corporation v. Hardwick*, 1873, L. R. 9 Ex. 20. For subsequent proceedings see 1 C. B. 60; 3 C. B. 970.]

A declaration in assumpsit by a corporation, stated that the defendants had presented a petition to the House of Commons for leave to bring in a bill for draining certain slob or waste lands in Ireland, the introduction of which bill was opposed by the plaintiffs, and also by A.; and that by a certain agreement made "between B. on behalf of the plaintiffs, of the first part, C. on behalf of A. on the second part, and the defendants of the third part, it was agreed that the plaintiffs and A. should withdraw all opposition to the bill; that the clauses therein should be settled by the solicitors of the parties, in order that the bill might be as perfect and beneficial as it could be made; that the plaintiffs and A. should use all reasonable means and endeavours to promote the progress of the bill; that part of the slob should be allotted to the plaintiffs, and part to A.; that the defendants would, on the passing of the act, pay the plaintiffs 1000l.; and that the defendants would pay all costs of obtaining the act; that by a memorandum indorsed upon the agreement, with the consent of all parties, and signed by D. as agent to the defendants, it was declared that the plaintiffs and A. were severally and jointly bound; that the 1000l. was to be paid to the plaintiffs for expenses incurred by them in a survey and for plans, &c. of which the defendants were to have the benefit; but that the plans, &c. were to be returned to the plaintiffs if the 1000l. were not paid. The declaration then stated, that in consideration of the agreement and memorandum, and of the premises, and that the plaintiffs would perform all things in the said agreement, &c. on their part, the defendants promised to perform all things therein on their part, so far as concerned the interest of the plaintiffs; that the plaintiffs delivered the plans, &c.; that they withdrew all opposition to the bill; that A. did the same, &c., whereof the defendants had notice.—Held, that it might be inferred that the contract was not under seal.—Held also, that it was not such a contract as would fall within the exceptions to the general rule requiring corporate contracts to be by deed. But —Held also, that the contract having been executed on the part of the corporation, and the defendants having received the full consideration, the latter were bound by the contract, and the plaintiffs were entitled to sue thereon.—Semble, that if the contract had remained executory, the fact of the corporation having put it in suit would have amounted to an admission on record of their liability under it, so as to estop them from disputing such liability in a cross action.—Semble also, that up to the time of the corporation adopting the contract by performing the condition on their part, there was a want of mutuality, as they could not be compelled to perform the contract; and consequently that the defendants during that interval had the power to retract.—Held, that, the interest of the plaintiffs and of A. being several, the latter was properly omitted to be made a co-plaintiff.—Held also, that the agreement declared upon was not illegal as being an agreement against public policy.—Held also, that a plea—that the bill was not as perfect and beneficial as it might have been made, was no answer to the action.—Held also, that the using by the plaintiffs of all reasonable means and endeavours to procure the bill to pass, was not a condition precedent, and therefore that a plea traversing that averment was bad.—Held also, that a plea stating that the plaintiffs had presented a petition to the

House of Lords against the preamble of the bill was bad, as amounting at least to an argumentative traverse of one of the two averments,—that the plaintiffs withdrew their opposition, and that they used all reasonable means to promote the bill. —Semble, that a plea directly traversing the averment, that the plaintiffs withdrew their opposition, was good.

Assumpsit. The first count of the declaration stated, that before and at the time of the making and entering into the articles of agreement therein [132] after in that count mentioned and set forth, a petition had been presented to the House of Commons, and was then pending, at the instance and on behalf of the defendants, that is to say, for leave to bring into the said House of Commons a bill for draining, embanking and reclaiming certain slob or waste lands in Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry, in Ireland; that the plaintiffs, before and until and at the time of making of the said articles of agreement thereafter next mentioned, had opposed, and were then opposing, and objected to, the bringing in and passing of such bill: that one Robert Ogilby at those times also objected to, and opposed, the introduction of the same bill, separately and apart from the plaintiffs, and on his own behalf: that theretofore, to wit, on the 17th of March, 1838, by certain articles of agreement in writing then made and entered into by and between J. D. Towze, for and on behalf of the plaintiffs, therein described as the wardens and commonalty of the mistery [133] of fishmongers of the City of London, commonly called the Fishmongers' Company, of the first part, T. G. Kensit, for and on behalf of the said R. O., of the second part, and the defendants of the third part: after reciting that a petition had then lately been presented to the House of Commons at the instance and on behalf of the defendants, the parties thereto of the third part, for leave to bring in a bill for draining, embanking and reclaiming the slob or waste land in Lough Swilly and Lough Foyle, in the said counties of Donegal and Londonderry (being the petition thereinbefore mentioned), and that certain proceedings had been thereupon had, and that the plaintiffs and the said R. O. were then respectively seised, possessed of, or otherwise entitled to, certain lands abutting upon, or adjacent to, certain parts of the said slob or waste land in Lough Foyle aforesaid, and, in respect of such lands, then were or claimed to be entitled to the slob or waste land adjacent thereto, and to certain rights and privileges in, over and upon the same; and also reciting that the plaintiffs and the said R. O. then objected to the said intended bill, and the powers and authorities thereby sought to be obtained, as injurious to their said respective rights, and had by their agents opposed the proceedings necessary for the introduction thereof into Parliament (being the opposition by the plaintiffs and by the said R. O. respectively, thereinbefore mentioned) it was by the said agreement, for the purpose of preventing the expense of further opposition to the said intended bill, and for settling and adjusting the rights of the plaintiffs and R. O. respectively to the said slob or waste land so sought to be reclaimed, mutually agreed by and between the said parties to the said agreement, and they did thereby mutually agree each with the others and other of them, in manner following, that is to say, that the plaintiffs and the said R. O. should respectively withdraw all opposition [134] to the further progress of the bill to be brought into Parliament, and promoted by the defendants, the parties thereto of the third part, for draining, embanking and reclaiming the said slob or waste land in Lough Foyle aforesaid; that the several powers and authorities to be granted by the said bill, and the several clauses, provisoes and restrictions and stipulations therein to be contained, should be agreed upon and settled by and between the solicitors of the said parties to the said agreement before any proceedings should take place thereupon in committee of either House of Parliament to the intent and with the object that the said bill might be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it could be made; and that, if, in framing and perfecting the said bill, any difference or dispute should arise between the said parties, or any of them, in regard to any clause, matter or thing which any of the said parties might desire to insert or have omitted in the said bill, such difference or dispute should be referred forthwith to a certain person in the said agreement described as P. B. Brodie, Esq., of Lincoln's Inn Fields, for his opinion and determination, which should be final and conclusive on the said parties; that the plaintiffs and R. O. respectively should, by petition or otherwise, at the expense of the defendants, use all reasonable means and endeavours to promote the progress of the bill, and

procure an act of parliament to pass thereupon; that such part of the said slob or waste land as was opposite to the plaintiffs' estate, bounded by the canal on the one side and by Mr. Maxwell's property on the other, and extending to the site of the proposed embankment, as laid down in Mr. McNeil's plan, should be allotted and given to the plaintiffs; that a proportion equal to one-tenth part of the whole of the slob or waste land opposite to the frontage of the lands of the said R. O., which should be [135] reclaimed under the powers of the intended act, should be allotted and given to the said R. O., such proportion of the said slob or waste land to be part of the slob opposite such frontage as aforesaid, and to be selected by the said R. O., and the defendants, with due regard to the convenience and interest of the said R. O., so far as the same could be accomplished consistently with an arrangement for the cession of further portions of the said slob entered into by one of the defendants, with certain other persons; it being understood that such arrangement was not to affect or prejudice any right of the said R. O.; that such respective allotments or proportions should be absolutely reserved in the said intended act to the plaintiffs and their successors, and to the said R. O. and his heirs, respectively, free and indemnified, of and from and against all costs, charges and expenses attending the embanking, draining and reclaiming of the said slob or waste land, or any other charge, stipulation, restriction or condition whatsoever: and the defendants did also in and by the said agreement undertake and agree that they would, on the passing of the said intended act, pay to the plaintiffs the sum of 1000l., and that the defendants should and would pay all costs and expenses of, and attendant upon, the application for and obtaining the said act: and lastly, it was in and by the said articles agreed, by and on the part of the plaintiffs and of the said R. O. that the aforesaid proportions or allotments of the said slob or waste land, when reclaimed, which should be allotted to them respectively as aforesaid, should be received and taken by them respectively, in full of all rights and claims of the plaintiffs and the said R. O. respectively, or any of their respective tenants, claiming from or under them or him, in respect of the said slob or waste land; and the plaintiffs and the said R. O. respectively would protect and indemnify the defendants from and against any right or [136] claim derived from or under the plaintiffs and the said R. O. respectively, which should or might be made by any of their said tenants respectively in, to, or upon the said slob or waste land, or any part thereof, save and except as to any contract or engagement which might have been then entered into by the defendants, or any or either of them, in respect thereof: That after the making of the said articles of agreement, to wit, on the said 17th of March 1838, by a certain memorandum then written and indorsed on the said articles of agreement, by and with the consent and approbation of all the said parties to the said articles of agreement, and then signed by one J. M. Pearce as the solicitor and agent of the defendants, it was declared to be understood between the said parties to the said articles of agreement, that the plaintiff and the said R. O. were only severally, and not jointly, held and bound for the fulfilment of the said agreement on their own respective parts, but not for each other; and that the sum of 1000l. so in the said articles of agreement mentioned to be paid to the plaintiffs was for certain costs and expenses which they the plaintiffs had been put to during the then present year, partly in a certain survey made by Mr. McNeil, and for his plans and valuations, which survey, plans and valuations the defendants were to have the benefit of; but that they were to be forthwith returned to the plaintiffs if the said sum of 1000l. should not be duly paid as mentioned in the said agreement; and it was also thereby agreed that the said agreement for withdrawing the opposition to the bill and facilitating the same as in the said articles of agreement mentioned, should only be and remain in force for the then present session of parliament 1837-1838. And that the said articles of agreement and the said memorandum, so indorsed thereon as aforesaid, having been so made as aforesaid, afterwards to wit, on the said 17th of March in the year last aforesaid, in consideration thereof, and of the pre-[137]-mises aforesaid, and also in consideration that the plaintiffs would then observe, perform, fulfil and keep all things in the said articles of agreement and memorandum contained on their part and behalf to be observed, performed, fulfilled and kept, the defendants then promised the plaintiffs that they the defendants would observe, perform, fulfil and keep all things in the said articles of agreement and memorandum contained on their part and behalf to be observed, performed, fulfilled and kept, so far as concerned the interest of the plaintiffs. That thereupon afterwards, to wit, on, &c., last afore-

said, and on the faith of and in pursuance of the terms of the said articles of agreement and memorandum, they the plaintiffs, confiding, &c. did deliver to the defendants, and the defendants then received from the plaintiffs the said survey and plans and valuations in the said memorandum mentioned, and being of great value, to wit, of the value of 1000l. ; and the defendants then and from thence hitherto have actually had and enjoyed the full benefit and advantage thereof according to the true intent and meaning of the said memorandum, and had derived great benefit and advantage therefrom ; that, from the time of the making of the said articles of agreement and memorandum, and the said promise of the defendants in that behalf, and on the faith thereof, they, the plaintiffs, did withdraw all opposition to the introduction of the said bill, in the said articles of agreement mentioned and referred to, into parliament, and to the proceedings of the defendants necessary for that purpose ; and that the said R. O. having then also in like manner withdrawn all such opposition as last aforesaid, thereupon and by reason of the withdrawal of such opposition to the introduction of the said bill as aforesaid, to wit, on the 23d of March 1838 ; and during the said session of parliament in the said memorandum mentioned, they, the defendants, ob-[138]-tained leave to bring in and introduce their said bill into parliament, to wit, into the House of Commons : and the same bill was afterwards, to wit, on the 26th of March in the year last aforesaid, accordingly brought in and introduced, to wit, into the House of Commons, and there promoted by the defendants, that is to say, for draining, embanking and reclaiming the said slob or waste land in Lough Foyle as aforesaid ; which said bill was intituled, and in fact was, "A bill for draining and embanking certain lands in Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry," and was and is the said bill so intended to be brought into parliament, and promoted by the defendants, as in the said articles of agreement mentioned, in pursuance of the said petition therein also mentioned ; that, after the bringing in of the said last-mentioned bill, and before any proceedings took place in committee of either house of parliament upon the powers and authorities to be thereby granted, or the clauses, provisoes, restrictions and stipulations therein contained or to be contained or any of them, to wit, on the said 26th of March 1838, and on divers days and times between that day, and any proceedings taking place as last aforesaid in committee of either house of parliament, the several powers and authorities granted or to be granted by the said last-mentioned bill, and the several clauses, provisoes, restrictions and stipulations therein to be contained, were discussed and considered by the respective solicitors of and for the plaintiffs and the said R. O. and the defendants respectively, to the intent and with the object that the said last-mentioned bill might be framed and perfected so as to be as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as it could be made, according to the true intent and meaning of the said articles of agreement and memorandum ; that, in framing [139] and perfecting of the said bill as last aforesaid, and during such discussion and consideration, divers disputes and differences having then arisen between the said parties in regard to certain clauses, matters and things which the plaintiffs and the said R. O. and the defendants respectively then wished to insert, and to certain other clauses, matters and things which the plaintiffs and the said R. O. and the defendants then respectively wished to omit, in and from the said last-mentioned bill, the same disputes and differences were then, to wit, on the 4th of May in the year last aforesaid, in pursuance of the said agreement in that behalf, forthwith referred by the plaintiffs and the said R. O., and the defendants to the said P. B. B., for his opinion and determination : that afterwards, and before any proceedings were taken thereupon in committee of either house of parliament, to wit, on the day and year last aforesaid, the said P. B. B., with the consent, and at the request, of the plaintiffs and the said R. O. and the defendants, (the plaintiffs and the said R. O. and the defendants respectively, then mutually agreeing to be bound and concluded thereby, as to the said matters in difference and dispute,) did give his opinion and determination upon the said clauses, matters and things so in dispute and difference, and referred to him as aforesaid ; that afterwards, and before any proceedings took place thereupon in committee of either house of parliament, to wit, on the day and year last aforesaid, the last-mentioned bill, and the several powers and authorities to be thereby granted, and the several clauses, provisoes, restrictions and stipulations therein to be contained to wit, as settled and determined by the said P. B. B. as aforesaid, were agreed upon, determined and settled by and between the

plaintiffs and the said R. O. and the defendants, and their respective solicitors, to wit, to the intent and with the object aforesaid; and the same last-mentioned bill so [140] agreed upon, settled and determined as last aforesaid then was as perfect and beneficial for the interest of all the said parties in the reclamation of the said slob or waste land as the same could be made, according to the true intent and meaning of the said articles of agreement and memorandum, and the said promise of the defendants: that, among other clauses, provisoes, restrictions and stipulations contained in the said last-mentioned bill so settled and agreed upon as last aforesaid, were contained divers clauses and stipulations whereby the said part of the said slob or waste land which was so agreed to be allotted and given and reserved to the plaintiffs as thereinbefore was mentioned, was and would be, on the passing of the said bill, as so settled and agreed upon as last aforesaid, allotted and absolutely reserved in and by the said intended act to the plaintiffs and their successors, free and indemnified of and from and against all costs, charges and expenses attending the embanking, draining and reclaiming the said slob, or any other charge, stipulation, restriction or condition whatsoever, according to the true intent and meaning of the said articles of agreement and memorandum respectively: that all opposition to the introduction of the said bill into parliament having been so withdrawn as aforesaid, and the same bill having been so introduced into the House of Commons as aforesaid, and the said several powers and authorities to be granted by the said bill when passed into a statute, and the several clauses, provisoes, restrictions and stipulations to be therein contained, having been determined, agreed upon and settled as last aforesaid by and between the plaintiffs and the defendants and the said R. O., and their respective solicitors, according to the true intent and meaning of the said articles of agreement and memorandum; they, the plaintiffs, further confiding, &c., did thenceforth continually from time to time, and at all [141] times up to and until the time of the passing the act of parliament thereafter in that count mentioned, use all reasonable means and endeavours to promote the progress of the said bill so determined, agreed upon and settled as aforesaid, and to procure an act of parliament to pass thereupon, according to the true intent and meaning of the said articles of agreement and memorandum; and did withdraw all opposition of them, the plaintiffs, to the progress of the last-mentioned bill, according to the true intent and meaning of the said articles of agreement and memorandum; and that, after the making of the said promise of the defendants, and before the passing of the act of parliament lastly above referred to, to wit, on the 11th of May 1838, they, the plaintiffs, did, in further pursuance of the said articles of agreement, and on the faith of the said promise of the defendants, and at their request, present a petition to the House of Commons in favour of the said bill so brought in and promoted by the defendants, whereby it was prayed by the plaintiffs that the said bill might pass into a law; and that they, the plaintiffs, by means of the said petition and otherwise, did endeavour to promote the progress of the said last-mentioned bill, and to procure an act of parliament to pass thereupon, according to the true intent of the said articles of agreement and memorandum; that the said R. O. did also, in like manner, withdraw all opposition to the progress of the said bill so determined, agreed upon and settled as aforesaid, and also use all reasonable means and endeavours to promote the progress of the said last-mentioned bill, and to procure an act of parliament to pass thereupon as last aforesaid: that, through and by means of the plaintiffs having so endeavoured, and in and about their said endeavours, to promote the progress of the said last-mentioned bill, and to procure an act of parliament to pass thereupon as aforesaid, they, the [142] plaintiffs, had been and were necessarily put to and occasioned, and obliged to, and did actually incur, sustain and pay, certain reasonable and proper costs and expenses, amounting to a large sum of money, to wit, 1200l.: that such costs and expenses were so incurred and sustained from time to time at the request of the defendants, and during the said session of parliament in the said memorandum mentioned: that afterwards, and during the said session of parliament in the said memorandum mentioned, and long before the commencement of this suit, to wit, on the 27th of July 1838, the said last-mentioned bill so brought into parliament as aforesaid, with divers alterations in the same, and additions thereto, and which had not been settled or agreed upon by the plaintiffs, or their solicitor, or referred to or determined upon by the said P. B. Brodie, was passed and carried through parliament, and then received the assent of our Sovereign Lady Queen Victoria; and the same then, to wit, on the day and year last aforesaid, became and was, and thence

hitherto has been, and still is an act of parliament made and passed in the session of parliament held in the first and second years of the reign of Queen Victoria, and was and is intituled, "An act for draining and embanking certain lands in Lough Swilly and Lough Foyle, in the counties of Donegal and Londonderry," of which the defendants then had notice; that the plaintiffs and the said R. O. had been at all times since the making of the said articles of agreement hitherto ready and willing that such part of the said slob or waste land as is opposite to the said estate of the plaintiffs, and bounded by the before-mentioned canal on the one side, and by the said property of the said Mr. Maxwell on the other, and extending to the site of the said proposed embankment as laid down in the said Mr. M'Neil's plan, should be allotted and given to the plaintiffs, and should be absolutely reserved to them [143] and their successors in and by the said intended act in the said articles of agreement mentioned; and that the said allotment or proportion of the said slob or waste land so proposed to be allotted and given to the said R. O. should be allotted and given to him, and absolutely reserved to him and his heirs by the said intended act, according to the true intent and meaning of the said articles of agreement and memorandum: that they, the plaintiffs, had also always from the time of the making of the said articles of agreement, hitherto been ready and willing to receive and take the aforesaid proportion or allotment so agreed to be allotted and given and reserved to them, as in the said articles of agreement mentioned, of the slob or waste land in full of all rights and claims of the plaintiffs, and of all and every of their respective tenants claiming from or under them or him in respect of the said slob or waste land, and to protect and indemnify the defendants from and against any right or claim derived from or under the plaintiffs or their successors, which should or might be made by any of their respective tenants in, to or upon the said slob or waste land, or any part thereof, save and except as in the said articles of agreement mentioned, according to the true intent and meaning of the said articles of agreement; and that no such claim or demand had hitherto been made by the tenants of the said plaintiffs, or by any or either of such tenants, in, to or upon the said slob or waste land, or any part thereof.

Breach: that although, from the time of the making of the said articles and memorandum respectively, the plaintiffs had always well and truly observed, performed, fulfilled and kept the same in all things on their part and behalf to be observed, performed, fulfilled and kept; of all which premises the defendants before the commencement of the suit, and before and at the several times of the committing of the several [144] breaches of promise by the defendants in that count after mentioned, respectively had notice: yet the defendants, disregarding their said promise in that behalf, after the said bill had been so settled, determined and agreed upon as aforesaid, according to the true intent and meaning of the said articles of agreement, and before the said bill had passed the said House of Commons, and during the said session in the said memorandum mentioned, to wit, on the 24th of May 1838, and on divers other days and times between that day and the time of the said bill passing the said House of Commons, did, without the consent and against the will of the plaintiffs and their solicitor,—of which the defendants then had notice,—cause and procure divers powers and authorities, and divers clauses, provisoes, restrictions and stipulations to be inserted and contained in the said bill, and certain proceedings to take place thereupon, at the several times aforesaid, before the said committee of the House of Commons, without the said last-mentioned powers and authorities, clauses, provisoes, restrictions and stipulations, or any or either of them, having been first agreed upon or settled by the said plaintiffs, or their solicitors, or any other person on their behalf, and without the same or any or either of them having been approved of, settled or determined by the said P. B. B., according to the terms of the said agreement, although divers disputes and differences then arose between the plaintiffs and the defendants respecting the same, and in framing and perfecting the said bill in respect thereto: that such last-mentioned powers and authorities, clauses, provisoes, restrictions and stipulations were not nor are, nor were nor are, nor was nor is, any or either of them, in accordance with the said bill and the said powers and authorities, clauses, provisoes, restrictions and stipulations so settled and determined by the said P. B. B. as aforesaid, and so agreed upon, determined and settled by and between [145] the plaintiffs and defendants and the said R. O. as thereinbefore mentioned, but contrary thereto, and to the true intent and meaning of the said articles of agreement and the promise of the defendants; and through and by means of such last-mentioned powers and authorities,

clauses, provisoes, restrictions and stipulations, so caused to be inserted and contained in the said bill by the defendants as last aforesaid, the said allotment or proportion of the said slob or waste land so agreed to be allotted and given and reserved to the plaintiffs as aforesaid, was not so allotted, given or reserved in or by the said bill, to the plaintiffs and their successors, according to the true intent and meaning of the said articles of agreement and the said promise of the defendants: that, on the passing of the said intended act, and by reason of the premises last aforesaid, the said last-mentioned proportion or allotment of the said slob or waste land was not nor is absolutely reserved to the plaintiffs and their successors in and by the said act of parliament so made and passed as aforesaid, contrary to the said articles of agreement and promise of the defendants in that behalf, and in breach thereof; and the plaintiffs had thereby not only lost and been deprived of divers great profits, benefits and advantages, to wit, of the value of 1000*l.*, which they, the plaintiffs, might, and otherwise would, have derived and acquired from the said last-mentioned part of the said slob or waste land being so reserved to them as aforesaid, but, by means of the premises aforesaid, they, the plaintiffs, were and had been put to and occasioned, and forced and obliged to incur, and necessarily did incur and sustain, divers other costs, charges and expenses, to wit, amounting to the sum of 1300*l.*, in and about the endeavouring to procure the said part of the said slob or waste land so agreed to be allotted and given to the plaintiffs as aforesaid, to be absolutely reserved to them in and by the said intended [146] act, according to the true intent and meaning of the said articles of agreement, and in accordance with the said bill so agreed upon, settled and determined, as thereinbefore mentioned.

Second breach: that the defendants did not nor would, nor did nor would any or either of them, or any persons or person on their behalf, on, or at any time after, the passing of the said act of parliament, pay or cause to be paid to the plaintiffs the said sum of 1000*l.* in the said articles of agreement and memorandum mentioned, or any part thereof, although a reasonable time for paying the same elapsed after the passing of the said act and before the commencement of this suit, and although the defendants were during that time, to wit, on the 1st of September 1838, and often afterwards, requested to pay the said sum of 1000*l.* in the said articles of agreement and memorandum mentioned, to the plaintiffs; but the defendants, to pay the same or any part thereof to the plaintiffs, had wholly neglected, &c., and the last-mentioned sum of 1000*l.*, and every part thereof, still was and remained wholly due and owing, and in arrear and unpaid from the defendants to the plaintiffs.

Third breach: that the defendants had not at any time before or since the passing of the said act of parliament, although often requested so to do after the making of such default in payment of the last-mentioned sum of 1000*l.* as last aforesaid, to wit, on the 14th of May 1839, returned the said survey, plans and valuations in the said memorandum mentioned, and being of the value aforesaid, or any of them, to the plaintiffs; but the defendants to return the same or any of them to the plaintiffs had wholly neglected, &c., and had kept and retained the same, contrary to their said promise.

Fourth breach: and that, although such reasonable costs and expenses were, at the request of the defendants, incurred, sustained and paid by the plain-[147]-tiffs, as thereinbefore mentioned, in using their best endeavours by petition and otherwise as aforesaid to promote the progress of the said bill so agreed, determined and settled by the plaintiffs and the said R. O. and the defendants as aforesaid, and to procure the same to be passed into an act of parliament as thereinbefore mentioned, to wit, to the amount of 1200*l.*; of which the defendants, after the passing of the said act of parliament, and before the commencement of this suit, to wit, on the 1st of September 1838, had notice; and although the defendants were then requested to pay the same, and a reasonable time for that purpose had thereafter and before the commencement of the suit elapsed; yet the defendants had not paid the said last-mentioned sum of money, or any part thereof, to the plaintiffs, or to any other person or persons, but had thitherto wholly neglected, &c., and the same and every part thereof was still due and owing and unpaid by the defendants.

There was also a count upon an account stated.

The defendants severed in pleading, the defendant Robertson pleading *inter alia* as follows:—

Secondly, that the plaintiffs, at the time of the making of the said articles of agree-

ment, and also of the said memorandum in the first count mentioned, were and still are a corporation aggregate, and which same corporation aggregate was then and still is called and known by the name of The Wardens and Commonalty of the Mistery of Fishmongers of the City of London; that the said articles of agreement and memorandum were not, nor was either of them, made or entered into by the plaintiffs by or under the common seal of the corporation; and that the said articles and memorandum were not, nor was either of them, made or entered into by any person for that purpose, duly authorised by any instrument in writing under the common seal of the said corporation. Verification.

[148] Thirdly, as to all the several breaches in the first count of the declaration above assigned—except as to the breach above assigned, whereby it was alleged that the defendants had not returned the said survey, plans and valuations in the said first count mentioned to the plaintiffs, but had neglected and refused to return the same, and had kept and retained the same, contrary to their said supposed promise, in manner and form as in the said first count alleged and expressed—that the said bill in the said first count mentioned, so agreed upon, settled and determined as in the same count mentioned, was not as perfect and beneficial for the interest of all the said parties in the said first count mentioned, in the reclamation of the said slob or waste land in the same count mentioned, as the same bill could be made, according to the true intent and meaning of the said articles of agreement and memorandum in that count mentioned, *modo et formâ*:—concluding to the country.

Fourthly, as to all the several breaches in the first count of the declaration above assigned—except as to the breach above assigned, whereby it was alleged that the defendants had not returned the said survey, &c.—that the plaintiffs did not continually from time to time, and at all times up to and until the time of passing the act of parliament in the first count mentioned, use all reasonable means and endeavours to promote the progress of the said bill in the same count mentioned, and to procure an act of parliament to pass thereupon, *modo et formâ*:—concluding to the country.

Fifthly, as to all the said several breaches in the first count of the declaration above assigned—except as to the breach above assigned, whereby it was alleged that the defendants had not returned the said survey, &c.—that the plaintiffs had not, from the time of the making of the said articles of agreement and memorandum in the first count mentioned, always well or truly observed, [149] performed, fulfilled or kept the same in all things on their part and behalf to be observed, performed and fulfilled and kept in manner and form as the plaintiffs had above thereof in the first count alleged against the defendants; but on the contrary thereof amongst other things, they the plaintiffs, after the making of the articles of agreement and memorandum respectively, and before the said bill in the first count mentioned was passed or carried through parliament, or received the assent of our Sovereign Lady the Queen, or became an act of parliament, as in the first count mentioned (a), and before the said bill had been passed by the House of Lords, and whilst the said bill was in and was passing through the House of Lords, to wit, on the 18th of June 1838, did present a petition to the House of Lords, and did thereby petition the said House of Lords, against the preamble of the said bill, and against the passing of the said bill, contrary to the form and effect of the said articles of agreement and memorandum. Verification.

The defendant Booth pleaded, secondly, as to the first count, that the plaintiffs, at the time of the making of the articles of agreement and also of the memorandum in the first count mentioned, were and from thence have been and still were a corporation aggregate, and which corporation aggregate was then and still was called and known by the name of "The Wardens and Commonalty of the Mistery of Fishmongers of the City of London;" that the articles of agreement and memorandum and each of them were made concerning certain estates and interests in lands and tenements, and that the same articles and memorandum did not, nor did either of them, relate to or concern any trade or merchandise whatso-[150]ever; that the articles of agreement and memorandum were not, nor were either of them, made or entered into by the plaintiffs by or under the common seal of the plaintiffs (so being such corporation as

(a) In the defendant Booth's sixth plea the following words were here introduced, "And before any breach by the defendants of the promise of the defendants in that count mentioned."

aforesaid); and the articles and memorandum were not, nor were either of them, made or entered into by any person for that purpose duly authorised by any instrument in writing under the common seal of the plaintiffs so being such corporation as aforesaid. Verification.

The second, third, fourth and fifth pleas, pleaded by the defendant Booth, were in substance the same as those pleaded by the defendant Robertson.

The defendant Staines pleaded fourthly, to the whole of the first count, a plea similar to the fourth plea of the defendant Robertson.

Fifthly, to the first count; that the plaintiffs did not withdraw all opposition to the progress of the said bill in that count mentioned, according to the true intent and meaning of the said articles of agreement and memorandum, *modo et formâ*: concluding to the country.

Replication to the second plea of the defendant Robertson. The plaintiffs, not denying the matters stated in the said second plea, for replication, nevertheless, said, that, before and at the times of the making and entering into the said articles of agreement and memorandum respectively in the said first count mentioned, and which on the faith of the defendants' said promise were so acted upon and performed by the plaintiffs on their part as therein also mentioned, the said J. D. T. had been and was the attorney and solicitor of the plaintiffs, and had been and was employed by them, the plaintiffs, as such solicitor and as the agent for them, and on their behalf, in and about the conduct and management of the [151] said opposition of the plaintiffs to the bringing in and passing of the said bill in the first count first above mentioned and referred to, and the supporting the said claims of the plaintiffs to, in, over and upon the said slob or waste land in the said articles of agreement mentioned, and also in and about the making and entering into the said articles of agreement and memorandum respectively; and that the said articles of agreement and memorandum were respectively made and entered into and consented to and approved of, as in the said first count mentioned, by the said J. D. T., as such solicitor and agent as aforesaid, for and on behalf of the plaintiffs, and in the course and performance of his the said J. D. T.'s employment and duty as such solicitor and agent as aforesaid, and by and with the authority, consent and approbation of the plaintiffs, and of which the defendants, at the respective times of the making and entering into the said articles of agreement and memorandum respectively, had notice. Verification.

Special demurrer to the third plea of the defendant Robertson; assigning for causes, that the said third plea traversed, and attempted to put in issue, matter which was wholly immaterial to the merits of the case, and to the matters to which the same was pleaded; and that, if, as the said third plea must be taken to admit, the agreement and memorandum were made and entered into and fully performed by the plaintiffs on their part, and the disputed clauses and provisions were settled by Mr. Brodie as alleged in the first count, it was perfectly immaterial as to each and every of the breaches of contract charged in the first count, and to which the said third plea was pleaded, especially as to the nonpayment of the costs and the 1000*l.*, that the bill after it was settled and agreed upon, was not so beneficial as it might have been, as alleged in the said third plea; that [152] it was material only that the differences should have been settled by Mr. Brodie; that the said third plea shewed no default or failure of consideration on the part of the plaintiffs, nor any valid excuse or justification of the defendants' breaches of contract to which the said third plea was pleaded, and did not even disclose any grounds for a cross action against the plaintiffs; that it was not a matter contracted for by the agreement that the bill should be so beneficial as in the third plea mentioned; and that this defendant was by his own argument, and by consenting to the bill, as admitted by the pleas, precluded from now disputing the matters attempted to be put in issue by the said third plea; and that, at most, the third plea could be an answer, if at all, only to the first breach charged in the declaration; and that, if the third plea contained sufficient matter of defence (*) to the breaches of promise to which the same was pleaded, the same also would amount to an answer and defence to the whole of the first count of the declaration; that the third plea improperly contained and was an answer and defence to a further and other part of the first count of the declaration than was professed to be answered by the said third plea, that is to say, to the whole of the first count; and, if judgment on the said third plea should be given for the defendant, the court could not consistently give judgment for the plaintiffs, as to the matter excepted in the introductory part of such

plea, and would be uncertain for whom judgment ought to be given; and that the said third plea was in other respects wholly immaterial, improper, and insufficient, &c. Joinder.

Special demurrer to the fourth plea of the defendant Robertson; assigning for causes, that the said plea tendered an issue which was wholly immaterial and insufficient; that the portion of the agreement on the part [153] of the plaintiffs, the partial breach whereof was alleged and relied upon by the said fourth plea, was not in the nature of a condition precedent to the performance of the defendant's part of the contract, but was an independent agreement; that it formed a part only of the consideration for the defendant's promise; that the breach of it might be compensated in damages, and afforded a ground only for a cross action, without being a defence in the present case: that the fourth plea admitted that the plaintiffs delivered over the survey, plans and valuations, withdrew their opposition to the introduction of the bill, and also presented a petition in its favour, and otherwise promoted it, withdrawing also, until the passing of the act, all opposition to its further progress, and that the defendants had had, and still had, the benefit of the said survey, plans and valuations, and had further obtained the advantage, by the plaintiffs' acts, of having been able to bring in their bill, and that there had been in other respects a partial performance of the contract on the part of the plaintiffs; and yet that the same fourth plea contained no sufficient answer or matter of defence as to the said breaches of contract in the first count of the declaration mentioned, and to which the said fourth plea was pleaded, or any of them, more especially as to the breach in nonpayment of the 1000l. which was to be paid at a specified time, and on account of the said survey, plans and valuations, which the defendants had actually enjoyed to their own use (*); that it was not in or by the fourth plea alleged that the defendants, or either of them, requested the plaintiffs to use any means or endeavours, or that the plaintiffs could have used any means or endeavours, to promote the progress of the bill, or that the defendants, or either of them, tendered or offered, or were or was ready or willing, to pay to the plaintiffs the expenses thereof, or that the plaintiffs had notice of [154] the same; that if the said fourth plea contained sufficient matter of defence, &c. (Concluding as the demurrer to the third plea from the (*).) Joinder.

Special demurrer to the fifth plea of the defendant Robertson; (assigning similar causes to those assigned in the demurrer to the fourth plea down to the (*); and continuing thus); that the said fifth plea did not sufficiently traverse or confess and avoid the matters to which the same was pleaded, or any of them; that the same plea amounted to and was an argumentative denial of the allegation contained in the first count, that the said plaintiffs did use all reasonable means and endeavours to promote the progress of the said bill, and to procure an act of parliament to pass thereupon, as therein alleged; that the said fifth plea amounted to and was an argumentative denial of the allegation contained in the first count, that the plaintiffs did withdraw all opposition of them, the plaintiffs, to the progress of the said bill, according to the true intent and meaning of the said articles of agreement and memorandum; that the plea improperly concluded with a verification, instead of to the country; that it was not alleged in the plea, that the petition therein mentioned was presented by the plaintiffs before any breach by the defendants of their said promise in the first count mentioned as to which the same plea was pleaded, nor did it sufficiently appear in or by the plea, at what time the plaintiffs presented the petition therein mentioned; that the plea did not sufficiently confess the breach of promise in the first count firstly above assigned, being a matter to which the plea was pleaded; and if the same is sufficiently confessed, then that it appeared by the first count, and was not denied by the plea, that the defendants broke their said promise as to the breach in the said first count firstly above assigned, and to which the plea was pleaded, before the bill had passed the House of Com-[155]-mons, and before the alleged breach of contract by the plaintiffs in the fifth plea mentioned and to which the same plea was pleaded; that from the said fifth plea, it appeared that the plaintiffs partially broke their contract as in that plea alleged, after such breach by the defendants of their said promise as last aforesaid; that, if the plea contained sufficient matter of defence, &c. (Concluding as the demurrer to the third plea from the (*).) Joinder.

The plaintiffs also replied and demurred in a similar manner to the pleas of the defendant Booth. Upon each demurrer there was a joinder in demurrer.

The plaintiffs also demurred to the fourth and fifth pleas respectively of the

defendant Staines, assigning similar causes to those assigned in the demurrer to the fourth plea of the defendant Robertson, down to the (*). Joinder.

Rejoinder by the defendant Robertson to the replication to his second plea, that the plaintiffs, before and at the several times of the making and entering into the said articles of agreement and memorandum respectively in the said replication and first count mentioned, were and still are a corporation aggregate, and which same corporation was before and at the several times and still is called and known by the name of The Wardens and Commonalty of the Mistery of Fishmongers of the City of London; that the said bill in the said replication and first count respectively mentioned, and the said opposition to the bringing in and passing of the same bill in the replication and first count respectively mentioned, and also the said claims of the plaintiffs, and the said articles of agreement and memorandum also in the said replication and first count respectively mentioned, severally [156] and respectively solely related to and concerned certain estates and interests in lands and tenements, and did not nor did any or either of them relate to or concern any trade or merchandise whatsoever; that before and at the said several times of the making and entering into the said articles of agreement in the said replication and first count respectively mentioned, the said plaintiffs by parol only, and without and not by any instrument in writing under the common seal of the plaintiffs, or otherwise howsoever, appointed and employed the said J. D. T. as, and to be, attorney and solicitor and agent of them the plaintiffs, for them and in their behalf in and about the conduct and management of the said opposition of the plaintiffs and the supporting of the said claims, and also in and about the making and entering into the said articles of agreement and memorandum respectively; that the said J. D. T., by virtue of such parol appointment and employment of him the J. D. T. as aforesaid, and not otherwise, was so employed by them, the plaintiffs, as such solicitor and agent for them and on their behalf, in and about the conduct and management of the said opposition of the plaintiffs to the bringing in and passing of the said bill, and the supporting the said claims, and also in and about the making and entering into the said articles of agreement and memorandum respectively, as in the said replication mentioned; that the said J. D. T., by parol only, and without and not by any instrument in writing under the common seal of the plaintiffs, or under the seal of the said J. D. T., made and entered into and consented to and approved of the said articles of agreement and memorandum respectively; that the said articles of agreement and memorandum were respectively made and entered into, and consented to and approved of, by the said J. D. T., as such solicitor and agent, for and on behalf of the plaintiffs, and in the [157] course and performance of his the said J. D. T.'s employment and duty as such solicitor and agent, as in the said replication mentioned, by virtue of the said J. D. T.'s so, by parol and without and not by any such instrument in writing under the common seal of the plaintiffs, or under the seal of the said J. D. T. as aforesaid, so making and entering into, and consenting to, and approving of, the said articles of agreement and memorandum respectively, and under and by virtue and in pursuance of the said parol appointment and employment of him the said J. D. T. as aforesaid, and not otherwise, he the said J. D. T. having been so appointed and employed by parol only, and without, and not by, any instrument in writing under the common seal of the plaintiffs as aforesaid; that the plaintiffs by parol only, and without and not by any instrument in writing under the common seal of the plaintiffs, or otherwise howsoever, did authorise, and did consent to, and did approve of the said J. D. T. as such solicitor and agent (so appointed and employed by parol, and not otherwise, as aforesaid), for and on behalf of the plaintiffs, and in the course and performance of his, the said J. D. T.'s, employment and duty, as such solicitor and agent (so appointed, &c.), making and entering into, and consenting to, and approving of the said articles of agreement and memorandum respectively, in manner aforesaid; that the said articles of agreement and memorandum were respectively made and entered into, and consented to, and approved of, by the said J. D. T. as such solicitor and agent (so appointed, &c.), for and on behalf of the plaintiffs, and in the course and performance of his, the said J. D. T.'s employment and duty as such solicitor and agent (so appointed, &c.), by and with the authority, consent and approbation of the plaintiffs, as in the said replication and therein-before mentioned [158] and alleged, under and by virtue of the plaintiffs so by parol only, and without and not by any writing under the common seal of the plaintiffs or otherwise, howsoever, authorising and consenting to, and

approving of, the said J. D. T., as such solicitor and agent, (so appointed, &c.), for and on behalf of the plaintiffs, and in the course and performance of his, the said J. D. T.'s employment and duty as such solicitor and agent (so appointed, &c.), so making and entering into, and consenting to, and approving of, the said articles of agreement and memorandum respectively, by parol only, and without, and not by, any instrument under the said common seal of the said plaintiffs, or under the seal of the said J. D. T. as therein-before mentioned; without this, that the said articles of agreement and memorandum were respectively made and entered into, and consented to, and approved of, as in the said replication and first count respectively mentioned and alleged, by the said J. D. T., as such solicitor and agent as in the same replication mentioned and alleged, for and on behalf of the plaintiffs, and in the course of his, the said J. D. T.'s, employment and duty as such solicitor and agent as aforesaid, and by and with the authority, consent and approbation of the plaintiffs, modo et formâ:—concluding to the country.

The defendant Booth rejoined, that the articles of agreement and memorandum in the first count mentioned, were not, nor were either of them made or entered into, or consented to, or approved of, as in the replication and first count mentioned by the said J. D. T. as the attorney, solicitor, or agent of the plaintiffs by any instruments in writing under their common seal, or under the seal of the said J. D. T. by or with any authority, consent or approbation of [159] the plaintiffs in writing under their common seal. Verification (a).

Special demurrer to the rejoinder of the defendant Robertson; assigning for causes, that the matters stated in the inducement in the rejoinder were wholly immaterial, and did not directly or indirectly deny, or confess and avoid, the last-mentioned replication of the plaintiffs, and the matters therein alleged; that, if it were material that the said J. D. T. should have been employed and appointed by an instrument under seal, and that the articles of agreement and memorandum should have been made and entered into, and consented to, and approved of, by an instrument under the common seal of the plaintiffs, or under the seal of the said J. D. T., and that the authority, consent and approbation for the said J. D. T.'s making and entering into, and consenting to, and approving of such articles of agreement and memorandum should have been by an instrument under the common seal of the plaintiffs, then that the said matters ought to have been pleaded by way of confession and avoidance; that the rejoinder improperly concluded with a traverse; that it improperly concluded to the country, and ought to have concluded with a verification; that the plaintiffs were, by the said rejoinder, precluded from relying upon a subsequent ratification of the articles of agreement and memorandum by the plaintiffs under their common seal; that, if the rejoinder were properly pleaded by way of traverse, then that the same ought to have further averred in the inducement thereof that the said articles of agreement and memorandum had not been ratified by the plaintiffs under their common seal; that, if the matters stated in the inducement to the rejoinder in any way traversed or denied matter set forth and alleged in the replication, the same amounted to [160] and were a direct denial of the matter alleged or necessarily implied in such replication; that the inducement and the matters therein stated ought to have been and contained an argumentative denial only of the matter of the replication; that the rejoinder was impleaded by way of special traverse; that, if the matters aforesaid stated in the inducement were material, then any one of such matters would have been sufficient as a special inducement to the rejoinder; that, by the insertion of the several allegations and matters before mentioned, the rejoinder was double and multifarious; that the matters stated and alleged in the inducement of the rejoinder ought to have been pleaded disjunctively, and not copulatively; that if it were material and necessary that the said J. D. T. should have been appointed and employed by an instrument under seal, then the rejoinder improperly contained an argumentative and no direct denial of such appointment and employment; that the rejoinder was also double, in avowing the appointment and employment of the said J. D. T., as well as the fact of the agreement and memorandum having been made, and entered into, and consented to, and approved of, by him; that the rejoinder was a departure from the second plea of the last named defendant, and the said last named defendant by his said rejoinder attempted to vary and put in issue, and, by the said inducement, directly to deny, the

(a) Unnecessary, ante, vol. i. 22, 816.

articles of agreement and memorandum in the first count mentioned, and although the same had not been varied, questioned or denied by the last-named defendant in his said second plea; that the construction and effect of the agreement were matters for the consideration of the Court, and could not be traversed as in the said rejoinder was attempted; and that the said rejoinder confessed and admitted the matter of the last-mentioned replication of the plaintiffs, and was in other respects immaterial, &c. Joinder.

[161] Surrejoinder to the rejoinder of the defendant Booth: that, after the said articles of agreement and memorandum in the first count mentioned were respectively made and entered into, and consented to, and approved of, as in that count and also in the last-mentioned replication mentioned, and after the same had been so acted upon and performed by the plaintiffs upon the faith of the defendants' said promise, as in the first count also mentioned, and before the commencement of the suit, to wit, on the 9th of May, 1839, by a certain deed-poll under the common seal of the plaintiffs, as and being such corporation aggregate as aforesaid, then made and executed by the plaintiffs,—and which deed-poll the plaintiffs did recognise and adopt,—ratify and confirm the said articles of agreement and memorandum; and of which the defendants thereupon afterwards, and before the commencement of the suit, to wit, on the day and year last aforesaid, had notice. Verification, and profert.

Rebutter; setting out upon oyer the deed-poll mentioned in the surrejoinder. (Which deed-poll, reciting the agreement and memorandum declared on, witnessed that the said Wardens and Commonalty of the Mystery of Fishmongers of the City of London did thereby recognise and adopt the said articles of agreement, and the indorsement thereon, and all and every the acts done and performed, as well by the said J. D. T., as by the Irish-estate committee of the said company in pursuance thereof, and did thereby ratify and confirm the said agreement and indorsement, and all such acts as aforesaid, and did thereby testify and declare that such agreement was entered into, and that such acts were done and performed, by the said J. D. T., and by the said Irish-estate-committee, not on his or their own behalf, but as the agent or agents of and for, or on behalf of, them, the said company; as witness their common seal thereto affixed, &c.) Averment: that the deed-poll mentioned [162] in the surrejoinder was made under the common seal of the plaintiffs long after the articles of agreement and memorandum in the first count mentioned had been and were respectively made and entered into and consented to and approved of, as in that count mentioned, and long after the making of the supposed promise in the first count mentioned, and long after the respective times of the committing of the several breaches of promise respectively in that count mentioned, and long after the respective times of the accruing of the supposed causes of action in that count mentioned, to wit, on the 9th day of May, 1839. Verification.

Special demurrer; assigning for causes, that the said agreement and memorandum and promise by the defendants having been made by them and acted upon and performed by the plaintiffs on the faith thereof, it was wholly immaterial whether the same agreement and memorandum were expressly ratified by the plaintiffs under their common seal before or after the breaches of promise by the defendants;—that, if the matters stated in the rebutter were material, then the same must be taken to be, and were, a traverse of matter necessarily implied by the surrejoinder, namely, that the deed-poll was executed before the defendants' breaches of promise, and the rebutter ought to have concluded to the country instead of concluding with a verification;—that, although the rebutter admitted the agreement and memorandum to have been acted upon and performed by the plaintiffs on the faith of the defendants' promise before the deed-poll was executed, yet it did not sufficiently confess that the deed-poll was executed before the commencement of the suit;—that it did not deny, or sufficiently confess, the surrejoinder, or any of the matters stated therein, or sufficiently avoid the same;—and that the rebutter was in other respects uncertain, &c. Joinder.

The case was argued in last Trinity term (May 25th, 27th, and June 1st) by

[163] Channell Serjt. (with whom was Bovill) for the plaintiffs. The first point intended to be raised by the defendants is that the plaintiffs, being a corporation aggregate, cannot sue upon a contract made by them which is not under their common seal; or, if the contract were made by their agent, that his appointment must not be shewn to be under seal. Assuming these to be correct, as general propositions, the

question then is whether it is necessary to shew that the contract in this case was executed by the corporation at all, inasmuch as they have acted upon it, and have further ratified it, by now suing upon it.

The corporation having performed the agreement on their part, may enforce it against the defendants. It is not always necessary that a contract should be signed by both parties; a party who has not signed may, in cases where there is a good consideration, recover against the party who has; *Bowen v. Morris* (2 Taunt. 374), *Laythorp v. Bryant* (2 New Cases, 735; 3 Scott, 238), *Kenmaway v. Treleavan* (5 M. & W. 498). In the last case Parke J. observes—"There are a great number of cases of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties" (d). In the present case it appears on the face of the declaration that the plaintiffs have performed their part of the contract, and that the defendants have had the benefit thereof; the contract therefore is binding on the latter, and no objection for want of mutuality can arise.

The recognition and adoption of the contract by the corporation are equivalent to a ratification, or to an original contract, under seal. In *De Grave v. The Mayor* [164] and *Corporation of Monmouth* (4 C. & P. 111) it was held that where goods had been ordered by the mayor of a corporation, and had been subsequently examined and approved of at a full meeting of the corporate body, it was such a recognition of the contract as would make the corporation liable to pay for them, although the order was not under the common seal. That case was referred to by Patteson J. in giving the judgment of the court in *Beverley v. The Lincoln Gas Light and Coke Company* (6 A. & E. 829; 2 N. & P. 283), where his lordship observed—"The recognition of a contract is its adoption—the taking it to be the contract of the party so recognising it" (6 A. & E. 843). So, in *Roe dem. The Dean and Chapter of Rochester v. Pierce* (2 Campb. 96), where a verbal notice to quit had been given by the steward of the Dean and Chapter, M'Donald C. B. held it was sufficient without any other evidence of his authority. His lordship added—"The Dean and Chapter, by bringing the ejectment, shew that they authorised and that they adopt this act." In *Marshall v. The Mayor, &c. of Queensborough* (1 Sim. & St. 420), Leach, V. C. observed that, "if a regular corporate resolution passed for granting an interest in a part of the corporate property, and, upon the faith of that resolution expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution." Again, in *Edwards v. The Grand Junction Railway Company* (1 Mylne & Cr. 650), where a person, acting on behalf of the subscribers to a railway, who were then soliciting a bill in parliament for the purpose of forming them into an incorporated joint-stock company, entered into a contract with the trustees of a road, whereby it was [165] stipulated, that, in consideration of the trustees withdrawing their opposition in parliament, and consenting to forego certain clauses of which they had intended to press for the insertion in the act, a formal instrument, to the effect of the clauses, should be executed under the seal of the company when incorporated, and the bill was accordingly allowed to pass unopposed and without the clauses, an injunction was granted at the suit of the trustees, to prevent the company from violating the provisions contained in the omitted clauses.

The principle that a subsequent ratification will give all legal qualities to a previous act was also recognised in *Whitehead v. Taylor* (10 A. & E. 210; 2 P. & D. 367), *Robinson v. Gleadow* (2 New Ca. 156; 2 Scott, 250), *Maclean v. Dunn* (4 Bingh. 722; 1 Moo. & P. 761), and *Yarborough v. The Bank of England* (16 East, 6). [Maule J. *The Mayor, &c. of Carmarthen v. Lewis* (e) seems very like the present case. Parke B. there held that a corporation aggregate might maintain assumpsit for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal.] In *Smith v. The Birmingham and Staffordshire Gas Light Company* (1 A. & E. 526; 3 N. & M. 771) the doctrine was carried much further, and it was held that a corporation was liable in tort for the tortious act of their agent, though not appointed by seal, if such act were an ordinary service, such as a distress professedly made under a statute for a debt due to the corporation; and that a jury might infer

(d) The cases mentioned in the former branch of this sentence appear to be imperfect synallagmatic contracts, those in the second, perfect unilateral contracts.

(e) 6 C. & P. 608. As to this case, see ante, vol. ii. 249 (c).

the agency from an adoption of the act by the corporation, as from their having received the proceeds of the seizure.

In the present case it appears, on the face of the de-[166]claration, that Towse was the agent to the plaintiffs; for it is stated that the agreement was executed by him "for and on behalf of the plaintiffs." The second plea sets up the defence that the agreement was not made under the corporate seal or by any person authorised under seal; the replication is, that Towse was the solicitor and agent for the corporation employed by them as such agent in the conduct and management of the bill in parliament, and the agreement was entered into by him, as such solicitor and agent, on behalf of the corporation in the usual course of his employment. The rejoinder states that the appointment of Towse was by parol only, and not by an instrument under the corporate seal. The replication states the employment of Towse as agent to the company, and the making of the agreement by him, as such agent, more fully than the declaration. All the facts of adoption that are mentioned in the declaration are drawn down to the replication which sets up additional matter, namely, that the agreement was entered into by the solicitor to the corporation in the course of his duty. The cases as to subsequent ratification, therefore, are applicable to the consideration of the replication. Upon this state of the record the defendant Robertson can only take such objections to the replication as would be admissible on general demurrer. And on general demurrer the replication would be good; as it must be taken that either the agreement itself, or the appointment of the agent, was under seal, if that be necessary to give validity to the agreement. In *The Dean and Chapter of Windsor v. Gover* (2 Wms. Saund. 302), to debt for the rent of tithes, the defendant pleaded that he assigned the premises to one J. B., and that the plaintiffs had notice of the assignment, and received rent from J. B. as their tenant; [167] it was objected on the part of the plaintiffs that the plea was bad for not shewing that such acceptance was by deed under the common seal. "But to this it was answered that if a deed be necessary, it is implied in the plea; for an acceptance being pleaded, every thing that makes it to be a good acceptance is implied, for otherwise it is no acceptance at all." And several cases are there cited to the same effect—and others are collected in a note by Serjt. Williams (1 Wms. Saund. 305 a. n. (13). So, in *Tilson v. The Warwick Gas Light Company* (4 B. & C. 962; 7 D. & R. 376), which was an action of debt for work and labour against an incorporated company, Bayley J. said: "I think, that if a deed were necessary, we are justified, upon general demurrer, in presuming that there was such deed, and (in saying) that the neglect to set out the deed is mere matter of form;" and Holroyd J. expressed himself to the same purport.

The first point in this case is the same as that in *Arnold v. The Mayor of Poole* (ante, vol. iv. p. 860); and the cases there cited are authorities for the plaintiffs here; especially *Beverly v. The Lincoln Gas Light Company* (6 A. & E. 829; 2 N. & P. 283), *Church v. The Imperial Gas Light and Coke Company* (6 A. & E. 846; 3 N. & P. 35), *The Mayor, &c., of Ludlow v. Charlton* (6 M. & W. 815), *The Mayor, &c., of Stafford v. Till* (4 Bingh. 75; 12 J. B. Moore, 260), and *The Southwark Bridge Company v. Sills* (2 C. & P. 371). These cases establish that, in reference to actions by or against corporations, there is no difference between assumpsit and debt, or between contracts executory and executed. It may be objected that this rule is applicable only to trading companies established under acts of parliament; but that observation will not [168] apply to the cases of *The Mayor of Stafford v. Till* and *The Dean and Chapter of Rochester v. Pierce* (1 Campb. 466).

He then proceeded to argue that the rejoinder to the replication to the second plea by Robertson was bad, as being an informal special traverse of the allegation that the contract, or the appointment of the agent, was under seal. (The argument upon this point is not reported, as the judgment of the court proceeded upon other grounds. The learned serjeant cited Stephen on Pleading (page 207, 4th edit.) and *Pearson v. Rogers* (9 A. & E. 303; 1 P. & D. 302)).

The third plea is pleaded to all the breaches in the first count; and, unless it is an answer to each of the three breaches there set out, it is bad; *Gray v. Pindar* (2 B. & P. 427). It is clearly no answer to the third breach for the non-payment of 1000l.; and that part of the plea which states that the bill was not as perfect and beneficial as it might have been made, is no answer to the declaration, since the declaration alleges that both parties were to be bound by the decision of the referee, and that he settled the bill.

The fourth plea, which is pleaded to the same breaches as the third, states that the plaintiffs did not continually use all reasonable endeavours to pass the bill. The plaintiffs in the declaration have alleged certain acts on their part to promote the bill. The language of this plea is consistent with the neglect to perform some only of the acts stipulated to be done; but, that would be a breach of the agreement affecting part only of the consideration;—such part not amounting to a condition precedent. The remedy for such breach would be by action. It would be like the case of the action on a covenant in a deed whereby the plaintiff conveyed an estate with the stock of negroes upon [169] it; where a plea, that the plaintiff was not legally possessed of the negroes, was held bad, on the ground that otherwise the fact of any one negro not being the property of the plaintiff would bar the action (a)¹.

The fifth plea states that the plaintiffs presented a petition to the House of Lords in favour of other parties interested in the bill. That, however, would be no answer to this action; and the plea is open to the like objections as the fourth.

The pleas by the other defendants, Booth and Staines, raise substantially the same questions; and the same arguments are applicable to them.

R. V. Richards for the defendant Robertson. The main question is, whether it was competent for the plaintiffs, being a corporation, to enter into a contract not under seal; or whether they could take advantage of any contract made on their behalf by an agent whose appointment was not under seal. The agreement in question is one that affects the title to lands, and that fact makes an essential difference between this case and those principally relied upon on the other side. *The Mayor of Ludlow v. Charlton* (6 M. & W. 815) is an important authority against the plaintiffs. In that case, although there had been a formal entry of a resolution in the books authorising the contract attempted to be set off by the defendant, and although the contract had been executed, yet, as it affected lands of the corporation, it was held that it was invalid as not being under the corporate seal. [Tindal C. J. That would have been a very strong authority in the case of an action brought against these plaintiffs upon this agreement.] It is [170] equally strong here, since in every contract there must be mutuality. [Maule J. The contract here is executed (a)².] So it was in *The Mayor of Ludlow v. Charlton*. [Cresswell J. Upon what ground is it that there must be mutuality in a contract? Is it not that there must be a good consideration? And have not the defendants here got a good consideration?] It is submitted that they have not; for they never were in a situation to sue the corporation; and unless the corporation could be sued in assumpsit, they cannot sue the defendants. [Maule J. That is the very point in the case. The other side do not contend that the corporation could have been sued.] This is an action on a precise contract, and there is no case to shew that one party to such a contract has the power to sue, and not the other. [Tindal C. J. An infant can sue on a promise of marriage, though he cannot be sued upon it (b).] In that case the contract is merely voidable and not void.

The necessities of modern times have introduced an extension as to the liability of corporations; but the relaxation of the ancient rule has obtained only in favour of trading companies. None of the cases cited, therefore, are applicable to the present. Neither do the more ancient exceptions apply; as this contract does not relate to matters of a trifling nature, or of constant occurrence. This is a contract affecting the lands of the corporation. The general rule as to the nature of contracts binding upon corporations is laid down in 1 Blac. Com. 463 (citing Davis, 44, 48) and Co. Litt. 94 b. And in *Freerill v. Eubanke* (1 Roll. Rep. 82), it is said by Coke that no action lies at common law against a dean and chapter upon a promise made by them, because a corporation cannot be bound [171] without deed. If one party is not bound by a contract, the other is not. Unless, therefore, the court shall be prepared to overrule *The Mayor of Ludlow v. Charlton*, there is an end of this case.

The cases relied upon on the other side are distinguishable from the present. In

(a)¹ *Boone v. Eyre*, 1 H. Bl. 273, n.; 2 W. Bl. 1312; cit. 6 T. R. 573. See also *Slavers v. Curling*, 3 N. C. 355; 3 Scott, 740; and 1 Wms. Saund. 320 a. et seq.; 2 Smith, Lead. Ca. 10, n.

(a)² The plaintiffs did not declare upon the executed contract, but upon the antecedent executory contract; post, 172.

(b) See *Holt v. Clarencieux*, 2 Stra. 937.

Bowen v. Morris (2 Taunt. 374) the contract was entered into by a mayor on behalf of himself and the corporate body; and upon the question whether he could sue in his individual capacity, it was held that he could not. In *Laythorpe v. Bryant* (2 New Ca. 735; 3 Scott, 238), the question turned purely upon the construction of the statute of frauds, and had no reference to a contract by a corporation. The same remark applies to *Kennaway v. Treleavan* (5 M. & W. 498).

Beverley v. The Lincoln Gas Light Company (6 A. & E. 829; 2 N. & P. 283), *Church v. The Imperial Gas Light and Coke Company* (6 A. & E. 846; 3 N. & P. 35), and that class of cases were all cases of trading companies, which have been introduced of late years by the legislature, for the purpose of trade alone; they are not corporations in the proper sense of the term. The sound reason why the general principle is not applicable to them will be found in the case of *Church v. The Imperial Gas Light and Coke Company*. *The Dean and Chapter of Rochester v. Pierce* (1 Campb. 466), *The Mayor of Stafford v. Till* (4 Bingh. 75; 12 Moore, 260), and *The Mayor and Burgesses of Carmarthen v. Lewis* (6 C. & P. 608), were all actions for use and occupation, and were decided upon the grounds explained by Lord Ellenborough in the first mentioned case; namely, that an action for use and occupation under the statute 11 G. 2, c. 19, s. 14, does not imply a demise by deed. [Maule J. Those cases were decided upon the plea of non-assumpsit. In this case the plea is that there was no agreement. The declaration states an agreement; and if the plaintiffs could not agree, except by deed, that allegation in the declaration may be held, on general demurrer, to mean that the plaintiffs promised under seal; and if Towse agreed, and the plaintiffs afterwards under seal promised to perform the agreement, must not that now be taken to be a good consideration?] The declaration states an agreement in writing; and contains merely the averment of a promise on the part of the plaintiffs to perform that agreement. In *Roe dem. Dean and Chapter of Rochester v. Pierce* (2 Campb. 96), the authority of the agent to give the notice to quit had been fully recognized by the corporation. *Marshall v. Queenborough* (1 Sim. & St. 420), and *Edwards v. The Grand Junction Railway Company* (1 Myl. & Craig, 650), shew that if parties are obliged to have recourse to a court of equity, it is because no relief is to be had at law. In *De Grave v. Monmouth* (4 C. & P. 111) the contract was for weights and measures, a small matter, falling within the old recognized exception. And the consideration there was executed. It is contended, indeed, that the consideration in this case is executed; but that is not so. The contract declared upon is executory; and although in subsequent averments it is alleged that the contract was performed, that will not alter the original nature of the contract. The subsequent ratification is matter of evidence; but it is clear that the original contract is executory.

The cases cited as to the ratification and adoption of the act of an agent have no application; for the present contract can only be ratified as an executory contract. In *Whitehead v. Taylor* (10 A. & E. 210; 2 P. & D. 367), the point in question was as to the power of executors to ratify a distress for rent [173] made in the name of the testator, and by his direction, but after his death; and the ratification was held good. Perhaps that case may be doubtful law; but at any rate it is very distinguishable from the present. The act had been authorised by the testator, and the ratification was after his death. [Cresswell J. It does not appear in that case that any positive act was done by the executor after the death of the testator.] In *Robinson v. Gleadow* (2 New Ca. 156; 2 Scott, 250), and *Maclean v. Dunn* (4 Bingh. 722; 1 M. & P. 761), there was a sufficient legal ratification which would be drawn back to the previous contract; but that is not so here. [Maule J. Is not the bringing the action a sufficient ratification by the plaintiffs?] It is submitted that it is not, if both parties are not bound. The adoption must be of equal force, that is, equally binding on both parties. [Maule J. You say the plaintiffs are not bound; and that the defendants have no cross action against them; but the plaintiffs having brought the present action are bound on the record.] It is submitted that, after breach, the one party, not being bound, cannot by bringing an action bind the other party. Otherwise he might lie by for five years and three-quarters, just to avoid the operation of the statute of limitations, before the other party could know whether the contract was binding upon him. The cases of *Yarborough v. The Bank of England* (16 East, 6) and *Smith v. The Birmingham and Staffordshire Gas Light Company* (1 A. & E. 526; 3 N. & M. 771) have also no application. Those were actions in tort, where it was held that the jury might assume that the act of the agent was sufficiently the act of the principal

to make the latter a tort-feasor. In *Tilson v. The Warwick Gas Light Company* (4 B. & C. 962; 7 D. & R. 376) the first count was founded upon the obligation contained in the [174] act of parliament, under which the company was formed, that the costs of obtaining that act should be paid; the other counts were general indebitatus counts upon a debt which might have been founded upon a deed; and the court held that upon general demurrer, a deed might be presumed. In this case also it is argued that it may be presumed, the plaintiffs contracted by deed; but that will not be sufficient, inasmuch as one party cannot be bound by deed and the other by parol. [Tindal C. J. It would appear upon the whole record in this case that the promise was by simple contract. Maule J. Suppose a deed had been executed by the plaintiffs; and been signed but not sealed by the defendants, would the plaintiff have no remedy?] It would be very doubtful. [Maule J. I think there is a case in point in which assumpsit has been held to lie. Manning Serjt., for the defendant Haines, referred to *White v. Cwyler* (1 Esp. N. P. C. 200; 6 T. R. 176). Channell Serjt. referred to *Sutherland v. Lishman* (3 Esp. N. P. C. 42).] Unless both parties were equally bound by the instrument, it is submitted that one could not sue the other (c)¹. [Maule J. In cases of demise, if the lessor executes the lease and the lessee does not, may not the latter be sued?] Not upon the lease. In *Cardwell v. Lucas* (2 M. & W. 111) the declaration in covenant stated that one J. H. was seised in fee, and being so seised, by a certain indenture, with the consent and approval of the said J. H. then given, made between the said J. H. of the one part, and the defendant of the other part, and, sealed with the seal of the defendant, it was witnessed, that, for the considerations therein mentioned, he the said J. H. did demise to the defendant, his executors and adminis-[175]-trators, certain premises therein mentioned: to hold to him, his executors, &c., for the term of eleven years; and that by virtue of that indenture, and by permission of the said J. H., the defendant afterwards entered into the premises, and was possessed thereof: that J. H. afterwards made his will, by which he devised the estate to his widow E. for life, remainder to the plaintiff for life. It then averred the death of J. H., and afterwards that of E., and that thereupon the plaintiff became and was seised of the reversion of and in the premises, in his demesne as of freehold, for the term of his natural life, under and by virtue of the will. The defendant pleaded, in effect, that, although the deed was his deed, yet, that it was not signed by J. H., or by any agent of the said J. H. thereunto lawfully authorised by writing, nor was any lease for the said term of eleven years put into writing and signed by J. H. or any agent, &c.; and it was held on demurrer, that the action was not maintainable by the plaintiff against the defendant for breaches of the covenants in the indenture. The declaration in this case states an agreement between the parties. If that is to be taken as an agreement by deed, then, if it were executed by the agent in his own name on behalf of his principal, it would be void as against the principal, and binding upon the agent alone; *Frontin v. Small* (2 Ld. Raym. 1418; 2 Stra. 705), *Appleton v. Binks* (5 East, 148), *Burrell v. Jones* (3 B. & A. 47. See also *Toplis v. Grane*, 5 New Ca. 636; 7 Scott, 620). [Maule J. referred to *The East India Company v. Lewis* (3 C. & P. 358).]

Assuming that the corporation have not contracted under any instrument binding upon their corporate property, the question is whether, where a contract is binding on one party but not on the other, the party who is not bound can sue the other. The plaintiffs here, it [176] is true, allege that they are bound, as part of the consideration for the defendants' promise, but that allegation will not make them bound, if they are not so in law. Mutuality is wanting in this case, and that is the essence of all contracts; *East London Waterworks Company v. Bailey* (4 Bingh. 283; 12 Moo. 532), *Kingsdon v. Phelps* (Peake, N. P. C. 227), *Biddell v. Douse* (c)², *Antram v. Chace* (15 East, 209), *Ferrer v. Owen* (7 B. & C. 427; 1 M. & R. 222), *Bird v. Higginson* (2 A. & E. 695; S. C. affirmed in Cam. Scacc. 6 A. & E. 824). [Maule J. There is a large class of cases mentioned by Pothier, where one party, A., promises to do something, if another party, B., will do something else. This contract is not binding on

(c)¹ But see Co. Litt. 229 a. 231 a.; *Foster v. Massey*, Cro. El. 212; *Clement v. Henley*, 2 Roll. Ab. Faits (F), pl. 2; Com. Dig. Fait, (C. 2); *Cooch v. Goodman*, 3 Q. B. 580.

(c)² 6 B. & C. 256; 9 D. & R. 404, reversing the judgment of C. P. in *Douse v. Caze*, 3 Bingh. 20; 10 Moo. 272.

B.; but if he does the act, then it becomes binding on A.(h). Perhaps it may be contended that this is some such case.] Even if it were so, still the mode of statement of the contract is not sufficient. There is no consideration moving from the plaintiffs to the defendants—no benefit from, or detriment to the plaintiffs; and therefore they, being strangers to the considerations, cannot sue upon the contract; *Lees v. Whitcomb* (5 Bing. 34; 2 M. & P. 86). [Maule J. The declaration there stated, as the consideration of the defendant's promise to remain with the plaintiff for two years, that the plaintiff would teach the defendant the business of a dress-maker; but the contract proved contained no such consideration. Coltman J. How do you make the [177] plaintiffs strangers to the consideration?] Because they are not bound. *Bates v. Cort* (2 B. & C. 474; 3 D. & R. 676) also shews the necessity for mutuality in a contract. [Cresswell J. That case and others of a similar kind resolve themselves into a question of nudum pactum. The point here is, as put by my brother Maule, of an executory contract, where one party undertakes to do one thing, if the other will do another.] It comes back to the fact of there being no binding contract. *Saunderson v. Griffiths* (5 B. & C. 909; 8 D. & R. 643) is an authority to shew that a subsequent ratification by one who was not a party to the original agreement, is not sufficient.

If the action is maintainable at all, Ogilby, who by the agreement was to do something as well as the other parties, ought to have been made a co-plaintiff; *Chanter v. Leese* (4 M. & W. 295; affirmed in Cam. Scac. 5 M. & W. 698); for no action could have been maintained upon the agreement, if Ogilby had not performed his part.

As to the replication to the second pleas; if there is any weight in the argument that the company cannot bind themselves except under the corporate seal, then, unless the appointment of Towse were under seal, he could have no valid authority, as their agent, to enter into the contract; and the replication, not shewing any such authority, is clearly bad.

He then proceeded to argue that, assuming the replication were good, the rejoinder was not open to the objection that had been urged against it (vide ante, p. 167). Upon this point he cited *Gough v. Bryan* (2 M. & W. 770), *Stephen on Pleading*, 201, and *Cross Keys Bridge Company v. Rawlings* (3 New Ca. 71; 3 Scott, 400).

The third, fourth and fifth pleas may be dealt with [178] together; they all contain the exceptions as to the breach for the non-return of the plans. The defendant contends that, by the agreement, he is entitled to the benefit of the entire consideration. There is no analogy between this case, an action of assumpsit, and an action of covenant, where no consideration is necessary; such as *Boone v. Eyre* (1 H. Bl. 273, n.; 2 W. Blac. 1312) and *Stavers v. Curling* (3 New Ca. 355; 3 Scott, 740). In simple contract the consideration must be laid and proved. The consideration here is laid as executory, not as executed. The exertions of the plaintiffs in favour of the bill are the consideration for the defendant to enter into the contract. If the plaintiffs did not use all reasonable means and endeavours to procure the bill to pass, as alleged in the fourth plea—or, if they presented a petition against the bill, as alleged in the fifth—the consideration for the defendant's promise would fail.

Hindmarch, for the defendant Booth. The plaintiffs were never bound by the agreement, it not being under seal. If any agreement under the seal of the plaintiffs could be implied, it would be a deed made between the three parties to the agreement, and of course it would be the deed of each; for it would not be presumed that there was a deed on the one side and a parol contract on the other. If the real cause of action arose on a contract by deed, a parol promise to perform that contract would not sustain assumpsit; *Baber v. Harris* (9 A. & E. 532); and, therefore, if a deed were to be presumed in this case, the action would not lie. The allegation as to the memorandum indorsed on the articles of agreement, does not state that such memorandum was an agreement, or that it was made by any one. It merely states that it was

(h) See Pothier, *Traité des Obligations*, part 2, chap. 3. A contract or obligation of this kind is termed conditional, i.e. an obligation which is suspended by the condition under which it has been contracted, and which is not yet accomplished; (Poth. *Traité des Obligations*, No. 198).

The particular condition mentioned above by the learned judge is termed potestative, i.e. one which is in the power of him towards whom the obligation is contracted; (Poth. *Traité des Obligations*, No. 201).

signed by Pearce as solicitor of the defendants: this excludes the possibility of its having been executed under seal. If, therefore, the articles of agreement are taken [179] to be by deed, that agreement cannot be varied by parol. Assuming the contract to be void in its inception for the reasons already suggested, it could not be made good by any thing done afterwards, except by the consent of the party charged. The plaintiffs cannot elect, after breach, to make the defendants wrongdoers by relation.

As to the necessity of the contract being by deed, in order to bind the plaintiff, he cited *Horne v. Ivy* (1 Vent. 47; 1 Sid. 441; 1 Mod. 18; 2 Keb. 567, 604), *Panel v. Moore* (Plowd. 91), *Rez v. The City of Chester* (2 Show. 366), *Cary v. Matthews* (1 Salk. 191), *Smith v. The Birmingham and Staffordshire Gas Light Company* (1 A. & E. 526; 3 N. & M. 771), *Jenkins's Centuries*, case 68 (page 131), and *Dumper v. Sym's* (Cro. Eliz. 815); and upon the point of want of mutuality, *Sykes v. Dixon* (9 A. & E. 693; 1 P. & D. 463), *Daniel v. Bowles* (2 C. & P. 553), *Harrison v. Cage* (1 Ld. Raym. 386), *Cole v. Cottingham* (8 C. & P. 75), *Cooke v. Oxley* (3 T. R. 653), and *Payne v. Cave* (3 T. R. 148). The plaintiffs ought, at least, to have alleged notice to the defendant that they adopted the contract; *M'Iver v. Richardson* (1 M. & S. 557). He also cited *Cardwell v. Lucas* (2 M. & W. 111), *Saunderson v. Griffiths* (5 B. & C. 909; 8 D. & R. 643), *Richardson v. Gifford* (1 A. & E. 52; 3 N. & M. 325), and *Wilson v. Woolfreys* (6 M. & S. 341).

The cases cited on the part of the plaintiffs, which turn upon the statute of frauds, are inapplicable. Before that statute such contracts as are mentioned in those cases would have been binding on both parties although not in writing. The statute altered the law by requiring that such agreements should be in writing and signed by the party to be charged; but as to the other party, whose concurrence forms the consideration, the statute does not require his signature (vide tamen, vol. ii. 462). The consideration in such [180] cases remains the same as at common law. The statute says nothing as to a seal; but by common law a corporation can only bind themselves by seal and without their seal to a contract the other party has no consideration. The questions here are, 1st, whether all the parties were originally bound by this contract, and 2dly if the plaintiffs were bound whether assumpsit will lie at their suit. [Maule J. There are cases which shew, that though a contract be signed by one party only, it may be enforced by the other (a).] That arises from the express words of the statute (29 Car. 2, c. 3), which require that a memorandum of certain contracts shall be signed by the party to be charged therewith. The statute merely says in effect that there shall be no evidence of such a contract, except by such a memorandum. [Cresswell J. The contract cannot otherwise be enforced. What is the value of that as a consideration which cannot be enforced?] The other party in such a case may not avail himself of the power which the statute gives him to avoid the contract which is only voidable: but in the present case the contract on the part of the plaintiffs is altogether void, and therefore it is also void as against the defendants. The cases upon the statute of frauds in fact turn upon the express words of the statute; but here the contract was at the common law void ab initio. The agreement set out in the declaration was made between three parties; the consideration for the alleged promise is stated to be, that the plaintiffs would perform their part of the agreement; but it should have been, that the plaintiffs and Ogilby would perform their parts respectively. The second plea, which is not demurred to as amounting to the general issue, says, in effect, that the defendant has never had any consideration.

The surrejoinder, which sets forth a ratification of the [181] contract by deed poll on the part of the plaintiffs, is bad, as a departure both from the declaration and the replication. [Coltman J. The defendant has not demurred specially upon that ground.] It was not necessary, as departure is matter of substance, and may be taken advantage of upon general demurrer; 2 Wms. Saund. 84 d. (n); *Palmer v. Stone* (2 Wils. 96).

Manning Serjt. for the defendant Staines. The pleas are good in two points of view. Either they traverse that which amounts to a condition precedent to the defendant's promise; or, if the facts stated do not amount to a condition precedent,

(a) See *Egerton v. Matthews*, 6 East, 307; 2 Smith R. 389. *Allen v. Bennett*, 3 Taunt. 169. *Martin v. Mitchell*, 2 Jac. & W. 426.

they form, at least, part of the entire consideration; and the promise being founded upon the entire consideration, if part thereof fails, the promise also fails.

The declaration alleges the presentation of a petition to parliament by the defendants which was opposed by the plaintiffs; it then states the agreement, according to which the plaintiffs were to withdraw all opposition. The fifth plea of the defendant Staines alleges that the plaintiffs did not withdraw all opposition. It is admitted by the demurrer of the plaintiffs, that the opposition continues; then the substance of the promise, namely, the withdrawal of the opposition, fails. The opposition not having been withdrawn, the 1000l. is not payable by the defendants. The fifth plea, therefore, contains an answer to the whole declaration. [Maule J. Are the defendants entitled to keep the plans?] The agreement is, that if the opposition is withdrawn the defendants are to pay 1000l., and, upon payment of that sum, are to keep the plans. The plaintiffs may perhaps say that the defendants' title to the plans, which depends upon the payment of the 1000l., is abandoned. [Tindal C. J. You need not put it so broadly. It will be enough for [182] you to contend that the plaintiffs cannot recover in this form of action. Channell Serjt. then prayed for and obtained leave to amend, by withdrawing the demurrer to the fifth plea and taking issue thereon, upon payment of costs.]

The fourth plea stands upon the same footing as the fifth; it being a condition precedent that the plaintiffs shall take all means to promote the bill.

The declaration is bad, as shewing a parol contract of a corporation who can only express their will by deed. The ancient doctrine is recognised in *The Mayor of Ludlow v. Charlton* (6 M. & W. 816). The principle established in *Yarborough v. The Bank of England* (16 East, 6), that a corporation is liable in trover, is as old as a case in *Savile (c)*. Several objections to the general rule, that a corporation must act by deed, are collected in Bro. Abr. tit. Corporations et Capacities; but they have no application to the present case. (The learned serjeant referred in particular to pl. 14 (d), 34 (e), [183] 51 (a), 53 (b) and 56 (vide ante, vol. iv. p. 876, n. (d)). It has been argued from

(c) Pa. 20, case 50. "Action upon the case brought by one ——— against the corporation and company of ———, in London. And he counted that he was possessed of 100l. in pecuniis numeratis, and so possessed casualiter amisit; and they came to the hands of the defendants, who having notice thereof converted them to their own use. . . . Fleetwood Serjt. How can a corporation receive notice (prendra notice), being a body politic? Manwood. Well, by their solicitor and counsel; and they by them, under their instrument under their seal, do all things touching their corporations."

(d) "Covenant was brought by the mayor and commonalty of N. against the mayor and commonalty of D.; and they counted, that the defendants by their deed had covenanted that the plaintiffs should be quit of murage, pontage, custom and toll, in D. of all those of N.; and that they had taken toll, by certain of their burgesses, of certain of the burgesses of N. to the wrong, &c.; and there it was adjudged that a taking by the common servant (ministre) is a taking by the corporation; and therefore the covenant was broken. Quod nota; and it was not pleaded there whether the servant was servant by specialty under the common seal of the corporation, or not. 48 E. 3, 17."

(e) "Error . . . Per Brooke Justice, the election of dean, master, et hujusmodi, and the making of their attorney, which are of record, are good without writing under the common seal; but in a feoffment to a dean and chapter, they cannot take but by letter of attorney, under seal; and if I disseise one to the use of a dean and chapter, they cannot agree but by writing. . . . 14 H. 8, 2, 2."

(a) "A man may justify as bailiff to a dean and chapter, et hujusmodi, a thing which appertains to his office, without shewing the deed making him bailiff; for it is to the use of the corporation, and as their servant; but an interest cannot depart from a corporation, as a lease for years, a licence to take trees, or to be an attorney to make livery of seisin, et hujusmodi, without deed; for that ought to be by deed. 12 H. 7, 25, 26."

(b) "Debt against the provost and scholars of a college in Cambridge, eo quod T. M. nuper præpositus, and predecessor of the defendant, and the scholars, by F. their servant, purchased two bells of the plaintiff for 40l. here at London, where the action is brought; which came ad usum et proficuum collegii prædicti; and afterwards

the cases decided under the statute of frauds that it is sufficient that the contract should be signed by the party charged; but those cases depend upon the positive declaration of the statute; which does not import any new doctrine as to the effect of the contract. If A. wishes to purchase a horse, and draws up and signs a contract in writing, and the vendor takes time to consider the matter, and the horse dies before the contract is completed, the vendor has no right of action. So, if A. proposes to buy a horse from a corporation and executes a deed of purchase, and the corporation say they [184] will consider the matter, or even, by parol, agree to accept the contract, and the horse dies, they cannot sue the purchaser. [Tindal C. J. But that is not quite the present case. The plaintiffs here say that the horse has been delivered. You contend that even then they would have only an equitable right.] The argument on the part of the plaintiffs upon this point is that, since the promise of the defendants, the consideration has been performed by the plaintiffs, and that therefore they are entitled to sue; but that consequence does not follow. In *Jackson v. Cobbin* (8 M. & W. 790) the declaration stated, in substance, that the defendant agreed to let, and the plaintiff agreed to take, a certain messuage and premises on certain specified terms, and that afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff, without restriction as to the purpose for which the same should be used and occupied; and it was held, on special demurrer, that the consideration alleged was insufficient to sustain the promise. The corporation here are not bound by the original contract; and the performance by them does not alter the state of things. The cases where a corporation has been held entitled to sue for use and occupation, are also very distinguishable. Where an act consists merely of nonfeasance or permission on the part of a corporation, a seal is not necessary. It is not necessary in such actions to shew any contract. This arises from the express language of the statute 11 G. 2, c. 19; but the principle is of much greater antiquity. It has been argued on the other side that the consideration here is executed; but if so, a precedent request by the defendants should have been averred (see 1 Wms. Saund. 264, n. (1)).

[185] The declaration is also bad in this respect—the contract is stated to have been made, not between the defendants and the corporation, but between the defendants and Towse. The contract therefore is not that of the corporation. Where A. contracts on the part of B. it is A. who contracts, and not B. [Cresswell J. That is, where A. contracts to do some act. But does Towse so undertake in this case?] There may be a contract by A. that B. shall do an act. [Maule J. Supposing that Towse was himself bound and not the corporation, yet the declaration says that, in consideration of the premises and that the plaintiffs would do certain things, the defendants promised to do certain things; this therefore is a new contract.] The consideration is that the plaintiffs would perform the things on their part and behalf to be performed. [Maule J. That would mean the things which Towse had undertaken they should perform.] It is submitted, it must mean the things they had themselves undertaken to perform.

Ogilby should have been made a co-plaintiff, the joint consideration being that the plaintiffs and Ogilby would withdraw their opposition to the bill. [Tindal C. J. Is not that objection got rid of by the allegation in the declaration that "Ogilby opposed the bill separately and apart from the plaintiffs, and on his own behalf?" How could he join with the plaintiffs in an action where there was no joint interest?] They have a legal joint interest—the consideration being their joint undertaking. [Maule J. Is it not competent for C. to promise A. to do something, in consideration of something

T. M. was removed from the provostry, and the defendant fuit electus et præfectus; and the defendant, sæpius requisitus, did not pay. And, by some justices, the purchase of the provost and the contract cannot be good; nor by abbot and convent, dean and chapter, husband and wife; for it is only the purchase of the dean, provost, abbot or husband; for the others shall not be but as dead persons in the law; and by some justices, the contract is good, and shall be intended the bargain only of the provost, and the name of the scholars is but surplussage; for the contract of the provost, and the sale to the use of the college, is the effect of the matter. 5 E. 4 (Longo Quinto) 70."

to be done by A. and B.? Upon demurrer we must presume an express promise.] But the contract here is between A. and B. on the one side and C. on the other; the action therefore will not lie by A. alone. [Tindal C. J. The consideration moves from two parties, and the promise is made to one.] It is submitted the original promise is made to both, and then a new promise to one is alleged, but without [186] any new consideration. At all events a performance by Ogilby ought to have been averred.

Another objection is, that the agreement was illegal. Where part of the consideration is illegal, a promise founded thereon cannot be enforced. The act of parliament in respect of which the agreement was made, is a public act, affecting the Crown and the rights of the subject; and therefore an agreement to take money for abstaining from opposing such is an illegal act, as being contrary to public policy; and it is therefore void. [Cresswell J. Why is it illegal to take money to do something for the benefit of the public? This measure is stated to be so in the act of parliament. Tindal C. J. This is not like a public act regulating the state of the nation. It is made public for judicial purposes only.]

Channell Serjt. in reply. The argument on the part of the plaintiffs—that if a contract under seal is necessary it may be assumed upon general demurrer that the contract here was so—has been answered on the other side, by saying that the same rule must be taken to apply to the promise by the defendants, and in that case assumpsit would not lie. But if the agreement were drawn up in writing and sealed and delivered by the plaintiffs, and merely signed by the defendants, it would constitute a binding contract. The allegation therefore in the declaration, that an agreement was made, will raise the inference that it was properly made—that is, under seal on the part of the plaintiff, and by parol on the part of the defendants. *The Mayor of Stafford v. Till* and that class of cases, proceeded, not upon the principle that a seal was unnecessary, but, assuming that to be so as a general rule, that something else had been done, which gave the parties a right of action. In *The Southwark Bridge Company v. Sills* (2 C. & P. 371), which was an action [187] for use and occupation, the contract was made out by a series of letters. In all these cases the corporation had either itself acted upon the contract, or allowed the other party to do so. And either way the courts must have determined that a corporation was in a situation to receive a promise, though not under seal from another party. It can make no difference whether a corporation lies by and allows the other parties to take advantage of a contract, or assists them to do so.

It is admitted that there must be mutuality in a contract. But that means merely that the one party shall not be bound, unless there be a consideration moving from the other. The consideration here is, that the plaintiffs would perform certain acts—as in *Rose v. Sims* (1 B. & Ad. 521) it was that the bankrupt would accept and deliver a bill to the defendant; and the declaration here alleges an entire performance on the part of the plaintiffs, and the non-performance by the defendants. And although the performance by the plaintiffs may be somewhat inartificially stated, yet enough is alleged to give a right of action, and that is sufficient upon general demurrer. The case cited from Bro. Abr. tit. Corporations et Capacities, pl. 53 (ante, 163 (a)) is a strong authority for the plaintiffs.

As to the non-joinder of Ogilby. Even in the case of a joint contract, where the interests of the parties are several, they may maintain separate actions; *Eccleston v. Clipsham* (1 Saund. 153; 2 Keb. 338, 347, 385), and the authorities cited in Serjt. William's note (1 Wms. Saund. 154, n. (1)). This principle was recognised in *Lane v. Drinkwater* (1 C. M. & R. 599; 3 Dowl. P. C. 223), though it was held that the covenant there sued upon was joint. It is clear that in the present case the plaintiffs and Ogilby had separate interests [188] in the land. This is a contract between three parties, but mutual promises between all are not alleged. The promise alleged on the part of the defendants is to do all the acts that concerned the interest of the plaintiffs.

It is said that the contract was with Towse, and not with the plaintiffs. It may be admitted that if he had contracted that the plaintiffs would do some act, the contract would be one on his part; but it is here stated that the agreement was made by him for and on behalf of the plaintiffs. But this point may be considered as already disposed of by what has fallen from the court.

It has been argued that the agreement was illegal, because money was to be taken

to ensure the passing of the bill ; but the bill proposed to interfere with the rights of the plaintiffs ; besides which, nothing was to be done without the assent of the legislature.

The second plea, by Robertson, does not exclude the fact of there having been a ratification under seal. [Coltman J. It says that the agreement and memorandum were not made by any person "duly authorised" under seal. That averment, perhaps, may be considered as excluding a ratification under seal.] The point, however, is immaterial if the allegation of performance by the plaintiffs is sufficient. The other side have not pretended to argue, that if the contract was under seal, the third, fourth and fifth pleas contain any answer to the action.

The same remarks apply to the pleas by Booth and Staines.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

In this action, the plaintiffs, the Fishmongers' Company, demurred specially to the pleas of the defendant, Robertson, put in by him thirdly, fourthly and fifthly, to the first count of the declaration ; and they also demurred specially to the rejoinder of Robertson, by [189] him put into the plaintiffs' replication to the second plea. But, as the principal question argued before us arose upon the declaration, the defendants contending that no action was maintainable by a corporation aggregate upon a contract not being under seal, it will be more convenient to consider that question, and the validity of the objections raised against the declaration, in the first instance, and afterwards to discuss and determine the several points which have been raised upon the subsequent pleadings upon this record.

The declaration stated, by way of inducement, that the defendants in the action had presented a petition to the House of Commons for a bill for draining and reclaiming certain slob or waste land in Ireland, the introduction of which bill was opposed by the plaintiffs, and also by one Ogilby, on his own behalf ; and that, by an agreement made on the 17th of March 1838, "between J. D. Towse, on behalf of the plaintiffs" of the first part ; one Kensit, on behalf of Ogilby, of the second part, and the defendants of the third part, for preventing expense and settling rights, it was agreed that the plaintiffs and Ogilby should respectively withdraw all opposition to the further progress of the bill ; that the powers and clauses to be inserted in the act, should be agreed and settled by the solicitors, in order that the bill might be as perfect and beneficial to all parties as it could be made, and that any disputes should be settled by Mr. Brodie, whose determination was to be final ; that the plaintiffs and Ogilby respectively should use all reasonable means and endeavours to promote the progress of the bill, and procure an act of parliament to pass thereupon ; that part of the slob should be allotted and given to the plaintiffs, and a proportion of the slob allotted and given to Ogilby ; that such allotments should be absolutely reserved in the act to the plaintiffs and Ogilby respectively, free of expense of draining, &c. ; [190] that the defendants would, on the passing of the act, pay the plaintiffs 1000l. ; that the defendants would pay all costs of and attendant upon the application for and obtaining the act ; that the allotments should be taken by the plaintiffs and Ogilby, in full of all rights ; and that they would indemnify the defendants against claims of tenants, &c. And the declaration then set out a certain memorandum indorsed upon the said agreement, and of the same date therewith, by and with the consent and approbation of all the parties, and signed by J. M. Pearce, as solicitor and agent of the defendants, by which it was declared to be understood, that the plaintiffs and Ogilby were severally and jointly bound ; that the 1000l. was to be paid to the plaintiffs for certain expenses incurred by them, partly in a survey and for certain plans, &c., which the defendants were to have the benefit of, but that the plans, &c. were to be forthwith returned to the plaintiffs if the 1000l. was not paid ; and that the agreement was to be in force only for the session 1837, 1838. And the declaration then proceeded to state, that, in consideration of the said agreement and memorandum, and of the premises, and that the plaintiffs would perform the same on their part, the defendants promised to perform the same on their part so far as concerned the interest of the plaintiffs. The declaration then proceeded to aver, that the plaintiffs had, on the faith of the defendants' promise, delivered the survey, plans and valuations, and that the defendants had had the benefit thereof ; that the plaintiffs had withdrawn all opposition to the introduction of the bill, and that Ogilby had done the same, and to allege in like manner a particular performance of each of the

matters and things specified in the said agreement, which, according to the plaintiffs' construction, amounted to conditions precedent to be performed by the plaintiffs, concluding with a general averment of performance by [191] the plaintiffs, and notice thereof to the defendants. And the declaration then stated, as breaches of the agreement on the part of the defendants, first, that, before the bill passed the House of Commons, the defendants had, without the consent of the plaintiffs, caused certain powers and clauses to be inserted without their having been first agreed upon or settled in the manner specified in the agreement; secondly, that the defendants had not paid the sum of 1000*l.* mentioned in the agreement, although a reasonable time had elapsed, and they had been requested so to do; thirdly, that the defendants had not returned the survey, plans and valuations, but had kept the same; and, lastly, that the defendants had not paid the costs incurred in prosecuting the bill at their request, although they had notice thereof, and were requested so to do. The declaration also contained a count on an account stated.

Upon the present state of the pleadings, the defendant Robertson has undoubtedly the right to raise any objection to the declaration which could have been made available on a general demurrer thereto; and it has accordingly been contended, on his behalf, that it may be assumed, from the declaration itself, that the contract upon which this action is brought, was not sealed on the part of the plaintiffs with the common seal of the corporation; that, by the general rule of law, the plaintiffs, being a body corporate, cannot bind themselves by an agreement which is not under their common seal; that, although there are certain admitted and well-known exceptions to this general rule, yet that the present case does not fall within any of such exceptions; and, lastly, that, if the agreement be such that the corporation is not bound thereby, and cannot be sued thereon, so neither can the other party be bound thereby, nor can the corporation sustain an action, as plaintiffs, upon such an agreement.

[192] We concur with some of the positions above laid down on the part of the defendants. From the statement of the contract itself on the face of the declaration, and the mode of its execution by an agent on behalf of the corporation, as there described, we think it may be inferred, that the defendants' counsel is entitled to assume, that the common seal of the corporation was never affixed thereto. We agree also in the general rule of law as above stated, and that the case now under consideration does not fall within any of those exceptions, which are so well known as to require no enumeration: but, whatever may be the consequences, where the agreement is entirely executory on the part of the corporation, yet, if the contract, instead of being executory, is executed on their part,—if the persons who are parties to the contract with the corporation have received the benefit of the consideration moving from the corporation,—in that case, we think, both upon principle and decided authorities, the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation (a) had been, on their part, executory only, not executed—we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal: on the same principle as it was held by Holt C. J., and the court, in *The Mayor of Thetford's case* (1 Salk. 193; S. C. 3 Salk. 103; 2 Lord Raym. 848; Lord Holt, 171), “that, though a corporation cannot do an act in pais without their common seal, yet they may do an act upon record; and that is the case of the city of London every year, who make an [193] attorney by warrant of attorney in this court without either sealing or signing; and the reason is, because they are estopped by the record to say that it is not their act. So, if an action be brought against a corporation for a false return, they are estopped to say it is not their return, for, it is *responsio majoris et communis* upon record.” And, in the present case, the direct allegation by the corporation upon this record, that the agreement was made by Towse on their behalf, would, as we think, amount to an estoppel to the corporation from denying the obligatory force of the agreement in a subsequent action against themselves. But it is unnecessary to determine this point on the present occasion, because, on the face of the declaration, there is, as we apprehend, an averment of the performance by the corporation of every matter which

(a) Vide ante, 170, n. 172.

amounts to a condition precedent on their part: at least, we so assume in the present stage of the argument, and before considering the pleas of the defendant. The question, therefore, becomes this, whether in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal.

Upon the general ground of reason and justice, no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is therefore nudum pactum; they never can want to sue the corporation upon the contract, in order to enforce the performance of those stipulations which have already been voluntarily performed; and therefore [194] no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of inability to sue the corporation, which suit they can never want to sustain. It may possibly be the case, that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a nudum pactum only. But, after the adoption of the contract by the corporation by performance on their part, upon general principles of reason the right to set up this defence appears altogether to fail.

Independently, however, of the reasonableness of such construction, there appears authority in law to support the position. In the case of *The Barber Surgeons of London v. Pelson* (2 Lev. 252)—assumpsit for a forfeiture under a bye-law—where the objection was expressly taken, that a promise cannot be made to a corporation aggregate without deed, the court held that the action well lay, and that the objection had been overruled in *The Mayor, &c. of London v. Goree* (1 Vent. 298). Again, in *The Mayor, &c. of London v. Hunt* (3 Lev. 37), assumpsit was held to be maintainable by a corporation for tolls. In *The Mayor, &c. of Stafford v. Tull* (4 Bingh. 77; 12 J. B. Moore, 260) use and occupation was held to be maintainable by a corporation aggregate, though there was no demise under seal, the tenant having occupied, and paid rent: and the same point was ruled in the case of *The Dean and Chapter of Rochester v. Pierce* (1 Campb. 466). The case of *The East India Company v. Glover* (1 Stra. 612) carries the law further; for the action in that case was not [195] upon a promise implied by law on an executed consideration, as, for goods sold, but was assumpsit by a corporation for not accepting and taking away coffee within the time mentioned by an agreement for sale. The objection, indeed, was not raised: but we cannot but suppose it would have been made, if thought maintainable; for, when the defendant wanted to shew fraud upon the sale, on the execution of the writ of inquiry before Pratt C. J., he refused to let in the evidence, saying, the defendant had admitted the contract to be as the plaintiff had declared, by suffering judgment by default, instead of pleading non assumpsit. And, again, the judgment of the court of error in *Bowen v. Morris* (2 Taunt. 374), although not directly an authority upon the point, shews a strong indication of the opinion of Mansfield C. J., in support of the present action. In that case, the mayor of a corporation had signed a contract to sell landed property belonging to the corporation "on behalf of himself and the rest of the burgesses and commonalty," and the action was brought in the name of the mayor, who had signed the contract, to recover damages. The Lord Chief Justice, in giving judgment that the action was not maintainable in the name of the mayor, observes, "that, although the corporation have not constituted the mayor their bailiff or agent by an instrument under seal, so that he was not competent by that contract to bind the corporation, yet as the mayor signed it, perhaps the corporation might have sustained an action on the contract." And the cases referred to on guarantees (see particularly the judgment in *Kennaway v. Treleavan*) (5 M. & W. 501), and on the statute of frauds, where the contract has been signed by the defendant only, and not by the plaintiff, but allowed to be enforced by action, notwithstanding the objection of a want of mutuality, tend strongly to [196] support the principle on which we consider the present action maintainable. And the earlier case of *Cooper v. Gooderick* (Cro. Eliz. 862) may be adverted to, as shewing the opinion of the court upon the legal consequence of

bringing an action by a body corporate. In that case the defendant, as bailiff of Emanuel College, made conuſance for rent granted to them in fee by indenture. The issue was non concessit: and the jury found that the grantor granted it by the deed, and delivered that deed to a stranger to their use, and they sealed the counterpart of that indenture; the question was whether a stranger, without letter of attorney from them to receive it, might receive the deed to their use: and it was held by all the court that he might, and that the sealing of the counter-part was a sufficient agreement, and as well as if they had made a letter of attorney; and, if they had not sealed the counterpart, but had brought an action upon it, that had made the grant perfect:" and judgment was given for the plaintiff.

We therefore think the present action is maintainable by the corporation, unless some sufficient answer appears on the pleas, which we now proceed to consider.

The second plea of the defendant Robertson only raises more distinctly the question which we have already fully considered as arising on the face of the declaration itself: and, as we hold the seal of the corporation not to be necessary in order to make the contract obligatory on the defendants, the plea itself is insufficient, and it becomes unnecessary to give any opinion on the subsequent pleadings depending thereon.

The third plea appears to us to be bad for reasons expressed in the course of the argument: and, indeed, the learned counsel for the defendants did not rely upon it.

[197] The fourth plea, which is pleaded to all the breaches in the declaration except that of not returning the survey, plans and valuations, is a traverse, in the terms of the averment in the declaration, "that the plaintiffs did not continually from time to time, and at all times up to and until the time of passing the act of parliament, use all reasonable means and endeavours to promote the progress of the said bill, and to procure an act of parliament to pass thereupon." Now, without stopping to inquire whether such general form of denial is allowable by the rules of pleading, instead of shewing that there were other reasonable means in the power of the plaintiffs which were not resorted to, or that any other means were pointed out to the plaintiffs, and they were requested to use them, but refused, this plea raises the question whether the failure to use all reasonable means, &c. is an answer to the action; that is, in other words, whether the using all reasonable means was a condition precedent to the right of the plaintiffs to maintain an action against the defendants for the breach of their part of the agreement. Now, in *Stavers v. Curling* (3 New Cases, 355; 3 Scott, 740), it was distinctly laid down as the result of a long series of decisions, "that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case, to which intention, when once discovered, all technical forms of expression must give way:" and one of the means of discovering such intention is thus laid down in *Ritchie v. Atkinson* (10 East, 306), "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go to a part only, there a [198] remedy lies on the covenant, to recover damages for the breach of it, but it is not a condition precedent."

In this case, the things to be done by the plaintiffs were, withdrawing opposition to the bill,—promoting the progress of the bill by petition or otherwise by all reasonable means at the expense of the defendants,—and handing over to the defendants certain plans, surveys and valuations which had been taken at the expense of the plaintiffs. The things to be done by the defendants, on the other hand, were, that they should by the bill secure to the plaintiffs certain portions of the slob and waste land,—that they should pay 1000l. on the passing of the act,—that they should pay all the expenses of procuring the act, and should return the plans, &c. forthwith to the plaintiffs if the 1000l. were not paid. Now, applying the test of common sense to this agreement, it seems impossible to say that the intention of the parties was, that, if the plaintiffs performed every part of that which they undertook, with the single exception of omitting to use some means of promoting the bill, which might be deemed reasonable, however small and inefficient those means might be in their own nature, they should not be in a condition to claim the performance of any part of that which the defendants had agreed to do on their part; and this, too, although the omission to use such means may have worked no prejudice to the defendants, and they may have actually obtained that object in the pursuit of which those very means

were to be employed. And, again, to apply the other test laid down in *Boone v. Eyre* (1 H. Blac. 273, n.), and the other cases before referred to, can it be said that this stipulation goes to the whole consideration on either side? It is only a part, and a very small part, of the consideration moving from the plaintiffs: it certainly does not amount [199] to that for which the defendants were to give the whole consideration moving from them. It is sufficient to refer to the terms of the agreement itself, and to see what stipulations the defendants entered into thereby, to be satisfied that this part of the plaintiffs' engagements goes to a very immaterial part of the consideration on either side.

We hold, therefore, that this stipulation on the part of the plaintiffs, the performance of which has been denied by the fourth plea, is not a condition precedent on the part of the plaintiffs. And, although it may be argued that this must be considered as a condition precedent, because the defendants cannot maintain a cross action thereon for damages; we answer that it is not to be assumed that such cross action is not maintainable, but, on the contrary, for the reasons before given, it might be maintainable. But even if it could not be, the question whether a condition is precedent or not, is a question of intention of the parties themselves as it appears on the contract itself, not the determination whether the agreement will bear a cross action in a court of law. We therefore think the fourth plea, which puts in issue the performance of that which is not a condition precedent, cannot be supported.

The fifth plea appears to us to be clearly bad. It alleges that the plaintiffs presented a petition to the House of Lords against the preamble of the bill. This amounts at most to an argumentative traverse either of the averment that the plaintiffs withdrew their opposition to the bill, or of the averment that the plaintiffs used all reasonable means to promote the bill, without distinctly shewing to which it is intended to apply. It is bad, therefore, on the grounds discussed in the consideration of the fourth plea; and indeed it may be further observed, that, neither by the fourth nor the fifth is it shewn that the supposed breach of contract [200] imputed to the plaintiffs was committed by them before the breach of contract as to the clauses of the bill alleged in the declaration to have been committed by the defendants.

Inasmuch, therefore, as we think the declaration good, and the several pleas, for the reasons above given, insufficient, we give our judgment for the plaintiffs, against the defendant Robertson.

The several pleas which are pleaded by the defendant Booth are, in substance, the same as those pleaded by the defendant Robertson, which we have already considered, and upon which we have given our judgment. The only difference in the subsequent part of the pleadings is, that the plaintiffs, instead of demurring specially to the rejoinder of the defendant Booth to the replication to the second plea, have surrejoined, and stated a confirmation of the authority of their agent by a deed-poll under their common seal. But, as the judgment given in the case of Robertson proceeded on the ground, as well of the insufficiency of the pleas pleaded, as of the sufficiency of the declaration, we think the same reasons apply to the present case, and that it is unnecessary to add any thing to what has been already stated.

The judgment already pronounced upon the pleas of the defendant Robertson will also govern those pleaded by the defendant Staines, except as to the fifth plea; upon which we have given the plaintiffs leave to amend on the usual terms.

Judgment for the plaintiffs.

[201] GRANT QUI TAM, &C. v. RIDLEY. Jan. 23, 1843.

In a qui tam action for penalties, the court refused to stay the proceedings or to give the defendant further time to plead, upon a suggestion by affidavit, that an act of parliament was likely to be passed, the effect of which would be to relieve the defendant from the penalties.

This was an action brought to recover two penalties of 100l. each, under the statute 1 & 2 W. 4, c. lxxvi.(a), against the defendant as a coal-fitter, for having

(a) Intituled, "An act for regulating the vend and delivery of coals in the cities of London and Westminster, and in certain parts of the counties of Middlesex," &c.

By s. 75 it is enacted "that every fitter, or other person, vending or delivering

given false certificates of the names of the collieries out of which certain coals, delivered by him for the port of London, had been wrought.

Bompas Serjt. on the part of the defendant applied to stay the proceedings, or for time to plead till the first day of next term. It appeared from the affidavits upon which he moved that the plaintiff had commenced thirty-nine other actions against various persons to recover similar penalties, amounting altogether to 21,500l.: [202] that it was the intention of the defendants in this and the other actions to apply to parliament early in the ensuing session for leave to bring in a bill to stay the proceedings in these actions, and that it was believed that leave would be given to bring in such bill: that the plaintiff's attorney had intimated that it was not his intention to oppose the bill, and that it was anticipated that no other person would offer any opposition, but that the bill would pass into a law before the next assizes (a): that a summons for time to plead till the first day of next term had been taken out, and attended before Cresswell J. at chambers, and that his lordship had made an order that the defendants should have four days' time to plead, pleading issuably, without prejudice to any application to the court. [Tindal C. J. The present application is in the nature of one quia timet. The defendant had better plead.] In *Whitter v. Cazalet* (2 T. R. 683), which was an action of trover for goods, where the defence was that they were sold by the plaintiff, the court gave the defendant time to plead, in order that he might have time to file a bill of discovery in equity (c). [Tindal C. J. But how can we speculate upon what the legislature may do?] The legislature has often interfered to relieve parties from vexatious proceedings for penalties, as by 54 G. 3, c. 54, s. 4, to stay actions for penalties against clergymen for non-residence; and by 5 & 6 W. 4, c. 2, s. 1, to stay actions for penalties incurred by printers of newspapers in not complying with the requisitions of 38 G. 3, c. 78 (d). If the legislature should not interfere in this case, the plaintiff would recover. The learned serjeant also referred to *Roadknight v. Green* (1 Dowl. N. S. 65, 910; 9 M. & W. 652).

[203] TINDAL C. J. Perhaps the plaintiff's attorney may consent to the time to plead being given to the defendant: but the question for the court is whether, in a state of complete uncertainty as to what course the legislature may think fit to adopt, we have any right to interfere with the plaintiff's proceedings. What we are asked to do is to delay the suit for a certain time; but we have no more right to delay than we have to deny justice. *Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam*, are the words of *Magna Charta* (cap. 29). The application to the court is founded upon an intended application to parliament for a bill to relieve the defendant and others from penalties in respect of which actions have been commenced against them; but we have no right to delay the plaintiff's suit upon such a speculation.

ERSKINE J. The only case which is at all like the present is where the defendant obtains a summons before a judge at chambers for time to pay the debt and costs. Sometimes that is a reasonable indulgence. Formerly it was considered that the proper mode of granting that indulgence was, by giving further time to plead. But the matter was brought under the consideration of all the judges, and they thought

coals for the port of London shall send, in a letter directed to the clerk of the coal market, and put into the general post-office on the day on which the ship or vessel containing any coals shall sail on any such voyage, or shall give to the ship-master of such ship or vessel before the same shall sail on every or any such voyage, a certificate, signed by such fitter, containing the day of the month and year of such loading, the master's and ship's names, and the quantity of tons, and the usual names of the several and respective collieries out of which the said coals are and shall be wrought and gotten, and the price paid by the master or masters for each and every sort of coals that each and every fitter or other person vending or delivering coals as aforesaid, his or their agent or servant, hath sold and loaded on board each and every ship or vessel: and, in case any person or persons shall omit or refuse to give such certificate as aforesaid, or shall give or make any false certificate, every person so offending shall, for every such offence, forfeit and pay the sum of 100l." &c.

By a subsequent section the act is declared to be a public act.

(a) It has since become an act (6 & 7 Vict. c. 2). It received the royal assent on the 3d of March 1843.

(c) See *Sibson v. Nivin*, Barnes, 224; *Clark v. Allbut*, 4 Dowl. P. C. 684.

(d) And see 7 & 8 Vict. c. 58.

that time to plead should be granted only in cases where there was a difficulty with regard to the plea. No such difficulty is suggested here.

The other judges concurred.

Rule refused.

[204] REARDEN v. MINTER. Jan. 28, 1843.

In an action by A. against B. for commission due to A. as agent for B., in procuring him an apprentice, B. produced the deed of apprenticeship under notice; and there being an attesting witness to it who was not called, A. was non-suited:—Held, that as B. did not claim under the deed any interest in the subject-matter of the cause, the case did not fall within the exception to the rule requiring proof of the execution of an instrument.—Held also, that A. was not entitled to a new trial on the ground of surprise, though he was not aware before the trial that there was an attesting witness; it not appearing that he had made any inquiry on the subject.

Assumpsit for work and labour, &c., by the plaintiff as the agent for the defendant, in procuring an apprentice for him. Plea: non assumpsit.

At the trial before the secondary of London, on the 13th of January, it appeared that the plaintiff had set up an establishment, called The Metropolitan Apprenticeship and Partnership Institution; that the defendant had applied to him to procure him an apprentice, which it was alleged on the part of the plaintiff that he had done by introducing the defendant to the father of a lad who was afterwards apprenticed to him. The action was brought to recover a commission at a certain per centage on the premium paid. The plaintiff had given the defendant notice to produce the indenture of apprenticeship, which was produced accordingly; but as the execution was attested by a person who was not in attendance, the plaintiff was nonsuited.

Shee Serjt., on a former day in this term, applied for a rule to set aside the non-suit, and for a new trial upon the ground that the production of the indenture was not necessary to establish the plaintiff's case. [Maule J. If the commission was to be paid in the event of procuring an apprentice for the defendant, the plaintiff would probably not be entitled to any thing till the apprentice was duly bound; and in that case the indenture of apprenticeship would form a necessary ingredient of the plaintiff's case.] He also moved upon an affidavit of surprise made by the plaintiff's attorney, stating that until the production of the indenture he was not aware that there was any attesting witness thereto. A rule nisi having been granted,

Channell Serjt., now shewed cause.

Shee Serjt., in support of the rule. The deed of apprenticeship being in the possession of the defendant, the plaintiff could not know previously to its production, that there was an attesting witness to it. [Tindal C. J. He might have had a judge's order to inspect the deed beforehand.] The plaintiff had no interest in the deed so as to be entitled to compel its production. [Tindal C. J. He might, at any rate, have asked the defendant's attorney if there was an attesting witness, and what his name was. Maule J. Or he might have inquired of the father of the apprentice. An attesting witness to a deed is not a new invention.] The father might have refused to give the information, or might have forgotten the fact. Maule J. The plaintiff might at least have tried the experiment.] The defendant claimed an interest under the deed, and, having produced it under a notice, he was not entitled to insist upon proof of its execution. [Tindal C. J. Where land is claimed by one party under a deed,—the land being the subject matter of the action,—and such party produces the deed under notice, he cannot compel the opposite party to produce the attesting witness, or prove the execution (a). But that rule has no application here. The defendant does not claim any interest under the deed of apprenticeship.] It is his muniment of title to the lad's services. [Cresswell J. But there is no dispute here as to [206] the title to the lad's services. Erskine J. The rule only applies where the party producing the deed claims an interest under it, in the cause.] The defendant here denies that he was entitled to the services of the apprentice through the plaintiff's assistance. In *Gordon v. Secretan* (8 East, 548), though it was decided that, where an instrument is produced at the trial by one of the parties, in consequence of notice from the other,

(a) See 2 Phill. Evid. 207, *Collins v. Baynham*, 1 Q. B. 118.

which when produced appears to have been executed by the party producing it and third persons, and to be attested by a subscribing witness, the production of it, in that manner, does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it, yet the court set aside the nonsuit, on the ground of surprise, in order to give the defendant an opportunity of calling the subscribing witness.

TINDAL C. J. The general rule requires that where there is an attesting witness to an instrument he shall be called. This case does not fall within the exception to that rule, where the party producing the deed claims an interest under it, as in *Pearce v. Hooper* (3 Taunt. 60). In this case the instrument produced in evidence was *res inter alios acta*. I do not see any reason for setting aside the nonsuit, or for granting a new trial on the ground of surprise (c)¹.

Per curiam. Rule discharged.

[207] FITZGERALD v. EVANS. Jan. 28, 1843.

The court allowed a *distringas* to compel appearance to issue, although the writ of summons was indorsed for "50l. for debt and interest thereon," without stating any time from which the interest was to be computed.

Talfourd Serjt. applied for a *distringas* to compel an appearance. The affidavit of the attempts to serve the writ of summons was in the usual form; but the copy of the writ left at the defendant's residence, was indorsed thus:—"The plaintiff claims 50l. for debt, and interest thereon, and 2l. 2s. for costs;" without stating from what day the interest was to be calculated. The case had been before Maule J. at chambers, who thought this was an irregularity (a)¹, and referred the parties to the court. Admitting that it was an irregularity, which, if the writ had been served, would have entitled the defendant to set aside the service (b), or if he had offered to pay the amount of debt and costs might have entitled him to a stay of proceedings (c)², still, being merely an imperfect compliance with the rule as to the indorsement of the writ, it would not prevent the issuing of a *distringas*. [Tindal C. J. It seems like forestalling an objection which the defendant may never take. Maule J. It is impossible from the indorsement to say whether the plaintiff seeks to recover 51l. or 100l. It appeared to me, when the case was before me at chambers, that in order to obtain a *distringas* it should be shewn that the writ of summons was such, that if served upon the defendant he would have been compelled to appear to the action. It is submitted, that he must have appeared to this writ if it had been [208] served, as it is not a nullity. [Maule J. And yet it is admitted, that if he had been served he might have moved to have set aside the service. Tindal C. J. Perhaps the more regular course will be to allow the *distringas* to go; and the defendant may move to set it aside if he thinks fit.]

Per curiam. Rule granted.

ORLANDO JONES AND ANOTHER v. BERGER. Jan. 28, 1843.

[S. C. 6 Scott, N. R. 208; 12 L. J. C. P. 179; 7 Jur. 883. Discussed, *Morgan v. Fuller*, 1866, L. R. 2 Eq. 300.]

The notice of objections to a patent delivered by the defendant under stat. 5 & 6 W. 4, c. 83, s. 5, ought to contain more particular information than that which is necessarily conveyed by the defendant's pleas (a)².—In an action for the infringement of a patent "for improvements in treating, or operating upon, farinaceous matter and other products, and in manufacturing starch," one objection stated, that the alleged invention had been published in the specification of two previous patents (particularising them), "and also by other persons in other books and writings:" Held, that

(c)¹ See *Tharpe v. Stallwood*, post, E. T.

(a)¹ See *Coppel v. Brown*, 1 C. M. & R. 575; 3 Dowl. P. C. 166.

(b) See *Trustlove v. Whitechurch*, ante, vol. i. p. 426; 1 Scott, N. R. 415.

(c)² See *Elliston v. Robinson*, 2 C. & M. 343; 3 Dowl. P. C. 241. See also *Cook v. Cooper*, 7 A. & E. 605; 2 N. & P. 607.

(a)² See *Neilson v. Harford*, 8 M. & W. 806, 822, acc.

the books, &c. should be specified.—A second objection stated, that the plaintiff's specification did not "sufficiently distinguish between what was old and what was new." Held sufficient, as the objection was to an omission in the specification.—The same objection alleged that the plaintiff did not state in his specification "the most beneficial method with which he was then acquainted, of practising his said invention." Held, sufficiently precise.—A third objection stated that the invention was in use by many persons before the patent, and particularly that the use of rice starch was "known and practised by persons engaged in the manufacture, and finishing, of lace and similar fabrics at Nottingham and elsewhere." Held, that upon striking out the words "and elsewhere," the objection was sufficiently precise.—Semble, per Maule J., that it was sufficiently so without striking out these words.

Case (in the usual form) for the infringement of a patent, granted to the plaintiff Jones, on the 30th of April 1840, for certain "improvements in treating, [209] or operating upon, farinaceous matters to obtain starch, and other products, and in manufacturing starch."

Pleas: first, not guilty; secondly, that the plaintiff Jones was not the first inventor; thirdly, that he did not, by the instrument in the declaration mentioned, particularly describe and ascertain the nature of his said invention and improvement, &c.; and fourthly, that the working of the said invention was before, and at the time of the making of the letters patent, in use by others within the realm.

The following notice of objections was delivered by the defendant with his pleas, under the 5 & 6 W. 4, c. 83, s. 5.

"That the said Orlando Jones was not the true and first inventor of the said invention, the same having been published in the specification of certain letters patent granted to Thomas Wickham, and which specification was inrolled on or about the 10th day of March, A.D. 1824; and also in the specification of certain other letters patent granted to William Prince, and which specification was inrolled on or about the 2d day of May 1768 [and also by other persons in other books and writings] (vide post, p. 218, n. (a)), before the date of the said letters patent of O. J. in the declaration mentioned.

"That the said specification does not sufficiently distinguish between what is old and what is new; that the processes therein described are not beneficially applicable to obtaining starch from all farinaceous matter; that the said O. J. did not state in the said specification the most beneficial method with which he was then acquainted of practising his said invention; that the proportions and directions given are not such as to enable an ordinary workman to make starch of a quality suitable for the general purposes of commerce; [and that the specification is in other respects uncertain, insufficient and calculated to mislead (vide post, p. 218, n. (a)).]

[210] "That the said invention was in use by many persons before and at the time of the date of the said letters patent, particularly that the use of rice as and for starch, and the use of rice-flour as and for starch, and the preparing of rice-flour to be used as starch, and the preparation of starch from whole rice, from rice-flour, were known and practised by persons engaged in the manufacture and finishing of lace and similar fabrics, and in clear-starching, and otherwise dealing with, lace and similar fabrics, at Nottingham [and elsewhere (vide post, p. 218, n. (a))] before and at the time of the grant of the said letters patent to O. J., as in the said declaration mentioned."

Sir Thomas Wilde Serjt., on a former day in this term, obtained a rule nisi for the defendant to give further and better particulars of objections, upon the ground that those delivered were too vague. He cited *Fisher v. Dewick* (4 New Ca. 706; 6 Scott, 587).

Channell Serjt. (with whom was Webster) now shewed cause. The first objection is addressed to the second plea, which says that Jones was not the first inventor of the subject of the patent. The objection specifies two particular patents for inventions, alleged to be similar to that claimed by the plaintiff; and it adds, that the invention had been published "by other persons in other books and writings." This case is different from those where it has been required that the names should be furnished of parties who have used a patent, or where it was required that an objection should point out what portion of the alleged invention had previously been in use; as in *Heath v. Unwin* (10 M. & W. 684). It is sufficient to state that the principle has been discussed in learned treatises [211] by other persons. It cannot be

required that the defendant should refer to all the cyclopædias in which the subject has been treated of. [Tindal C. J. The defendant might keep back his best evidence, and then start upon the plaintiff at the trial with some article in a foreign cyclopædia. The question is, what is the meaning of the objection as it stands.] It is submitted it is sufficient to shew that the principle was well known in the scientific world.

The second objection is sufficiently specific: the general words at the end may be struck out if they are considered objectionable.

In the third it is presumed the plaintiffs require the names and residences to be given of the "persons engaged in the manufacture and finishing of lace and similar fabrics at Nottingham." But in cases where such information has been required no particular trade was specified, as here. In *Bulnois v. Mackenzie* (4 New Ca. 127; 6 Dowl. P. C. 215; S. C. (more fully) 5 Scott, 419) the defendant stated in one of his objections that the patented article had been used by one Mann, in England, and by divers other persons in other parts of the kingdom, before the date of the plaintiff's patent. The plaintiff thereupon obtained a judge's order, requiring the defendant (inter alia) to furnish the plaintiff with "the names, description and places of abode of the several persons respectively alleged in the notice to have used the invention before the patent, and also the dates when the said invention was used:" but this court, upon motion, rescinded that part of the judge's order that required the names and addresses of other parties to be given. In a note in Webster's Patent Cases (page 268, n. (a)) the learned reporter refers to the case of *Galloway v. Bleaden* (Chitt. Archb. 1031, S. C., not S. P., ante, vol. i. 247; 1 Scott, N. R. 170), where Coltman J. ordered names, addresses, [212] and descriptions to be given, and the words, "divers other persons" to be struck out; "but," the reporter adds, "in a subsequent case (*Carpenter v. Walker*), the objection stated the making of locks similar to the subject of the patent by the defendant and others, several years before the date of the letters patent, and their sale to divers persons, and, among others, to one S. T., of, &c.: on summons to strike out the words 'to divers person, and, among others,' or to state the names and descriptions of the others besides S. T., to whom sales were made, the parties were referred to the court, who refused the application." [Maule J. Suppose a patent for making pins; and an objection were delivered that several persons had used similar pins; it would hardly be necessary to mention all their names.] It is possible that the stat. 5 & 6 W. 4, c. 83, may have been passed with reference to the old rules of pleading, under which the plea of not guilty gave no information as to the defence intended to be set up.

Bompas Serjt. in support of the rule. Words are inserted in these objections of such a vague and general character, that they render the notice of objections of no effect. If the reference, in the first objection, to the publication "by other persons in other books and writings" were sufficient, it would equally be sufficient to say that the invention had been used by John Smith and other persons—and John Smith might be nobody. [Tindal C. J. This is not quite like saying that an invention had been used by other persons,—it is saying in effect that it had been published in books that were known to all the world.] The books should at least be specified. They may have been published many years ago; and it might be impossible upon their production at the trial to ascertain how far they were applicable to the subject matter. The legislature intended that the objections [213] should be specific; and the defendant is not tied down to those which he may deliver in the first instance, for he may amend his notice at any time before the trial, upon the discovery of fresh evidence. In *Fisher v. Dewick*, after the amended particulars of objection had been delivered pursuant to the judge's order, a summons was taken out for further amended particulars, which summons was heard before Tindal C. J. at chambers, by whom, after time taken to consider, the particulars were finally settled as follows:—To the first objection, that the plaintiff was not the first inventor, the defendant had added a statement that "the plaintiff was not in possession of the said alleged improvements before or at the date of the said letters patent;" and these words were expunged by his lordship. Another objection stated that "a particular improvement" had been used by A. B. &c. (stating several names and addresses) and divers other people within the kingdom and elsewhere; his lordship struck out the words "and divers other people;" and the same course was adopted as to another objection. Another objection was, that "there were several washings (describing them) and others, to which the said improvements are inapplicable;" and his lordship struck out the words "and others." A

further objection stated that the invention for which the patent was granted was more extensive than, and did not correspond with, the invention described in the specification; and his lordship observed that the attention of the plaintiff ought to be specifically called to the particular part or parts in question. That remark of his lordship's applies to the second objection in this case, which states that the specification does not sufficiently distinguish between what is old and what is new. The particular parts should have been pointed out. [Maule J. How could that be done? It is an objection to an omission in the specification.] The objection also alleges, "that [214] the plaintiff, Jones, did not state in his specification the most beneficial method with which he was then acquainted of practising his said invention." The plaintiffs cannot tell what this means without specific information. [Tindal C. J. The plaintiffs must know whether or not they were acquainted with a better method. It is a fact which surely lies more within their own knowledge.] The means which the defendant may attribute to the plaintiffs are not within their knowledge. The third objection amounts to no more than the fourth plea—that the invention had been used by others before the date of the patent. The statute would be utterly useless if the objections were not to be fuller than the pleas. The objection here subsequently mentions "persons engaged in the lace trade at Nottingham, and elsewhere;" so that under this notice any one person may be produced as a witness to support it. [Maule J. The object of the statute is, that whatever the objection may be, the defendant is to give notice of it; but giving notice of an objection will not make it a legal objection. Tindal C. J. The objection refers to a particular trade. The plaintiffs may make inquiries among the class of persons engaged in that trade. Erskine J. Proving that the invention had been used by one or two persons would not support the objection, which states that "the said invention was in use by many persons."]

TINDAL C. J. The new rules as to pleading, which were promulgated by all the courts in Hilary term 1834, under the provisions of the stat. 3 & 4 W. 4, c. 42, s. 1, were certainly made a considerable time—more than twelve months—before the stat. 5 & 6 W. 4, c. 83, received the royal assent (a)¹. We are not at liberty, there-[215]fore, to say that the legislature was not aware of the existence of the new rules, under which the effect of the plea of "not guilty" in actions on the case was so materially abridged (a)². And when we find that the legislature have directed that the defendant shall give the plaintiff a notice of the objections upon which he intends to rely, it is but reasonable to think they must have meant to require something more particular than the pleas. What degree of particularity is required it may be difficult to define. But the question is, whether the statute has been virtually complied with in this case.

The first objection is, that the plaintiffs' invention had been previously published in the specifications of patents granted to two persons who are named, "and also by other persons in other books and writings." Now I think it would be a more fair compliance with the statute, that the objection should disclose the names of the authors, or should specify the books upon which the plaintiffs mean to rely. The objections would then come more within the analogy of other cases that have been decided. And no hardship is hereby imposed upon the defendant, as he can add the names of other publications to his notice by applying to a judge at chambers any time before the trial (b). The effect of requiring the defendant to be more specific upon this point will be to diminish expense, and it will cause his notice of objection to be in more complete compliance with the provisions of the statute.

The general words at the end of the second objection [216] have been given up on the part of the defendant; and the argument on the part of the plaintiffs, as to the rest of that objection, has been already answered by the court.

With regard to the third objection, I think if the words "and elsewhere" are struck out—leaving it to the defendant, if he should, before the trial, discover any places besides Nottingham, where the invention has been used, to apply to add the

(a)¹ The new pleading rules were laid before parliament (in pursuance of the first section of the law amendment act) on the 5th of February 1834. They came into operation on the first day of Easter term following (15th of April). The new patent act received the royal assent on the 10th of September 1836, but the bill had been brought forward in 1833.

(a)² See R. G. (Pleading in Particular Actions), iv. 1.

(b) See the proviso at the end of sect. 5 of 5 & 6 W. 4, c. 83.

names of such places—that there will be no objection to its present form. This case is distinguishable from *Fisher v. Dewick*. That was a patent for an improvement in machinery, consisting principally in the use of particular wheels or cranks. They may have been known in particular houses, with which the plaintiff was not acquainted; and, unless the names of the persons using them were given, nothing was disclosed by the notice. The patent in this case is for making starch generally; and the notice of objection does limit the alleged user to a particular class of persons—namely, those engaged in the trade of lace-making—in a particular place—Nottingham; and it is quite as open to the plaintiffs as it is to the defendant, to make inquiries in that place among that class of persons. But as the words “and elsewhere” are too general, and might mislead the plaintiffs, I think they should be struck out.

ERSKINE J. I am of the same opinion. It must be taken that something more was intended by the legislature to be disclosed in the notice of objection than would be contained in the pleas themselves. The court has to see that the objections are stated with a reasonable particularity. And I think that, with the alterations suggested by my lord, sufficient information will be given by these objections.

[217] MAULE J. I also think that the statute requires some further information to be given by the notice of objections than would be conveyed by the pleas; as the new rules of pleading must be assumed to have been known to the legislature at the time the statute passed. In *Fisher v. Dewick* the patent was for certain improvements in machinery; one notice of objection on the part of the defendant was, that the machinery had been in previous use by certain persons who were named, “and divers other people in this kingdom and elsewhere.” There was nothing in this notice to distinguish or point out these “other people.” The objection was as wide as the plea, and the court held that it should be narrowed by naming the parties who, according to the defendant, had previously used the invention. The invention claimed here is for improvements in the manufacture of starch. The third objection is not in general terms—that the same process had been used by certain other persons; but the objection is narrowed and excludes all but rice-starch, and that applied to a particular purpose, namely, the dressing of lace. I think that is a reasonable particularity, and sufficiently points out the nature of the inquiry which the plaintiffs may institute—the nature of the fabric and the particular starch being specified. My own opinion is that the words “and elsewhere”—might have been permitted to stand; but upon this point I do not think it worth while to differ from the rest of the court; and I dare say the omission of the words will not make much difference to the parties. With respect to naming the books alluded to in the first objection, I think it may be as well that the defendant should state them—by the names of the authors or some other description—in the same way as he has stated the specifications of the patents, in which he says the plaintiff’s invention has been previously published.

[218] CRESSWELL J. It is very difficult to lay down any general rule as to the particularity required in notices of objection of this nature. If the act of parliament under which they are delivered had been passed before the new pleading rules were promulgated, I should have thought that the fifth section was intended to be to the same purport as the rule that has been referred to: but the general rules were laid on the tables of both houses of parliament and came into operation, before the act passed. I think, therefore, the act must mean that a defendant should have some information further than the pleas would supply; and that we are authorised to call upon the defendant to give some more particular information. I entirely concur with the rest of the court as to the amendments suggested.

Rule absolute accordingly (a).

(a) The notice of objections was accordingly amended by striking out the words inserted in brackets (ut supra, p. 209, 210) and after the words “at Nottingham,” (supra, p. 210) the defendant afterwards (under an order of Erskine J., dated 26th of May, 1843) added the following sentence; “and at Linton near Nottingham, at Radford near Nottingham, and at Tiverton in Devonshire, and further, that the manufacture of starch from rice, both whole and ground, was used, known and practised at Cornbrook near Manchester.” See *R. v. Walton*, 2 Q. B. 963, where, on a *scire facias* to repeal a patent, the prosecutor had, while the record was in Chancery, filed a notice of objections under the same section of the statute (5 & 6 W. 4, c. 83, s. 5), that other persons than the patentee had used the invention in England before the patent,

[219] CORRIGAL v. THE LONDON AND BLACKWALL RAILWAY COMPANY.

Jan. 3, 1843.

[S. C. 6 Scott, N. R. 241; 2 D. N. S. 851; 3 Railw. Cas. 411; 12 L. J. C. P. 209. Followed, *In re Bradshaw*, 1848, 12 Q. B. 572. Applied, *East and West India Docks and Birmingham Junction Railway v. Gattke*, 1851, 3 Mac. & G. 170. Discussed, *R. v. London and North Western Railway*, 1854, 3 El. & Bl. 473. Applied, *Mortimer v. South Wales Railway*, 1859, 1 El. & El. 384. See *Long Eaton Recreation Grounds Company v. Midland Railway*, [1902] 2 K. B. 580.]

By a railway act, it is enacted, that if any person interested in lands affected by the execution of the act shall not agree with the company as to the amount of purchase money or compensation, &c., and shall request that the matter in dispute may be submitted to the determination of a jury, the company shall issue a warrant to the sheriff or sheriffs of the county or city where the lands in question shall be situate, &c.; and if such sheriff or sheriffs shall be a shareholder or shareholders in the company, then to any of the coroners of the said county, &c., commanding such sheriff, &c. to impanel a jury, who are to inquire and assess, &c.:—Quære, whether this enactment would apply in a case where, as in Middlesex, the office of sheriff is constituted of two persons, and where one only of such persons is a shareholder in the company.—By a subsequent act extending the line of railway, it is enacted, that in cases of dispute between the company and parties claiming compensation, wherein the company do not upon request, &c., within twenty-one days, issue their warrant to the sheriff or sheriffs of the county or city where, &c., it shall be lawful for the party so having given notice himself to send a request in writing to the sheriff, &c., according to the tenor of the former act; and the sheriff, &c. shall thereupon impanel a jury, &c.:—Held, that the former enactment did not apply in a case where a party proceeded under the latter act, so as to render void the proceedings held before the sheriff; the former enactment being confined to cases where the company themselves issued their warrant, which they were not to direct to one of their own shareholders, and the latter embracing cases in which the company having neglected to issue the warrant, the party in dispute with them might call upon the sheriff to hold an inquisition; as such party would have no means of knowing whether or not the sheriff was a shareholder.—Quære, whether such proceedings would have been avoidable, if objected to at the proper time.—But held, that, where the company appeared by their counsel before the sheriff and jury at the holding of the inquisition, without objection, they had waived any such objection.—By the first act it is further enacted, that the jury shall inquire, &c., and give a verdict for the sum to be paid for the purchase of lands, and also the sum to be paid by way of satisfaction, &c. for goodwill, &c., and that such satisfaction shall be inquired into, and assessed, separately and distinctly from the value of the lands.—By the second act it is further enacted, that in case any dwelling-house, &c., within fifty feet from the railway shall be deteriorated in value, and the owner, &c. shall require the company to purchase the same, the company shall treat for the purchase and for the compensation, &c., for any loss, &c. in respect of any tenant's fixtures, &c.; and in case the parties cannot agree as to the value of such dwelling-house, &c., or as to the amount of such compensation, &c., then the amount shall be ascertained by the verdict of a jury in the manner described in the former act, &c., provided that no party shall be entitled to receive compensation unless the jury shall by their verdict determine that the property has been deteriorated in value by the construction of the railway:—The plaintiff, in an action upon a judgment founded upon an inquisition to recover, under the last-mentioned section, the purchase-

and the defendant had applied to the Master of the Rolls for an order on the prosecutor to deliver a particular of the names of such persons, which was refused. When the case came before the court of Queen's Bench a similar application was made, and it was stated by counsel, in support of the rule, that similar rules had been granted by this court; but after time taken to consider, the court of Queen's Bench refused the application, Lord Denman C. J. stating that they agreed with the Master of the Rolls rather than with this court.

money of a house, and compensation for tenant's fixtures, &c., stated that the jury gave a verdict for 250l. "for the purchase of the house, and also by way of satisfaction, &c. for all damage in respect of the tenant's fixtures." The defendant pleaded that the plaintiff adduced evidence at the inquisition, "not only of the loss and damage in respect of good-will, tenant's fixtures, &c., but also of certain loss and damage in respect of the dwelling-house, by reason of the construction of the railway; that the jurors did assess and give a verdict for the sum of 250l. for the purchase of the dwelling-house, and also by way of satisfaction, &c. for the several losses, &c. in the plea mentioned;" whereby the inquisition, verdict, and judgment were void:—Held, that the mere fact of the plaintiff's adducing such evidence, and the receiving thereof by the sheriff, did not affect the validity of the verdict; as such evidence may have been given to shew that the house had been deteriorated; which was necessary to give jurisdiction to the sheriff and jury:—Held also, that the verdict, as stated in the declaration, excluded the possibility of any damages being given for the deterioration of the house by the construction of the railway:—Held also, that the enactment in the first act as to separate assessments, was directory only, and not in the nature of a condition.—By the first act it was provided, that if the jury gave the same or a greater sum than the company had previously offered, the company should pay all the costs of the inquisition; if less than had been previously offered, that each party should pay half the costs; and that if by reason of absence abroad, or any other disability, any person should have been prevented from treating with the company, they the company should pay the whole costs:—The second act was silent as to costs:—Held, that a party proceeding under the second act, in a case not falling within the cases mentioned in the first, was not entitled to costs.

Debt. The first count of the declaration stated that the London and Blackwall Railway (which said railway was authorised by and constructed according to [220] and under and by virtue of the provisions of a certain act of parliament made and passed in a session, &c. (6 & 7 W. 4, c. cxxiii.) intituled "An act, &c.;" and also of a certain other act of parliament made and passed, &c. (2 & 3 Vict. c. xcv.) intituled, &c., was first opened to the public on the 6th of July 1840; that the plaintiff, theretofore, to wit, on the 24th of October, in the year last aforesaid, was the lessee, for a certain term of years then and still unexpired, to wit, for a term of [221] seventy-four years and one quarter of another year from the 29th of September 1817, of a certain dwelling-house numbered 82, and situate and being in a certain street called Lucas Street, in the Commercial Road, in the Parish of St. George, in the county of Middlesex, and within fifty feet from the said railway; and by reason of the construction of the said railway the said dwelling-house, and the estate, interest and property of the plaintiff therein as such lessee as aforesaid, were then, to wit, on the 24th of October 1840 aforesaid, greatly deteriorated in value; and thereupon the plaintiff, so being such lessee as aforesaid, and the said dwelling-house being so situate and so deteriorated in value as aforesaid, did, within the period of twelve months from the opening of the said railway as aforesaid, to wit, on the said 24th of October 1840, by notice in writing, bearing date the day and year last aforesaid, and left at the office of the said company, to wit, on the 2d of November in the year last aforesaid, require the said company to purchase his, the plaintiff's, estate, interest and property in the dwelling-house whereof he was such lessee, and wherein he was so interested as aforesaid, and thereby then gave the said company notice that he was ready to treat for the sale of the same to the said company, according to the provisions of the said acts of parliament made and passed concerning the said railway; and to the said notice the plaintiff annexed a plan more particularly delineating the said dwelling-house: that the said company did not nor would, within thirty days after the service of the said notice as aforesaid, treat for the purchase of the estate, interest, and property of him the plaintiff as such lessee as aforesaid, in the said dwelling-house mentioned in the said notice, or for the compensation, recompense or satisfaction to be made to him as such lessee as aforesaid for any loss, damage or injury in respect of any good-will, tenant's fixtures, improve-[222]ments, or otherwise, occasioned by the taking thereof, nor did the plaintiff and the said company, within that time or afterwards agree as to the value of the estate, &c. of him the plaintiff as such lessee as aforesaid in the dwelling-house, or as to the amount or value of the compensation, &c. to be paid to him, the

plaintiff, as such lessee, for such good-will, &c. as aforesaid: whereupon he, the plaintiff, afterwards, and after the expiration of the said thirty days, to wit, on the 29th of December 1840, did, by a request in writing then made by him, request the said company to issue a warrant, and to submit the said matter in dispute between him, the plaintiff, and the said company, of and concerning the premises aforesaid, to the determination of a jury, in the manner and according to the regulations prescribed by the said acts of parliament: that the company did not nor would, within the space of twenty-one days after the making the said request, comply with the same, or issue their warrant according to the regulations prescribed by the said acts for the impanelling and summoning a jury as aforesaid; and thereupon he the plaintiff, afterwards, and after the expiration of the said space of twenty-one days after the making of the said request to the said company as aforesaid, to wit, on the 10th of February 1841, did himself send a request in writing to the sheriff of Middlesex aforesaid, according to the tenor and provisions of the said acts, and did thereby request the said sheriff to impanel, summon and return a jury according to the provisions and in the manner prescribed by the said acts of parliament, to require of and assess and give a verdict for the sum of money to be paid by the said company to the plaintiff for the purchase of his estate, &c. as such lessee as aforesaid in the said dwelling-house as aforesaid, and for the compensation, &c. to be paid to the plaintiff by the said company for loss, damage and injury in respect of the good-will, &c. occasioned by [223] the taking thereof as aforesaid, and to proceed in that behalf in the manner and according to the regulations prescribed in the said first-mentioned act of parliament, upon the issuing of the warrant of the said company as therein directed: that, upon a certain inquisition taken in pursuance to, and accordance and compliance with the last-mentioned request, afterwards, to wit, on the 6th of March 1841, to wit, at the house known by the name of the Sheriff's Office in Red Lion Square, in the county of Middlesex, before Thomas Farncombe and Michael Gibbs, esquires, then being sheriff of the said county of Middlesex, W. F. J., W. J., &c. &c., twelve honest, lawful, sufficient and indifferent men of the said county, qualified according to the laws of this realm to serve on juries for trials of issues in Her Majesty's courts of record at Westminster, being duly impanelled, summoned, returned and drawn pursuant to the provisions of the said act by the said T. F. and M. G., at the time of the said request and then being sheriff of the said county of Middlesex as aforesaid, and being by and before such sheriff at the time and place last aforesaid duly sworn to inquire of and concerning the matters in the said last-mentioned request in that behalf mentioned, and thereby referred to, to be inquired of, assessed and ascertained by them in manner therein mentioned; and the plaintiff and the said company, by their counsel respectively, having, at the time and place of inquisition aforesaid, appeared before the said sheriff and the said jurors, and having respectively adduced evidence before the said sheriff and jurors touching the matters so in question as aforesaid, the said jurors, upon their oath said, that the said dwelling-house before and at the time of such notice to purchase so given as aforesaid and then still was deteriorated in value by the construction of the said railway authorised by the first-mentioned act; and they the said jurors did then and there assess and give a [224] verdict for the sum of 250l., to be paid by the said company to the plaintiff for the purchase by them of the plaintiff of his estate and interest in the said dwelling-house, and also by way of compensation, &c. for all damage in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, or in other respects whatsoever, under the provisions of the said acts in that behalf; that the said sheriff did then and there, accordingly, pursuant to the said acts, give judgment for the said sum of 250l. so assessed by the said jury, to be paid by the said company to the plaintiff, according to the provisions of the said acts; that the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquisition as aforesaid, duly signed by the said sheriff: that the said verdict and judgment, having been so signed by the said sheriff as aforesaid, were afterwards, and before the commencement of this suit, to wit, on the 24th of May 1841, by the said sheriff duly deposited, left and lodged with the clerk of the peace for the county of Middlesex, to be by him kept, and the same are now by him kept among the records of the quarter sessions of the said county of Middlesex; that the said verdict and judgment still remain among the records of the said quarter sessions of the said county of Middlesex in full force and effect, and in nowise satisfied, reversed or annulled: that the parish of St. George above mentioned is the same

parish as described in the first-mentioned act of parliament as the parish of St. George in the East: of all which said premises the said company then and there, to wit, on the day and year last aforesaid, had notice: that the plaintiff being interested as aforesaid in the property to which the said inquisition referred, and known to the said company as the person so interested therein and entitled to receive the said sum of 250l. upon making such title and conveyance as thereafter mentioned, [225] and being there present, to wit, in the county of Middlesex aforesaid, and the said property not being property which any corporation, trustee or person under disability was, by the first-mentioned act, capacitated to convey (of all which premises the said company then had notice), was afterwards, and after the recording of the said verdict and judgment, and within a reasonable time in that behalf, and before the commencement of this suit, to wit, on the day and year last aforesaid, ready and willing and able to make to the said company a good title to the property to which the said inquisition referred, and also to make a proper conveyance thereof to the said company, upon payment by them of the said sum of 250l., and to receive that sum accordingly; and that the said company then had notice; but that the said company discharged him from making, and waived the tender of any such title or conveyance, and gave him notice that they would not accept such title and conveyance, or either of them, if made: that the plaintiff had not as yet obtained payment and satisfaction from the said company of the said sum of 250l., for which the said jurors so gave their verdict, and the said sheriff so gave judgment, as aforesaid, or any part thereof, although the said company, afterwards, and before the commencement of this suit, were requested by the plaintiff to pay him the said sum of money; whereby and by reason of the said sum of 250l. being and remaining wholly due, &c., *actio accrevit*.

The second count stated, that, after the said inquisition in the first count mentioned, to wit, on the day and year last aforesaid, the costs and charges and expenses of summoning the jury, and the expenses of witnesses on the said inquisition, were duly settled and determined by the said sheriff pursuant to the said acts at a certain sum, to wit, the sum of 110l. 1s. 11d., to be paid by the said company to the plaintiff, who by reason of the pre-[226]-mises in the said first count mentioned had been prevented from treating and agreeing as aforesaid; and that thereof the said company (who prior to such settlement and determination had had due notice to attend before the said sheriff on that occasion) afterwards, to wit, on the day and year last aforesaid had notice; and the last-mentioned sum of money was then, and more than ten days before the commencement of this suit, duly demanded of the said company by the plaintiff; yet that the plaintiff had not yet obtained payment or satisfaction of the last-mentioned sum of money: whereby, &c. *actio accrevit*.

Third plea; that the said Thomas Farncombe, Esq., in the declaration mentioned, at the time of the said request so made by the plaintiff to the said sheriff of Middlesex to summon a jury for the purposes in the declaration in that behalf mentioned, and thence continually until and at the respective times of the holding the inquisition, and giving the judgment in the first count mentioned, and of the settling and determining the costs, charges and expenses in the second count mentioned, was and continued to be a shareholder in the said company; and that by means thereof the said inquisition and judgment, and the said settling and determining the costs, charges and expenses, were and are wholly void, and of no force or effect: *Verification*.

Fourth plea; that, upon the holding of the inquisition in the first count of the declaration mentioned, to wit, on the day and at the place in the said first count in that behalf mentioned, the plaintiff adduced evidence before the said sheriff and jurors, not only of the loss and damage in respect of good will, tenants' fixtures, improvements, or otherwise, alleged by the plaintiff to have been occasioned by the taking of the dwelling-house in the declaration mentioned, but also of certain loss and damage alleged by the plaintiff to have been [227] sustained by him in respect of his said dwelling-house, by reason of the construction of the said railway; that the said jurors did assess and give a verdict for the sum of 250l. to be paid by the company to the plaintiff for the purchase by them of the said plaintiff of his said estate and interest in the said dwelling-house, and also by way of satisfaction, recompense and compensation for the several losses and damages in this plea hereinbefore mentioned; by reason of which said premises the said inquisition, and the said verdict and judgment in the declaration mentioned, became and were and are wholly void and of none effect: *verification*.

Demurrer, to the third plea, assigning for causes that the said plea neither traversed, nor confessed and avoided, the matters alleged in the declaration; and that, if the said plea sufficiently confessed and admitted the matters alleged in the declaration, yet it did not set forth or allege any matters or things which shewed that the said inquisition and judgment, and the said settling and determining the said costs, charges and expenses, or either of them, were of no force and effect; that the said inquisition and judgment, and the settling and determining the said costs, &c., and each of them, were good, valid and effectual, notwithstanding the said Thomas Farncombe, Esq., at the several times in the said plea mentioned, was a shareholder in the said company; that, if by the said plea it was intended to be shewn that the said sheriff to whom the said request was made, and before whom the said inquisition was holden, and by whom the said judgment was given, and by whom the said costs, &c. were settled and determined, was at the several times in the said plea mentioned a shareholder in the said company, it should have been alleged that both the said T. F. and the said Michael Gibbs, Esq., at the said several times last aforesaid, were respectively shareholders in the said com-[228]pany; for, the said T. F. and M. G. Esqs., at the several times last aforesaid, were together sheriff of Middlesex, and not either of them alone; that the plea did not, therefore, shew that the said sheriff was a shareholder in the said company, and the fact of any other person than the said sheriff being at the several times last aforesaid a shareholder in the said company, would not render the said inquisition and judgment, or the settling and determining the said costs, &c., or either of them, void; that the objection to the validity of the said costs, &c., by reason of the said T. F. being a shareholder in the said company, could not now be pleaded in bar to the declaration; that it appeared by the said inquisition and proceedings that the said company appeared upon the said inquiry, and took the benefit of the same, and that they could not now object that the said T. F. was at the time a shareholder, a fact which the said company then knew; that there was nothing in the acts of parliament relating to the said company which makes an inquisition, like the present, bad by reason of one or even both of the persons filling the office of sheriff of Middlesex being a shareholder or shareholders in the said company; and that the said plea is in other respects uncertain, &c.

To the fourth plea, that it was not alleged in that plea that it appeared by the record of the said verdict and judgment that such evidence was adduced, as in that plea mentioned, and, unless it so appeared, the said company were estopped from alleging the fact to be so; and that no proof of such fact, except the record itself, could be now given; that it was not alleged that such evidence was received by the court, or allowed to go to the jury, or influenced their verdict, or that the said sum of 250l., or any part thereof, was in fact assessed by the jurors in respect of the loss or damage alleged to be sustained by reason of the construction of [229] the railway; that, even supposing the fact to be so, it would not make the verdict or judgment void, or form any objection to the same; that it was not alleged in the said plea that it appeared by the record of the said verdict and judgment that any part of the said sum of 250l. was given by way of satisfaction, recompense or compensation for such loss or damage as last aforesaid, but, on the contrary, it appeared by the record of the said verdict and judgment as set forth in the declaration, that the said sum of 250l. was given for the purchase of the plaintiff's estate and interest in the said dwelling house, and also by way of satisfaction, recompense and compensation for all damages in respect of the tenants' fixtures of the plaintiff in the said dwelling-house, or in other respects whatsoever, under the provisions of the said acts of parliament in that behalf; whereas the said company by the last-mentioned plea meant to insist that the said verdict and judgment were partly given in respect of matters not warranted by the provisions of those acts, which the said company were estopped by the said record from doing; that it did not appear by the last-mentioned plea, that the verdict therein first mentioned was the same verdict as the verdict mentioned in the declaration, and which was taken on the said inquisition therein mentioned, and that the said last plea was in other respects uncertain, &c. Joinder.

The points marked for argument on the part of the plaintiff, were substantially the same as the causes assigned for demurrer. The points marked on the part of the defendant were as follows:—

1st. That the inquisition is void in consequence of the personal disability of Thomas Farncombe, as alleged in the third plea.

2d. That the defendants are not estopped from alleging that the jury exceeded the authority given them by statute in the manner alleged in the fourth plea.

[230] 3d. That the sheriff had no authority to give judgment for the 250l., as mentioned in the first count of the declaration.

4th. That the first count of the declaration is defective, because it does not appear therefrom that the 250l. were assessed by the jury in respect of the amount of the value of the said dwelling-house, and the compensation for loss, damage or injury in respect of tenant's fixtures, improvements, or otherwise occasioned by the taking thereof, but on the contrary thereof it expressly appears thereby that the said sum was assessed in respect of other damages; which fact is admitted to be true by the demurrer to the fourth plea.

5th. That the second count of the declaration is defective, because in cases under the 2 & 3 Vict. c. xcv. s. 23 (being the enactments under which the plaintiff proceeded) the sheriff has no power to award or settle costs, nor can the party taking the benefit thereof claim any costs.

6th. That an action of debt will not lie either for the 250l. or for the costs.

The case was argued in last Michaelmas term (a).

(a) Nov. 11. Before Tindal C. J., Coltman, Erskine, and Maule JJ.

The following sections of the acts were referred to in the argument:

6 & 7 W. 4, c. cxxiii. s. 21, enacts, "That all and every body or bodies politic, and other person or persons hereinbefore capacitated to contract for, sell and convey any such tenements or hereditaments as aforesaid, and any other owner or owners of any such tenements, &c., or any share or shares, estate or estates, interest or interests therein, may accept and receive such satisfaction or recompense for the value thereof; and such body or bodies, &c. owners, and also any tenant for a year, or from year to year, or at will, or other occupier of any such premises entitled to any compensation for such good will or improvements as shall be lost, and for tenant's fixtures, and for such injury or damage as shall be sustained on account of the execution of this act, or in anywise relating thereto, may accept and receive such sum of money in respect thereof as shall be agreed upon between them respectively, and the said company; and in case the said company and the said parties interested in such tenements, &c., goodwill, &c., or sustaining such injury or damage, cannot or do not agree as to the amount or value of such satisfaction, recompense or compensation, the same respectively shall be ascertained and settled by a jury in manner hereinafter directed."

Sect. 22, "for settling all differences which may arise between the said company and the several owners and occupiers of, or persons interested in, any lands which shall or may be taken, used, damaged or injuriously affected by the execution of any of the powers thereby granted, enacts, "that, if any person, corporation or trustee so interested or entitled, and capacitated to sell, agree, convey or release as aforesaid, shall not agree with the said company as to the amount of such purchase money or satisfaction, recompense, or other compensation as aforesaid; or if any of the parties entitled to receive such purchase money, &c. shall refuse to accept such purchase money, &c., as shall be offered by the said company, and shall give notice thereof in writing to the said company within twenty-one days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury; or if any of such parties as aforesaid shall, for the space of twenty-one days next after notice in writing shall have been given to the clerk, agent or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, refuse to treat or shall not agree with the said company for the sale, conveyance and release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein, or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance or release as shall be necessary or expedient for enabling the said company to take such lands, or to proceed in making the railway and other the works aforesaid, or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest or charge which they may claim to be entitled unto or interested

[231] Channell Serjt. (with whom was Butt) for the plaintiff. The first question, intended to be raised by the third plea, is, whether the fact that one of the individuals, who [232] jointly with another held the office of sheriff of Middlesex, at the time the inquisition was held, was a shareholder, rendered the inquisition void.

in, or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made; then and in every such case the said company shall, and they are hereby required from time to time to issue a warrant, either under their common seal, or under the hands and seals of three at least of the directors of the said company, to the sheriff or sheriffs of the county or city where the lands in question shall be situate, or in case the said lands shall be situate within the liberty of His Majesty's Tower of London, then to the bailiff of the said liberty; and if such sheriff or sheriffs, or their under-sheriff or under-sheriffs, or such bailiff or his under-bailiff respectively, shall be a shareholder or shareholders in the said company, or enjoy any place of trust or profit under the said company, or shall be in anywise interested in the matters in question then to any of the coroners of the said county, city or liberty not interested as aforesaid; or if all the coroners shall be so interested, then to some person living within the said county, city or liberty, and free from personal disability, who shall have filled the said office of sheriff, bailiff or coroner within the said county, city or liberty (a person having more recently served either office being preferred), commanding such sheriff or sheriffs or other person to impanel, summon and return, and the said sheriff, &c. is and are hereby accordingly empowered and required to impanel, &c. a jury of at least forty-eight sufficient and indifferent men, qualified according to the laws of this realm to serve on juries for trials of issues in His Majesty's courts of record at Westminster; and the persons so to be impanelled, &c. are hereby required to appear before the said sheriff, &c. if the property in question be situate in Middlesex or within the liberty of His Majesty's Tower of London, or in case it be situate within the city of London, then, &c. at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impanelled, &c. a jury of twelve men shall be drawn by the said sheriff, under-sheriff, &c. or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in His Majesty's courts of record at Westminster are by law directed to be drawn." The section then contains provisions for returning a jury *de circumstantibus*, in cases of necessity; for enabling all parties concerned to challenge any jurymen, but not the array, for summoning witnesses, and for authorising a view by six of the jury; and it then proceeds as follows: "and such jury shall upon their oaths, or being quakers, upon their affirmations (which oaths, &c., as well as the oaths, &c. of all such persons as shall be called upon to give evidence, the said sheriff, &c. is empowered to administer), inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase of such lands except for such interest therein as shall have been of right purchased by the said company from any other person, and also the sum of money to be paid by way of satisfaction, recompense, or compensation for goodwill, improvements, tenant's fixtures, or for any injury or damage whatsoever which shall before that time have been done or sustained as aforesaid, and for the future, temporary or perpetual, or for any recurring damages to be so done or sustained as aforesaid, and the cause and occasion of which shall have been in part only obviated, removed or repaired by the said company, and which cannot or will not be further obviated, &c. which satisfaction, &c. for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid; and the said sheriff, &c. shall accordingly give judgment for such purchase money, satisfaction, &c. as shall be assessed by such jury; which said verdict and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes upon all persons and corporations whatsoever: provided always, that, in such inquiry the person or corporation claiming compensation shall be plaintiff, and shall have all such rights and privileges as plaintiffs in actions at law are entitled to: provided also that not less than twenty-one days' notice in writing of the time and place at which such jury are so required to be returned shall be given by the said company to the party with whom any such controversy shall arise, either by delivering such notice, &c."

Sect. 24 enacts, "That the said verdicts and judgments being first signed by the

[233] The twenty-second section of the 6 & 7 W. 4, c. cxxiii.—the first act under which the railway was constructed—provides that where the company and the owners of [234] property which may be injured by the railway, cannot agree as to the amount of purchase or compensation, the company are to issue their warrant “to the sheriff

said sheriff, &c. shall be kept by the clerk of the peace for the county or liberty in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county or liberty, &c. and shall be deemed records to all intents and purposes; and the same, or true copies thereof, shall be allowed to be good evidence in all courts whatsoever, &c.”

Sect. 27 enacts, “That, in every case in which the verdict of a jury summoned as aforesaid shall be given for the same or a greater sum than shall have been previously offered by the said company for the purchase of any lands to be used or taken by them for the purposes of this act, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs, charges and expenses of summoning such jury, and the expenses of witnesses shall be defrayed by the said company, and such costs, &c. shall be settled and determined by the said sheriff, &c.; and in case such costs, &c. shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods and chattels of the said company, under a warrant to be issued for that purpose by any justice of the peace for the county, city or liberty wherein such inquisition shall be held, not interested in the matter in question; which warrant such justice is hereby authorised and required to issue under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs, &c.; but if the verdict of the jury shall be given for a less sum than shall have been previously offered by the said company, one moiety of the said costs, &c. shall be defrayed by the party with whom the said company shall have such controversy or dispute, and the remainder shall be defrayed by the said company; and the former moiety of such costs, &c. having been ascertained and settled in manner hereinbefore mentioned, shall and may be deducted out of the money adjudged to be paid to such other party as so much money advanced to and for his use; and the payment or tender of the remainder of the money so adjudged shall be deemed and taken to all intents and purposes to be good payment or tender in satisfaction of the whole thereof: provided always that in cases in which, by reason of absence in foreign parts, or from any other cause or disability not hereinbefore provided for, any person shall have been prevented from treating and agreeing as aforesaid, the whole of such costs, &c. shall be borne and paid by the said company.”

Sect. 28 enacts, “That the said company shall not be obliged, nor shall any jury to be summoned by virtue of this act be allowed, (without the consent of the said company), to receive or take notice of any complaint to be made by any party for any loss or injury by him sustained, or supposed to be sustained, in consequence of the execution of any of the powers of this act, unless notice in writing by or on behalf of the person or corporation making such complaint, stating the nature, extent, and particulars of such loss or injury, and the amount or the compensation claimed in respect thereof, shall have been given by such person or corporation to the said company ten days before the summoning of such jury, and within the space of six calendar months after the time of such supposed loss or injury having been sustained, or after the doing or committing thereof shall have ceased.”

Sect. 51 contains similar provisions as those contained in the 2 & 3 Vict. c. xcv. s. 23 (*infra*), relating to the extended line of railway.

2 & 3 Vict. c. xcv., by which the line of railway was extended (after reciting the former act, and the 1 Vict. c. cxxxiii.), by s. 18 enacts “That in all cases where the verdict of a jury, summoned as by the said first recited act (6 & 7 W. 4, c. cxxiii., s. 22) directed, shall be given for the same or for a greater sum than shall have been previously offered by the said company, for the purchase of any lands to be used or taken by them, for the purposes of the said recited acts, or this act, or as compensation for any damage or loss which may happen or arise, in the execution of any of the powers thereof, the expenses of instructing and the reasonable fees of counsel, not exceeding two in number, for attending the enquiry before such jury, and the reasonable expenses of one surveyor which may have been paid by the party with whom the

[235] or sheriffs of the county or city where the lands," &c. are situate; and in case "such sheriff or sheriffs, &c. shall be a shareholder or shareholders in the company," then the warrant is to go to the coroners.

[236] In the first place, that section has no application to the present case. The words "the sheriff or sheriffs of the county or city" must be taken distributively, and be understood to mean, "the sheriff of the county, or the sheriffs of the city." In London the two sheriffs are distinct officers; but in Middlesex, the two officers only constitute one sheriff; *Thompson v. Farden* (a). In the [237] present case Mr. Farncombe

said company may be in dispute shall be paid by the said company, and the amount of such fees shall be settled and determined by the sheriff, under-sheriff, &c. in like manner as the costs of summoning such jury, and other expenses payable by the said company, but upon the same scale of allowance as may for the time being be adopted or allowed by the taxing officers of Her Majesty's courts of record at Westminster."

Sect. 22 enacts, "That in all cases of dispute between the company and the parties claiming compensation from the company under the provisions of the above recited acts and the present act, wherein the company do not, upon request made by such party or parties to submit the matter in dispute to the determination of a jury, within the space of twenty-one days, issue their warrant, according to the regulations prescribed by the aforesaid recited acts, for the impannelling and summoning a jury, then it shall and may be lawful for the party so having given notice himself, to send a request in writing to the sheriff or sheriffs, or under-sheriffs, bailiff, or his under-bailiff, respectively according to the tenor of the above recited act; and the sheriffs and bailiffs so mentioned in the first above recited act shall summon and impanel a jury, and proceed as in the manner prescribed in the above recited act upon the issuing of the warrant of the company."

Sect. 23, after reciting that the extended line of railway was intended to pass through divers streets, &c. and close to divers dwelling-houses, stables and shops which thereby might be greatly deteriorated in value, enacts "that in case the greater part of any such dwelling-house, &c. which shall be situated within fifty feet from the said railway shall be deteriorated in value, and the owner or lessee of any such dwelling-house, &c. shall by notice in writing, to be left at the office of the said company, require the said company to purchase the same, it shall be lawful for the said company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of the dwelling-house, &c. mentioned in such notice, and for the compensation, recompense or satisfaction to be made to such owner or lessee for any loss, damage or injury in respect of any tenant's fixtures, improvements, or otherwise occasioned by the taking thereof; and, in case the party so giving such notice and the said company shall not agree as to the value of such dwelling-house, &c. or as to the amount or value of the satisfaction, recompense or compensation to be paid for such improvements, tenant's fixtures, or otherwise, then the amount of such satisfaction, &c. shall be ascertained and settled by the verdict of a jury in the manner described in the said first recited act, or this act, for ascertaining and settling the value or recompense for other lands, &c. to be taken or purchased for the purposes of the said first recited act, or this act; provided always, that no party shall be entitled to receive any compensation under the above enactment unless the jury to whom it shall be referred to ascertain the amount thereof shall by their verdict determine that the property in respect of which the same is claimed has been deteriorated in value by the construction of the said railway: provided also that no party shall be entitled to claim any such compensation after the period of twelve months from the opening of the railway to the public, nor shall the said company be compellable to purchase any such property as aforesaid after the period of fifteen months from the opening of the said railway to the public, &c."

(a) Ante, vol. i. p. 535. 1 Scott, N. R. 275; 8 Dowl. P. C. 813.

In Gilb. Hist. C. P. (as to which see 3 Blac. Com. 271, n.), p. 180, it is said "The first beginning of this custom seems to be upon the foundation of the charter of King John," (confirming a previous charter from Hen. 1, see Com. Dig. tit. London (G.)) "who granted the sheriffwick of London and Middlesex to the mayor and citizens of London at the farm of 300l. per annum; so that being a grant in fee of the sheriffwick to them as a corporation, they had a right to name one or more officers in order to

and Mr. Gibbs were the two persons who held the office of sheriff of Middlesex, and the inquisition was taken before them, but the fact alleged in the plea that one of them was at the time a shareholder in the company, will not prevent the inquisition and the judgment thereon from being good. The other side must contend that they are void upon the ground that the sheriff was a shareholder. But Mr. Farncombe was not the sheriff. [Tindal C. J. There may be a different question as to the inquisition and the judgment. As to the former, the objection now insisted on might be ground for a challenge to the array, but that is expressly taken away in these proceedings by the 6 & [238] 7 W. 4, c. cxxiii. s. 22. The objection to the judgment would rest upon the principle that no man can be a judge in his own cause (a).] By the twenty-fourth section the presiding judge is to sign the verdict and judgment. If there is no valid objection against the inquisition being taken by the sheriff, there can be none against the judgment being given by him.

Again, the acts of parliament are to be construed with, at least, some strictness, against the company. The provision as to the sheriff being a shareholder, only applies to cases where the warrant is issued by the company themselves, under the twenty-second section of the first act. That act contained no provision by which any other party, except the company, could obtain the decision of a jury as to the amount of compensation. By the twenty-second section of the second act, parties claiming such compensation, are empowered, where the company neglect to submit the matter in dispute to the determination of a jury, to send a request to the sheriff, who is thereupon to hold the inquisition. This section presupposes a breach of duty on the part of the company; but it contains no enactment as to the sheriff being a shareholder.

But even supposing the objection were good, the defendants are estopped from availing themselves of it, by the fact of their having appeared before the sheriff, and having offered evidence upon the inquisition.

The fourth plea sets up as a defence, that the jury have given a verdict in respect of matter for which they were not authorised to award compensation; namely, "for certain loss and damage alleged by the plaintiff to have been sustained by him in respect of his said dwelling-[239]-house, by reason of the construction of the said railway;" as well as for loss and damage in respect of goodwill, tenants' fixtures, &c.; and that the verdict and judgment were consequently void. But by sec. 23 of the 2 & 3 Vict. c. xcv. in cases where any dwelling-house, &c., shall be deteriorated in value, the value thereof and the amount of compensation for tenants' fixtures, &c., is to be ascertained by a jury, who are required to determine that the property has been deteriorated. It is stated in the declaration that evidence was given that the plaintiff's house was deteriorated in value: the proceedings therefore would fall within that section, in which nothing is said about a separate assessment. [Tindal C. J. That section says that, "the amount of satisfaction, &c., shall be ascertained and settled by the verdict of a jury in the manner described in the said first recited act;"—that is in

execute the same; and they thought it proper to name two officers indifferently to execute both offices; and both of them execute as one sheriff, though the writ in Middlesex is directed to them as one Vic' Com' Middx. Præcipimus tibi; in that of London, Vice-comitibus London' Præcipim' vobis; and the reason of this difference seems to be, that before this grant of the sheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the sheriffs for London, and the London sheriffs were responsible to the king for the London profits of the sheriffwick; and that was the reason why two were appointed, that both might be responsible; and this nomination was, that the citizens might exhibit to the king responsible persons; and that seems to be the reason, that in many of the corporations that are cities and counties, there are two sheriffs; but when, by the charter of King John, the sheriffwick of London and Middlesex was granted to the citizens as a perpetual fee-farm, then they entered their sheriffs, which before were nominated for London only, and the election of the two was for both sheriffwicks, but the directions of the king's writs were as before, viz. in London to the two sheriffs, and in Middlesex as if there was only one." And see Pulling's London, 131, 2d ed.

(a) Ld. C. J. Hobart in *Day v. Savadge*, Hob. 87, goes the length of saying, that "an act of parliament made against natural equity, as to make a man judge in his own case, is void in itself." Sed quære.

the 6 & 7 W. 4, c. cxxiii. ;—and by the twenty-second section of that act, the satisfaction for good-will, &c., is to be “assessed separately and distinctly from the value of the lands.”] At all events, the non-compliance with the direction as to separate assessment will not vitiate the proceedings; *In re the London and Greenwich Railway Company and the Sheriff of Surrey* (2 A. & E. 678; 4 N. & M. 458). The plea does not raise any point as to the proceedings being merely defective; the defendant therefore can only rely upon such objections as would be available to him upon general demurrer to the declaration.

As to the second count, which is for the costs of the proceedings, the defendants will contend upon general demurrer, that the plaintiff is not entitled to costs, inasmuch as sect. 23 of the 2 & 3 Vict. c. xcv. is silent as to costs. But they are expressly given by sect. 27 of the former act, the provisions in which section are [240] incorporated into the latter act, by the concluding words of the twenty-second section thereof.

Bompas Serjt. (with whom was H. Hill), for the defendants. As to the mode of assessment it is submitted that it sufficiently appears upon the face of the declaration, that there was an entire assessment. At least it is no where shewn that there was a separate assessment. [Maule J. Need the fact that there had been a separate assessment distinctly appear? The jury might find two separate sums and add them together in their verdict. Non constat that this was not done.] It appears from the plea that one sum only was assessed. The first act expressly requires a separate assessment; and the court will not presume that such an assessment was made, unless it be distinctly stated to have been so done. The jury had no power to give both purchase money and damage in respect of deterioration for the same house. [Maule J. That is to say, that if a house was originally worth 20,000l., and had been deteriorated in value by reason of the railway, so as to be worth only 500l., the company were to have it for the latter sum.] If they pay for the deterioration they ought not to pay for the original value of the house as well. [Maule J. Does the word “value” mean the value before the deterioration, or after it?] It means the present value, the value at the time the inquisition is taken.

Again, there is nothing in the second act which says, that the inquisition taken under it is to be a record. There is nothing to compel or authorise the clerk of the peace to keep such inquisition as a record among the others. It follows that debt will not lie upon such an inquisition, as upon a record. [Maule J. Although there may be no express provision in the second act upon the subject, there seems to be no reason why inquisitions taken under it should not as much be treated [241] as records as those taken under the twenty-second section of the former act.] It is sufficient to say that there are no such provisions in the latter act, and that there are in the former. There is no necessity that the inquisition should be a record; and it is not made one. There is no provision that debt may be brought upon the inquisition. The only provision is, that the company shall purchase the lands, &c. [Maule J. Suppose the parties had agreed on the amount, and the plaintiff had been ready and willing to make a conveyance of the property as alleged in the declaration, might he not bring debt? Is it clear that this action is brought upon the verdict of the jury? May it not be upon an agreement between the parties? In that case it is not necessary that there should be any record. Then, may not the statement as to the deposit of the verdict and judgment among the records, be rejected as surplusage? And would not the declaration then disclose a sufficient cause of action?] It is submitted that it clearly appears from the whole of the declaration, that the action is brought upon the verdict and judgment. The request to pay is laid—not after the averment of readiness to convey—but after the allegation, that the judgment was unsatisfied.

As to the objection that, the sheriff being an interested party as a shareholder, the writ ought to have gone to the coroner, it is said that the act does not apply, inasmuch as only one of the persons who constitute the sheriff was so interested. But an interest in one is sufficient to disqualify both from acting. Where there are two distinct sheriffs, and one is interested in the subject matter of an action, the process may be directed to the other, and ought not to go to the coroner; *Letsom v. Bickley* (5 M. & S. 144). But in Middlesex, where [242] both the individuals make one, if one of them were plaintiff in an action, it is clear the writ must go to the coroner. They must both act together; and therefore in this case the interested moiety of the sheriff must act with the other. The other side must contend, that in Middlesex the provisions of the act upon this point could never be applicable unless both the parties who con-

stitute the sheriff were shareholders. If the argument on the part of the defendants is correct, the whole proceedings were coram non iudice, and void; and therefore there can be no waiver.

With regard to the second count, this is clearly not a case in which costs can be recovered. The twenty-seventh section of the 6 & 7 W. 4, c. cxxiii. gives costs only in three cases, within none of which does the present case fall. And there is nothing in the latter act to entitle the plaintiff to costs. Even if he were entitled to them, he could not recover them by action. His only remedy would be by distress under the former act.

Channell Serjt. in reply. The third plea sets up new matter, which is introduced by the defendants in avoidance of the liability alleged by the plaintiff. Now the defendants, in order to bring the case within the act, were bound to shew that the sheriff was a shareholder, which they have not done. It is argued that there is nothing in the twenty-second section of the second act requiring the judgment to be made a record. Neither is there in the corresponding section of the former act, namely, the fifty-first, which is identical in its purpose and language with the twenty-second of the latter act; yet it could hardly be contended that a judgment under the fifty-first section would not be a record. That section must be read in conjunction with the twenty-second of the latter act; the object of both of them being to provide for cases in which a party is act-[243]-ing hostilely to the company. By the twenty-fourth section of the former act, the judgments obtained under the twenty-second section of the same act are to be entered of record; and there can be no reason why such judgments should be so entered, and others obtained before the same tribunal, and relating to the same subject-matter, should not be. The whole of the clauses of the two acts must be taken together, as giving power to the sheriff to hold the inquisition. Besides, the first section of the second act incorporates the powers and provisions of the first act, except where they are expressly repealed, or are inconsistent with the second act. There is therefore an incorporation of all the provisions as to giving judgment and making it a record. It has been argued that the first count of the declaration is bad upon another ground,—that it does not expressly shew a separate assessment; but at any rate it is sufficient upon general demurrer.

With regard to the second count, it is said that costs are not recoverable under the acts; but the fifty-first section of the former act, and the twenty-second of the latter, were intended to incorporate all the machinery relative to the inquisition. It never can have been intended by the twenty-seventh section of the former act, that costs should be given against the company in a case where they could not treat with a party, by reason of his being abroad—and not in a case where they would not treat, as in the present. The legislature could not have meant that where a party recovers more than the company have offered, and the company are contumacious and will not treat with him, he is not to have his costs. The two pleas are pleaded each to the whole action. The defendants can only take such objections as would be open to them upon a general demurrer to the whole declaration, and then the demurrer would be too large, [244] as only one count is objected to; *Boydell v. Jones* (4 M. & W. 446); *Ferguson v. Mitchell* (Tyrwh. & G. 179; 2 C. M. & R. 692; 4 Dowl. P. C. 513); *The Parrett Navigation Company v. Stower* (6 M. & W. 564; 8 Dowl. P. C. 405). [Tindal C. J. Might not the court give judgment for the plaintiff on a good count, and for the defendant on a bad count? May not the demurrer be taken distribuendo?] Not, it is submitted, where there is a general demurrer to the whole declaration (d).

Cur. adv. vult.

TINDAL C. J., now delivered the judgment of the court.

The plaintiff in this case declared in an action of debt, stating in his declaration, the formation of the railway under the statute 6 & 7 W. 4, c. cxxiii., that the plaintiff was lessee of certain premises for a certain term of years, within fifty feet of the railway, and that, by reason of the construction of the railway, his premises had been greatly deteriorated; that within the period of twelve months, he gave notice in writing that he was ready to treat for the sale of the same to the company; that the company would not, within thirty days after the notice, treat for the purchase of his

(d) The doctrine that an entire demurrer to a declaration containing a good as well as a bad count shall be overruled as too large, appears to be now abandoned. Vide ante, vol. i. 201, vol. iii. 119; *Briscoe v. Hill*, 10 M. & W. 735, 740.

interest, or for the compensation or satisfaction to be made to him for his damage in respect of his good will, tenant's fixtures, improvements, or otherwise, or agree with him for the value of his interest; that, after the expiration of the thirty days, he requested the company to issue a warrant, and to submit the matter in dispute to the determination of a jury; that the company did not do so [245] within twenty-one days, and thereupon the plaintiff sent his request in writing to the sheriff of Middlesex, to summon a jury to inquire and assess the sum of money for the purchase of his interest, and for the compensation to be paid him by the company for his damage, in, and otherwise occasioned by, the taking thereof. The declaration then sets out the inquisition taken in pursuance thereof, before Thomas Farncombe and Michael Gibbs, Esquire, then being sheriff of the county of Middlesex, in which the premises lay; that the jury were duly impanelled; that the plaintiff and the company appeared before the jury by their counsel; that the jury found that the dwelling-house, before and at the time of the notice to purchase, was deteriorated in value by the construction of the railway, and assessed and gave their verdict for the sum of 250l., for the purchase by the company of the plaintiff of his said interest, and also by way of recompense and compensation for all damages in respect of the tenant's fixtures of the plaintiff in the said dwelling-house, or in other respects whatsoever; that the said sheriff gave judgment for the said sum so assessed by the jury; that the verdict and judgment were duly signed and properly deposited, as required by the act; that the plaintiff was ready to convey and to make title; of all which premises the defendants had notice, and that the plaintiff had not obtained payment, although the company had been requested to pay: by reason whereof an action had accrued, &c., to recover the said sum. The declaration contained a second count, for the costs and charges of the proceedings which the plaintiff had taken under the act.

The defendants pleaded—thirdly, that Thomas Farncombe, at the time of the request so made to the sheriff of Middlesex, and from thence to the time of holding the inquisition and giving the judgment, and of settling and determining the costs, &c., was, and continued to be, a [246] shareholder in the said company, by means whereof the inquisition and judgment, and the determining of the costs, charges and expenses, were wholly void; and the defendants further pleaded, that, at the holding of the inquisition, the plaintiff adduced evidence, not only of the loss and damage in respect of the good will, tenant's fixtures, improvements, or otherwise, but also of loss and damage in respect of the dwelling-house by reason of the construction of the railway; and that the jury assessed and gave their verdict for the said sum of 250l., for the purchase of the plaintiff's interest in the dwelling-house, and also by way of satisfaction, recompense, and compensation for the several losses and damages in that plea mentioned; and that by reason thereof the inquisition and judgment are void.

To each of these pleas the plaintiff demurred specially; and the defendants joined in demurrer.

With respect to the objection raised by the third plea, even admitting that the twenty-second section of the prior act applies to the case where the office of sheriff is constituted and composed of two persons, as in the sheriffwick of Middlesex, and where one only of such persons is a shareholder, yet we think the present case does not fall within the scope and object of that section, or within the provision therein contained. That section contemplates the case where the company issue their warrant to summon a jury, and the sheriff is a shareholder in the company; and in that case enacts that the warrant of the company shall not go to the sheriff, being one of their own shareholders, but to the coroner. It is very reasonable, that, where the company issue the warrant, as they must know beforehand, from their own books, whether the sheriff is a shareholder or not, they should not be allowed to send such warrant to one of their own body, and thereby, in effect, constitute one of the individuals of whom the company [247] is composed, and who may be presumed to be interested in their favour, to be a judge in their own behalf. But the present case falls within, and is governed by, the twenty-second section of the subsequent act, 2 & 3 Vict. c. xcv., being a case in which the company have declined or neglected to issue their warrant within twenty-one days after request made by the party for that purpose, and in which the claimant is authorised to send his request in writing to the sheriff to summon the jury. The party has no means of knowing whether the sheriff is a shareholder or not; accordingly in this clause there is no provision made in case of the sheriff being a shareholder, as in the former act. We think, therefore, the answer to be given to the

objection raised by the statement in the third plea, is, that this case does not fall within the provision of the former statute : and, if so, that the impannelling of the jury and the other acts done by the sheriff of Middlesex cannot be considered as void. And, supposing them to have been voidable, if objected to at the proper time, we think the company have waived any objection, if such could have been made by them, by appearing before the sheriff and jury, and allowing the inquisition to proceed, and the judgment to be given thereon : for, the objection itself, that the sheriff was a shareholder, and, therefore, interested in the behalf of the company, would be an objection taken by them to a matter in their own favour ; and it would be unreasonable that they should lie by and await the result of the proceedings, and raise no difficulty until after they have seen the inquisition, and can determine whether or not it is satisfactory to themselves. We, therefore, think that the objection, if it could ever have been taken, at all events comes too late, and that the third plea is bad in law.

The fourth plea raises the objection to the inquisition, that evidence was given before the jury, not only of the [248] loss and damage in respect of good-will, tenant's fixtures, and otherwise, by the taking of the dwelling-house, but also of loss and damage sustained in respect of the dwelling-house by reason of the construction of the railway : and it was urged in argument, first, that the plaintiff had adduced such evidence before them ; and, secondly, that the sum assessed by the jury was composed of damages given in respect of both those grounds of injury. But we cannot see how the mere fact of the plaintiff's adducing such evidence before the jury, and the receiving thereof by the sheriff, can of itself affect the validity of the verdict ; for such evidence may have been given to shew that the house had been deteriorated, which was necessary to give the jurisdiction to the sheriff and jury : and, as to the objection, that the sum assessed comprises damages given for injury to the premises by the construction of the railway, we think we must take the inquisition as it is set out upon the face of this declaration, which gives a verdict for the sum of 250l. "for the purchase of the house by the company, and also by way of satisfaction, recompense and compensation for all damage in respect of the tenant's fixtures of the said plaintiff in the said dwelling-house, or in other respects whatsoever ;" thereby excluding any damages given for the deterioration of the house by the original construction of the railway.

The objection is then raised, that, by the twenty-second section of the former statute, it is expressly provided that the jury shall assess, and give a verdict for, the sum to be paid for the purchase of the lands, and also the sum of money to be paid by way of satisfaction, recompense or compensation for good-will, &c. ; and also, "that the satisfaction, recompense or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid." [249] The question therefore is, whether the words just adverted to are compulsory, and in the nature of a condition, so that, if they are not observed, the inquisition and subsequent judgment are to be held void, or whether they are directory only, so that the company or the claimant might have called upon the sheriff to keep the evidence distinct as to the value of the premises, and the satisfaction for damage, and to find and adjudicate a separate sum in respect of each. And we think those words directory only. There are no expressions in the statute which require them to be construed as words of condition, or which shew such intention on the part of the legislature ; and they are not to be construed to avoid the proceedings, unless such appears the necessary construction. And the court of Queen's Bench, in the case, *In re The London and Greenwich Railway Company* (2 A. & E. 678 ; 4 N. & M. 458), which arose upon a precisely similar clause of another statute, considered those words to be directory only, and that the company could not treat the verdict as a nullity, it being the duty of the company to have called upon the jury at the time to make a separate assessment of the value and of the damages, which they had not done.

We therefore think, that, notwithstanding the objections raised by both the pleas, the plaintiff is entitled to judgment on the first count.

As to the second count, which is brought for the costs, charges and expenses which are alleged to have been duly settled and determined by the said sheriff, pursuant to the acts, at a certain sum, to be paid by the company to the plaintiff, who, by reason of the premises in the first count mentioned, had been prevented from treating and agreeing, we think the act has not provided for the case now under consideration. The only [250] clause which gives costs and charges, is the twenty-seventh section of the earlier statute ; but that appears to be limited to the case where the company are

compelling the owner of property to sell or to accept satisfaction for damages. That section provides for three cases—where the jury shall give the same or a greater sum than the company have previously offered—where the verdict of the jury is given for a less sum—and where, by reason of absence in foreign parts, or from any other cause or disability not thereinbefore provided for, any person shall have been prevented from treating and agreeing as aforesaid. But the present case does not appear to us to fall within either of the classes above set forth: clearly not within either of the two classes which are first enumerated; nor within the last, which, by the instance specified, cannot be contended to comprehend the case of a simple non-agreement, on the ground that the company will not treat or agree; but some cause or disability independent of the mere agreement of the parties themselves. The twenty-second section of the statute 2 & 3 Vict. c. xcv., which first enables the claimant to enforce the proceedings before the sheriff's jury against the company, is silent altogether on the subject of costs, except by the words of reference at the end of that section; which words, at most, apply only to the three cases enumerated in the twenty-second section of the former act, amongst which the present case does not fall.

We think, therefore, the plaintiff is entitled to judgment upon the first count, and the defendants to judgment in their favour on the last count of the declaration.

Judgment accordingly.

[251] CLARIDGE v. MACKENZIE. Jan. 21, 1843.

The 33d rule of H. 2 W. 4, which requires applications to set aside proceedings for irregularity to be made in a reasonable time, was held to apply to prisoners as well as to other persons.

The rule for a new trial, obtained by the defendant in this case, having been discharged with costs in last Easter term (*ante*, vol. iv. p. 143; 4 Scott, N. C. 796), the costs were taxed, and the defendant was taken in execution in May 1842, since when she had remained in custody.

Bompas Serjt. on a former day in this term (January 16th) obtained a rule, calling upon the plaintiff to shew cause why the master should not review his taxation, and why the judgment and all subsequent proceedings had thereon should not be set aside for irregularity, upon the ground that the defendant had not received any bill of costs, or notice of taxation.

Talfourd Serjt. now shewed cause. The application is much too late, under the thirty-third rule H. 2 W. 4 (b), which applies to prisoners as well as to other persons; *Primrose v. Baddeley* (c). Although in *Taylor v. Slater* (d), the rule was considered not to apply so strictly to prisoners; yet the lapse of time here has been quite unreasonable. [Tindal C. J. The irregularity suggested was merely the want of notice of taxation. The taxation [252] itself is not complained of. *Cresswell J.* If the judgment is to stand as a judgment, it must stand with all its consequences.] The learned serjeant stated that a similar application had been made to Coleridge J. at chambers, and had been discharged with costs; and that the case had also been before Erskine and Cresswell JJ. at chambers, who had likewise discharged the summons, considering the matter disposed of by Coleridge J.

Bompas Serjt. in support of the rule, suggested that the defendant may have been prevented by poverty from making an application by counsel; and, that being a prisoner, she had not been able to apply in person. [Tindal C. J. She might have come up by habeas. I cannot see how we can have one rule for one class of persons, and a different rule for another.] The fact of the defendant having made frequent applications at chambers, shews that she did not sleep upon her rights.

TINDAL C. J. The rule is a general one, that an application like the present must

(b) "No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

(c) 4 Tyrwh. 370, 2 C. & M. 468, 2 Dowl. P. C. 350. See also *Robertson v. Douglas*, 1 T. R. 191; *Fownes v. Stokes*, 4 Dowl. P. C. 125, 2 Scott, 125; *Fife v. Bruere*, 4 Dowl. P. C. 329; *Fowell v. Petre*, 5 A. & E. 818, 1 N. & P. 227, 5 Dowl. P. C. 276.

(d) 2 Scott, 839. See also *Rock v. Johnson*, Tyrwh. & Gr. 43, 4 Dowl. P. C. 405.

be made in a reasonable time. This is clearly not made in a reasonable time—it is much too late. The rule must be discharged.

ERSKINE J. The case was fully heard by Coleridge J. at chambers. It is not too much to expect parties to attend to the rule of court.

CRESSWELL J. We could not make this rule absolute without doing injustice to the plaintiff.

Rule discharged.

[253] CHANTER v. DICKINSON. Jan. 23, 1843.

[S. C. 6 Scott, N. R. 182; 2 D. N. S. 838; 12 L. J. C. P. 147.]

A memorandum as follows:—"Send me a licence to use two of A.'s patent furnaces to be applied to a single-plate, &c., for which I agree to pay, as agreed, 25l. as a patent-right, and which is to include iron works, fire-bricks, and labour; engineers' or furnace-builders' time to superintend or fix the above order, to be paid 6s. per day:"—Held to be either an agreement, or an acceptance of a previous proposal, and therefore to require a stamp:—Held also, that it was not within the exemption in the stamp act, as relating to "the sale of goods, wares, or merchandize," as either the primary object of the agreement was the licence, or it was an agreement for the erection of fixtures.

Assumpsit. The first count was for the licence, consent and permission of the plaintiff, before then given and granted to the defendant to erect, set up and apply and use in divers ways and on divers occasions and purposes, a certain patent invention whereof the plaintiff was the owner and proprietor, that is to say, a certain invention called Chanter and Co.'s patent furnace, and to use and apply the same for the use and benefit of the defendant; which patent invention the defendant had then, in divers ways, &c., erected, &c., and applied to his own use and benefit, under and by virtue of the said licence and permission. There were also counts for goods sold, for work and materials, and upon an account stated. Plea: non assumpsit.

At the trial, before Tindal C. J., at the sittings in London after Michaelmas term last, the plaintiff having abandoned the first count, tendered in evidence the following document, which was a printed form, filled in with names and dates, and with certain alterations and interlineations.

"No. 1 (a).

To Mr. *Nicholas Hoyle*

Send me a License to use two of
Chanter & Co.'s patent furnaces
to be applied to a single plate
and cloth boiler

[254] for which I agree to pay Mr. Chanter or his
order, ~~the terms of printed list herunto annexed~~
as ag., *Twenty-five pounds as a patent right and*
which is to include iron works, fire-bricks and labor.

"Signature. *Nathl. Dickinson.*

"Place. *Canal St. Dye Works.*

"Date. *June 7th, 1842.*

"Remarks. *To be paid for Nett Cash*

3

in — months.
one

"Engineers' or furnace-builders' time, to superintend or fix the above order, to be paid six shillings per day; and all expenses, if the distance exceeds three miles."

It was objected, that, this being an agreement, the subject-matter of which was of the value of upwards of 20l., a stamp was necessary under 55 G. 3, c. 184, Sched.

(a) The words in italics were written in this document; the others were in the printed form.

Part 1, tit. Agreement. The Lord Chief Justice reserved the point, and a verdict was found for the plaintiff, the defendant having leave to move to enter a nonsuit.

Bompas Serjt. on a former day in this term (January 13th) having obtained a rule nisi accordingly,

Channell Serjt. now shewed cause. The document in question is not an agreement. It is nothing more than an offer or proposal. It may be treated as being addressed to no one, since the name of Nicholas Hoyle (a), originally existing in the memorandum, has been struck out. It was a mere printed form for an order, subject to its becoming an agreement by acceptance and execution of it in the terms contained in it. In *Drant v. Brown* (3 B. & C. 665, 5 D. & R. 582) it was laid down by Bayley J., that a paper [255] containing a mere proposal, subsequently agreed to by parol, to let land according to terms contained in another paper that was stamped, was not such an "agreement, minute or memorandum of agreement" as required a stamp. The expression "as ag." contained in the memorandum in this case, must undoubtedly be taken to mean "as agreed;" but that may merely refer to the price, in case the proposal was accepted. [Cresswell J. That would seem to point to a price previously agreed upon, in which case acceptance would make it a complete agreement.] The document was merely a form adapted to ordinary sales, and capable of being altered to meet the particular circumstances of each case. The words "as agreed" would seem to refer to "the terms of printed list" which are struck out; so that the words "as agreed" may mean "as specified," and may be considered to refer to a rate of prices agreed to be substituted for those in the printed lists; and then the instrument on the face of it would not necessarily require a stamp. In *Edgar v. Blick* (1 Stark. N. P. C. 464), which was an action on a parol contract, it was held by Lord Ellenborough C. J., that reference might be had to an unstamped document containing a written proposal of the terms of such contract. It may perhaps be contended on behalf of the defendant, that as this document is at least evidence of a contract, it is within the terms of the act; but the same observation would apply to every case of a written proposal followed by a parol acceptance. In *Vaughton v. Brine* (ante, vol. i. p. 359, 1 Scott, N. R. 258) it was said by Tindal C. J. that though the words in the stamp act "whether the same shall be only evidence of a contract," &c. would extend to all cases in which recourse is had to any writing as evidence of a contract; still the document must come within the previous [256] words "minute or memorandum of agreement." [Erskine J. The document in that case was neither a contract obligatory upon the parties, nor a memorandum of contract between any parties. Tindal C. J. The difficulty here lies in the precise words in the document—"I agree" and "as agreed"—can they point to any thing but a former agreement?] There is no evidence of any previous negotiation. It is not disputed that wherever a contract is reduced to writing it must be stamped; and even where the terms of a parol agreement are subsequently reduced to writing, so as such writing is to be available as evidence, it would require to be stamped; but the document here it is submitted is a mere preliminary proposal.

But admitting the instrument to be an agreement, it falls within the exemption in the stamp act, being an agreement, "for, or relating to, the sale of goods, wares or merchandize." It has especial reference to the sale of the furnaces, and not merely the licence to use them. A patentee may grant a licence to other parties to use the principle of his patent; and in such case he would be estopped from bringing an action for the infringement of his patent; but the sale of a patent article by the patentee necessarily confers on the vendee, not only the right to use the article himself, but to transfer it with the same right to third parties. It amounts to a licence to all the world to use the article sold; but it is not a licence to use the principle of the patent. [The learned serjeant referred to the argument in *Minter v. Williams* (5 N. & M. 64).] The licence mentioned in the paper does not mean a licence in the ordinary sense of the word. The expression "to be applied to a single plate," &c., shews that the furnace itself rather than the licence was meant. [Tindal C. J. That expression seems rather to point [257] out the kind of article that was wanted, by shewing the purpose to which it was to be applied.] Even if the memorandum embraces the licence, it primarily relates to the furnace, which is a thing within the exemption of the stamp act. This more clearly appears from the expression "the 25l. to include

(a) He was stated to have been the agent for the plaintiff.

iron works, fire-bricks and labour." If an agreement is substantially for the purchase of goods, it is immaterial that an incidental matter, such as a licence, is also stipulated for. In *Meering v. Duke* (2 M. & R. 121), it was held that an agreement for the sale of a ship did not the less relate to the sale of goods, on account of its containing stipulations, that part of the purchase money should remain on mortgage; and that the vendor should procure a charter for the vessel, &c. "The mere circumstance," said Lord Tenterden C. J. "of other matters connected with the principal object being introduced, does not take the instrument out of the exemption. They are the terms of the agreement for the sale, but the instrument is not less an agreement for the sale of goods." In *Smith v. Cator* (2 B. & A. 778) the same learned judge stated the rule to be "that stamps are not required for those instruments in which the sale of goods is the primary object." In *Curry v. Edensor* (3 T. R. 524), the same principle was acted upon, in reference to the then existing stamp act, the words of which were similar to those of the act now in operation.

It may be contended on the other side that the furnaces which are the subject-matter of the agreement, are fixtures, and, therefore, not "goods, wares and merchandize" within the meaning of the stamp act; but those words are to receive a liberal construction; as in *Marson v. Short* (2 New Ca. 118, 2 Scott, 243). The memorandum at the foot of [258] this instrument is not to be taken as a part of the agreement. It appears to have been left in by accident. But in any point of view a contract as to the "labour" or "time" necessary to fix a chattel, will not make the chattel a fixture. In *Hughes v. Breeds* (2 C. & P. 159), it was held that part of the terms of an agreement for the sale of goods being "to finish them in a workmanlike manner," did not render a stamp necessary. In *The West Middlesex Water Works Company v. Suverkropp* (Moo. & Malk. 408), it was held that an agreement to supply a house and buildings with water by means of pipes, to be laid in a certain manner, and to a certain height, was an agreement relating to a sale of goods, and need not be stamped. It is only fixtures in the strict sense of the word—that is things necessarily affixed to the freehold—that are not within the exemption in the stamp act; *Wick v. Hodgson* (12 J. B. Moore, 213). But even tenant's fixtures may be treated as goods and chattels; *Poole's case* (1 Salk. 368), *Pitt v. Shew* (4 B. & Ald. 206), *Hallen v. Runder* (1 C. M. & R. 266). [Erskine J. In *Pinner v. Arnold* (2 C. M. & R. 613. Tyrwh. & G. 1), which was an action upon a contract to sell and deliver a printing-press of the plaintiff's manufacture, Parke B. said, "If it had appeared that part of the contract was to fix it to the floor or the walls of the defendant's house, I should have doubted whether it was a contract for the sale of goods within the meaning of the act, because that would be the same in principle as a contract to erect a pillar."] That was at most an obiter dictum. If a party purchases curtain-rods or a pier-glass to be fixed by the vendor, it would not the less be a contract for goods; the work and labour would be incidental to the sale of the article. The defendant here might, if he had thought fit, have himself fixed the furnace.

[259] Bompas Serjt., in support of the rule. The whole tenor of the memorandum in question shews that it amounts to an agreement, and is not merely an order or proposal. If it is an agreement it cannot be said to relate to the sale of goods. A furnace is not a manufactured article ready for delivery, as a boiler. A furnace is, in fact, manufactured in the setting up. The substance of the present agreement is for the patent right. In *South v. Finch* (3 New Ca. 506, 4 Scott, 293), it was held that an agreement for the sale of goods and the good-will of a business, required a stamp. That is a much stronger case than the present, since in that case the estimated value of the good-will, formed but a small part of the amount; but in this case the licence is the primary object, as expressly appears by the declaration. [Channell Serjt. The first count was given up at the trial, and the plaintiff proceeded upon the count for goods sold.]

The cases cited on the other side relate solely to the sale of goods. The present agreement, which appears on the face of the two documents, is not an agreement for the sale of goods. It is therefore within the provisions of the stamp act, and the onus lies upon the plaintiff to take it out of their operation.

TINDAL C. J. The first question in this case is, whether the document under consideration amounts to an agreement; for if it is only a proposal or a mere order it will not require a stamp. I think it is impossible to read the document without seeing that it amounts to an agreement. It seems that the parties had previously met and

agreed on a stipulated sum as the price to be paid. The words being "send me a licence to use two of Chanter and Co.'s patent furnaces, to be applied to a singe-plate and cloth boiler, for [260] which I agree to pay Mr. Chanter or his order, as agreed, 25l. as a patent right." Now this amounts to a statement, that the defendant holds himself bound by an agreement to pay a stipulated price for the things mentioned. *Prima facie*, therefore, this is a document requiring a stamp; and it lies on the plaintiff to shew that the matters contained in it are such as fall within the exceptions mentioned in the stamp act, which are confined to "memorandum, letter or agreement made for or relating to the sale of any goods, wares or merchandise." Then, the question is—does this agreement relate to the sale of any goods, wares or merchandise? In the first place it seems like a stipulation for leave to use the subject matter of the order. The defendant says, "send me a licence for two of Chanter and Co.'s patent furnaces," for which he agrees to pay 25l. "as a patent right." Now, I cannot see why these words were left in the memorandum, unless it was intended that the party should be at liberty to use the furnace as a patent right; that is, that he might repair or refix them if they got out of order, without being liable to the patentee for an infringement of his patent. It appears to be an agreement for a licence to put up a furnace upon the plaintiff's principle. If it were a purchase of a furnace itself, no licence to use it would be required; for it would be a purchase of the patent article and of the licence to use it, at the same time. But further, looking at the nature of the things to be used, I think they cannot properly be said to fall within the description of goods, wares or merchandise." They were furnaces "to be applied to a singe-plate and a cloth-boiler;" and it appears, from the whole of the agreement, that they were to be fixtures. The sum agreed upon was "to include iron work, fire-bricks and labour"—a stipulation not referable to a ready-made article, or to one which might be rendered serviceable without much [261] labour: on the contrary, it appears that something was to be done on the premises before the articles could be used. This is evident from the memorandum at foot, which we are entitled to look at. It provides that "engineers' or furnace-builders' time, to superintend or fix the above order is to be paid 6s. per day; and also expenses, if the distance exceeds three miles." This shews that it was not work to be done instantly and with little labour; that it was not merely an agreement for the sale of goods, but for work to be done by the plaintiff upon the premises of the defendant, whereby furnaces were to be put up on a particular plan. This brings the case within the principle of *South v. Finch* (3 New Ca. 506, 4 Scott, 293); and the rule for entering a nonsuit must therefore be made absolute.

COLTMAN J. I think the case is free from doubt. The document in question, clearly has reference to some former agreement with an agent, or to some previous offer, in which case it is an acceptance of such offer.

Then the question is, whether it falls within the exemption in the stamp act. The primary object of this contract seems to be, the purchase of the licence and not of the patented article. It is a contract for the right to make use of a patent machine. But, independently of that, I think the subject matter of the contract has not been shewn to be "goods, wares or merchandise," so as to support a count for goods sold. Work and labour were to be done before the article was available; indeed the thing itself had apparently no existence at the time.

ERSKINE J. I also am of opinion, that the rule must be made absolute. The statute imposes a duty [262] upon every "agreement, or minute, or memorandum of agreement, &c., where the matter thereof shall be of the value of 20l. or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument." It is true, it has been decided that these words, general as they are, do not include every written minute that may be used as a link of evidence of a contract; and, therefore, that a mere proposal in writing to enter into a contract is not within their operation. But, looking at this paper, it is clear that it must be taken, either as a contract obligatory on the defendant, or as evidence of an existing contract previously entered into. It shews that some previous arrangement had taken place, and must be considered, at the lowest, as a minute of a parol agreement. As such, it requires a stamp, unless within any of the exemptions of the stamp act. Then it is said, that it relates to the sale of goods. If it had been a contract for the purchase of a grate to be fixed, there is nothing to shew that such a document would require a stamp, except the doubt expressed by Parke B. in the case of *Pinner v. Arnold*. I should not, I confess, feel any great doubt myself on such a point, since

the purchase of the grate would be the principal thing, and the work and labour, in fixing it would be merely incidental. Here, I should say from the terms of the agreement, that the work and labour were the principal thing; at any rate it is for the plaintiff to shew that it is not so. The meaning of the contract appears to me to be this; the defendant writes to the plaintiff, "inasmuch as I cannot use furnaces according to your patent right without a licence, I will give you 25l. to erect two for me." This is quite beside any question as to a sale of goods.

CRESSWELL J. I am entirely of the same opinion. *Drant v. Brown* is certainly an authority for the proposition that a mere proposal does not require a stamp; but I think the document in this case does not bear that character. This is an absolute order; and I cannot adopt the ingenious suggestion of my brother Channell, that the words "as agreed" may mean as agreed in the printed list, which latter words are struck out. I am of opinion that it amounts to a written acceptance of a previous proposal; and that therefore a stamp was necessary.

It is said that the case comes within the exemption in the act as to sales of goods, &c. But it appears to me not to be a contract for the purchase of any thing; certainly not of any goods or chattels. Upon the face of the document, it rather bears the appearance of being an order for a licence or privilege to use a patent article, and not a purchase of any specific article. But even if we take it to be a contract for the purchase of two furnaces, what is there to shew that these furnaces were goods and chattels? It appears that they would have to be erected on the defendant's premises. A furnace has not an independent existence, to be sold as a chattel; it has to be erected and fixed on the freehold.

Rule absolute (a).

[264] DREW AND ANOTHER v. J. PRIOR, T. F. PRIOR, AND J. SALISBURY.
Jan. 23, 1843.

In an action on a joint and several promissory note against A., B., and C., the only evidence as to the hand-writing of C. was a retainer to the attorney to defend the action, bearing the signatures of all three defendants, upon which the attorney had acted, without having ever seen C., or being acquainted with his handwriting: Held, there was no evidence of the writing of C.

The declaration contained two counts on two joint and several promissory notes made by the defendants, and also a count upon an account stated.

Pleas:—To the first two counts, by J. Prior and Salisbury that they did not make the notes; by J. F. Prior a discharge under the insolvent act. To the residue, by all three defendants, the general issue.

At the trial before the undersheriff of Bedford, S. Prior, the brother of the first two defendants and the brother-in-law of the defendant Salisbury was called to prove the handwriting of the respective defendants. This witness swore to the signature of his two brothers; but stated that he had no belief as to the handwriting of Salisbury. The attorney for the defendants was then called. He stated that he had never seen Salisbury and was not acquainted with his writing; but that before undertaking to defend the present action he had required a retainer signed by all three defendants; and that he had received a retainer purporting to be signed by all the defendants, upon which he had acted.

The undersheriff was of opinion that there was no evidence of the handwriting of Salisbury, and the plaintiff was nonsuited.

Talfourd Serjt. now moved to set aside the nonsuit and for a new trial, submitting that there was at least some evidence of Salisbury's handwriting. The attorney undertook the action on the authority of a certain signature, and he was quite competent, therefore, to speak as to whose signature it was.

[265] TINDAL C. J. Non constat that the signature to the retainer was that of Salisbury. If he had acknowledged the signature to the attorney after the latter received the retainer, there might have been some ground for the motion; but as the case stands, the two other defendants might have signed the retainer for Salisbury

(a) See also *Lucas v. Beach*, ante, vol. i. p. 417.

with his assent. That might have been sufficient as an authority to the attorney; but the question is as to Salisbury's handwriting.

ERSKINE J. Suppose the issue had been, whether the signature to the retainer was in Salisbury's writing, the evidence would not have sufficed to prove that it was. And that was a necessary point for the plaintiff to prove in this case.

The other judges concurring,

Rule refused.

Talfourd Serjt. then moved upon affidavits, upon which a new trial was afterwards granted.

SOPHIA FLETCHER, Administratrix, &c., of John Fletcher, Deceased, v.
WILLIAM LECHMERE. Jan. 23, 1843.

An affidavit verifying a plea in abatement, was headed "Between S. F. administratrix, &c., plaintiff, and W. F. defendant." Held bad, as not shewing in what character the plaintiff was administratrix.

The defendant in this case had pleaded in abatement his privilege as an attorney of the court of Queen's Bench; the plea being intituled "Lechmere ats. Fletcher administratrix, &c." and the affidavit in verification being headed "between Sophia Fletcher, administratrix, &c. plaintiff, and William Lechmere, defendant."

[266] Channell Serjt. on a former day in this term obtained a rule nisi to set aside the plea for irregularity, upon the ground that the affidavit ought to have shewn how the plaintiff was administratrix. He cited *Poole v. Pembrey* (3 Tyrwh. 387, 1 Dowl. P. C. 693), *Steyner v. Cottrell* (3 Taunt. 377), *Phillips v. Hutchinson* (3 Dowl. P. C. 20), and *Clark v. Martin* (ibid. 222).

Bompas Serjt. now shewed cause. The heading of the affidavit is, in effect, the same as the title to the plea. *Steyner v. Cottrell* and *Phillips v. Hutchinson* have established that it is not sufficient to call a plaintiff "assignee, &c." in the heading of an affidavit, upon the ground that it ought to appear what kind of an assignee the plaintiff was. [Maule J. He might be an assignee of a bankrupt, of an insolvent, or of a sheriff.] No such difficulty arises in this case. In *Clark v. Martin* the marginal note states that the court declined to act upon an affidavit which was intituled "A. v. B. executor, &c." without specifying the party of whom the defendant was the executor. But it may be doubted whether the case quite bears out that statement. The objection was raised to an affidavit upon which a rule for judgment as in case of a nonsuit had been obtained; and Parke B. observed that "assignee" was more vague than "executor" because a party may be assignee in various ways; and that the master informed him that an affidavit intituled like the one under consideration was very common; he however advised the defendant to accept a peremptory undertaking, which was accordingly done. His lordship therefore seems to have thought the title of the affidavit was sufficient, as, if it had been bad he would not have proposed a peremptory undertaking. [Erskine J. Why should he do so, if the affidavit was [267] good? It was the plaintiff's affidavit. Cresswell J. It is clear that Parke B. persuaded the defendant to act as though the affidavit were bad.] In *Free v. White* (1 Dowl. N. S. 586) a writ of summons described the plaintiff "executor," not stating that he sued as executor. The declaration was general, without such description; and it was held no variance. If "executor" is a sufficient description, so is "administrator," for they both stand on precisely the same footing. [Tindal C. J. Not exactly. A party may be an administrator de bonis non, or durante minore ætate, or for a limited time, as while the executor is abroad, or in various other ways.] It is submitted that an indictment for perjury might be sustained upon this affidavit, if false, as it is an affidavit in the cause, and headed substantially in the same manner as the plea. [Tindal C. J. In the action against several defendants, a plea headed "C. D. and others ats. A. B." would be sufficient; but in the title of an affidavit the names of all the defendants must be mentioned.] At all events the court will allow the affidavit to be amended and resworn, as in *Cooper v. Talbot* (7 Scott, 345).

TINDAL C. J. In cases of this nature we ought to endeavour to lay down a rule of easy application and without any subtle distinctions. I cannot distinguish the present case from those in which it has been held that the mere description of a party as assignee, in the heading of an affidavit, is insufficient. These cases were decided

upon the ground that there might be different kinds of assignees. So, there may be administrators under distinct rights, who may have quite different powers. The case of *Clark v. Martin* seems rather an authority to the same effect, as the court certainly declined to act upon an affidavit in the heading of which [268] the defendant was merely described as "executor, &c." Now, if such a mode of intitling is insufficient in the case of an executor who can only be so under a will, a multo fortiori is it insufficient in the case of an administrator.

Bompas Serjt. applied for time to plead.

Channell Serjt. (who was to have supported the rule) submitted that leave could only be granted upon the usual terms of pleading issuably.

Per curiam. Rule accordingly, the costs to be costs in the cause.

WITHERS v. SPOONER. Jan. 21, 28, 1843.

An affidavit in order to ground a motion for judgment as in case of a nonsuit, must state the venue.—A rule for such judgment having been discharged by reason of such a defect in the affidavit, the costs being made costs in the cause, the court discharged upon the same terms a fresh rule that had been obtained upon an amended affidavit.

Manning Serjt. on a former day in this term obtained a rule nisi for judgment as in case of a nonsuit, upon an affidavit that issue was joined on the 30th of May as of Trinity term last; but the venue was not stated, and it did not otherwise appear whether the cause was a town or a country cause.

Dowling Serjt. now shewed cause (21st January). The defect in the affidavit is material; as if this is a country cause the application is made too soon; *Ellis v. Stebbing* (a). [Cresswell J. Is not the rule drawn up upon reading the record? If so that will shew the venue.] [269] The rule is drawn up merely upon reading the affidavit.

Manning Serjt. in support of the rule. The court will take notice of its own records. [Erskine J. There is no record in court to which we can refer.] The record is supposed to be before the court; and entries are presumed to be made upon the roll *de die in diem*. The affidavit is in the usual form. But whether it is a town or a country cause the application is made in proper time. If the former, a term has been lost; if the latter, an assize. [Erskine J. The rule is, that where issue in a country cause is joined in an issuable term, two assizes must intervene before the judgment can be signed. Cresswell J. It does not appear that there had been any notice of trial.] At any rate, as the point is a new one, and the defendant may have been misled by the form of the affidavit in the books of practice, the court, if they discharge the rule, will not do so with costs.

TINDAL C. J. I think the defendant is out of court. He comes here for strict law, and he must have it. The court have no means of looking at the record, and the defendant ought to shew where the venue is laid; there is no difficulty in his doing so by affidavit. The rule must be discharged; but as the point is new, the costs may be costs in the cause.

Per curiam. Rule discharged accordingly.

Manning Serjt. on a subsequent day obtained a fresh rule on an amended affidavit.

Dowling Serjt. shewed cause (28th January). The materials should have been brought before the court on [270] the former occasion, as they were then in existence; and not having been so, the court will not allow the matter to be re-agitated; *Reg. v. Harland* (8 Dowl. P. C. 323), *Saunderson v. Westley* (ibid. 652), *Ex parte Hasleham* (1 Dowl. N. S. 792). Besides, as, when the former rule was discharged, the costs were made costs in the cause, there was a sort of compact entered into, which the defendant will not now be permitted to violate.

Manning Serjt. in support of the rule. The former application was made on the usual affidavit, and perhaps rather a hard measure of justice was then dealt to the defendant. Nothing has happened to deprive him of his right to judgment as in case of a nonsuit under the statute.

(a) Ante, vol. iv. p. 639, 5 Scott, N. R. 167, 2 Dowl. N. S. 118. See *Higgins v. Stanley*, ante, vol. ii. p. 956.

TINDAL C. J. (after having referred to the master). It was certainly a new point that was started on the former occasion. The officers of the court say that it is not usual to state in the affidavit whether it is a town cause or not, except after notice of trial. But there would be no end to the business of the court, if motion after motion could be made in this manner. I think this rule also must be discharged; the costs likewise being costs in the cause.

Per curiam. Rule discharged accordingly.

[271] SHORE v. BEDFORD. Jan. 28, 1843.

[S. C. 12 L. J. C. P. 138.]

A. having a claim against B., they went together to the office of A.'s attorney, who had never acted as attorney for B. A statement was made by B. relating to A.'s claim; and it was arranged that the attorney should, on behalf of B., write to a third party in respect of the subject matter of the claim. An action having been afterwards brought by A. against B.;—Held, that the statement by B. was not a privileged communication:—Held also, that the letter, being an act done, might be proved by the attorney.

This was an action upon the warranty of a horse.

At the trial before the under-sheriff of the county of Berks, it was proved that the plaintiff had bought the horse in question from the defendant under a warranty; and that the horse proved unsound. It was contended for the defendant that he had acted in the matter only as the agent of one Pithers. Previously to the action being brought, one Ormond had been the attorney for the plaintiff, but had never acted for the defendant. The clerk of Ormond proved that before action brought, the plaintiff and defendant called together at Ormond's office. The witness was asked what passed on that occasion; the question was objected to by the counsel for the defendant, upon the ground that any statement made by the defendant under such circumstances was a privileged communication; but the question was overruled. The witness stated that the defendant admitted he had bought the horse from Pithers for the same price and with the same warranty; that the plaintiff then stated that he would not sue the defendant if he (the defendant) would sue Pithers, and that he (the plaintiff) would save him harmless; that the defendant agreed to this, and accordingly instructed the witness to write to Pithers for the price of the horse, which he did. The defendant's counsel also objected to the letter being read; but it was received in evidence; and the plaintiff had a verdict for 17l.

Talfourd Serjt. on a former day in this term (January 14th) moved for a new trial, upon the ground that the evidence of Ormond's clerk had been improperly received: as what took place between him and the defendant was a privileged communication between attorney and client. [Tindal C. J. It is more like an admission by the defendant in the presence of the plaintiff's attorney. All that passed in the office was before the time when the letter was written to Pithers, and before the time when Ormond could be said to have acted in any way as the defendant's attorney.] But if at that time he consulted him as attorney, the communication was privileged. The letter at all events was written in the character of attorney. [Erskine J. That was an act done, and therefore not within the rule as to privileged communications (a).] The learned serjeant referred to *Doe dem. Peter v. Walkins* (3 New Ca. 421, 4 Scott, 155), *Doe dem. Shellard v. Harris* (5 C. & P. 592). [Maule J. referred to *Reg. v. Avery* (8 C. & P. 596).]

A rule nisi having been granted,

Channell Serjt. now shewed cause. It may be admitted that the rule as to privileged communications may extend to such as are preliminary to a suit (e). But here the communication was not of that character. The meaning of the rule is, that one party shall not call the other party's attorney to state what he had been told professionally relating to the suit. But here the two parties go together to an attorney, and make a statement in his presence. Ormond was not at that time the defendant's

(a) See *Doe dem. Jupp v. Andrews*, Cowp. 845; *Spenceley v. Schulenburg*, 7 East, 357.

(e) See *Greenough v. Gaskell*, 1 Mylne & K. 100.

attorney, or if he was, the communication was not privileged, as it was made in the presence of the plaintiff. In fact it was an admission made to the clerk of the plaintiff's attorney.

[273] Talfourd Serjt. in support of the rule. The attorney's clerk must, of course, be taken to be the same as the attorney; and he was clearly consulted professionally by the defendant. [Maule J. If two parties go to an attorney, can what is said by one of them in the presence of the other be considered confidential? Erskine J. In *Griffith v. Davies* (5 B. & Ad. 502) it was held that a conversation in which the defendant proposed a compromise with the plaintiff, might be proved by the defendant's attorney who was present at the time.] Perhaps a party who accidentally overheard a conversation between an attorney and his client might be allowed to prove it. But the question here is, whether the attorney is at liberty to divulge a communication made to him. [Erskine J. It appears that the plaintiff and defendant having had a misunderstanding, they go to the plaintiff's attorney and come to an arrangement. The only question is, whether they did not go for the purpose of consulting Ormond as to the best means of seeing Pithers. Tindal C. J. It does not appear to me to be at all like a confidential communication.]

Per curiam. Rule discharged (b).

[274] THAMES HAVEN DOCK AND RAILWAY COMPANY v. HALL. Jan. 30, 1843.

[S. C. 6 Scott, N. R. 342; 3 Railw. Cas. 441; 7 Jur. 238.]

In an action for calls, after the cause had been set down for trial, and made a remanet, the defendant applied to set aside the proceedings, upon the ground that the company was virtually extinct, and that the parties who had instituted the action had no authority to do so:—Held, that the application was too late, it appearing that the defendant had known all the facts for a long time:—Held also, that as such parties had been for some time acting as directors, the court would not, upon summary application, inquire into the validity of their appointment; although it was provided, by the act incorporating the company, that at the trial it should only be necessary to prove certain matters, without proving the appointment of the directors.—The declaration, which was in the form given by the act, stated that the plaintiffs appeared by G. S., their attorney; the defendant having pleaded over;—Held, that the appointment of the attorney might be presumed to be under seal.—The court refused to allow the defendant, at that late period, to add a plea, so as to raise that question on the record.

Bompas Serjt. on a former day in this term (January 17th), applied for a rule calling upon the plaintiffs, and Sir George Stephen, James Esdaile, and six others to shew cause why all proceedings in the action should not be set aside, and why the said J. E., &c., or the said Sir G. S. should not pay to the defendant the costs of the action and the costs of the application.

The affidavits upon which the application was founded, stated, that by virtue of the act 6 & 7 W. 4, c. cviii.(a), in-[275]-titled "An act for making a railway from

(b) See *Perry v. Smith*, 9 M. & W. 681, 1 C. & Marsh. 554.

(a) See the principal sections of the act set out, ante, vol. iv. p. 552, in the notes to *The Thames Haven Dock and Railway Company v. Rose*. In addition to those there set out, the following were referred to in the affidavits in the principal case.

Section 94 enacts that the first general meeting of the company shall be held within six months after the passing of the act; and that, after such first general meeting, there shall be a half-yearly general meeting of the company in February and in August in each and every year.

Section 95 enacts "that a special general meeting of the proprietors of the company may be called at any time by the directors for the time being, or any five of them, if they shall see occasion; and any twenty or more proprietors of the said company holding in the aggregate 500 shares or upwards in the said undertaking, upon which all calls actually previously made shall have been paid and satisfied, may at any time, by writing under their hands, left at the office of the said company, require the directors of the said company to call a special general meeting of the proprietors of

Romford in the county of Essex, to Shell Haven in the same county, and for constructing a tide dock at the termination of [276] the said railway at Shell Haven aforesaid,' the parties therein mentioned became incorporated by the name of The Thames Haven Dock and Railway Company. The [277] affidavits then, after referring to sections 108 (ante, vol. iv. p. 552, n.) 94 (supra, p. 274), and 109 (ante, vol. iv. p. 553, n.), stated that within six months after the passing of the act, viz.: on the 28th of September

the said company to be held in London, so as such requisition fully express the object for which such special general meeting is required to be called; and the said directors are thereupon required to call such meeting accordingly, and in case of neglect or refusal of the said directors to call such meeting for the space of fourteen days next after such requisition given or left as aforesaid, the same may be called by such twenty or more proprietors by giving fourteen days notice thereof by advertisement in two or more London newspapers, and in one or more newspaper or newspapers usually circulating within the county of Essex, such notice expressing the object for which such special general meeting is required to be called; and the said company are hereby authorised to meet in pursuance of such notice, and such of the proprietors thereof as shall be present at such meeting shall proceed to the execution of the powers by this act given to the said company with respect to the matters so specified in such notice; and all acts and resolutions of the major part in votes of the proprietors of the said company met together at any such special general meeting shall be as valid and binding, with respect to the matters specified in such notice, as if the same had been done or resolved at a general meeting held at the time hereinbefore appointed for holding the same."

Sect. 98 enacts, "that, if at any such general meeting there shall not be twenty proprietors present who shall be holders of at least 500 shares in the aggregate, within two hours from the time appointed for such meeting, no choice of directors shall be made, nor shall any business be done, but in such case there shall be another meeting of the said company at the same place, and at the same hour at the expiration of seven days then next; and if at such adjourned meeting such sufficient number of proprietors shall not attend within the time last aforesaid, the directors for the time being shall continue to act and have the same powers as they had and were possessed of until the next general half-yearly meeting, or until new directors shall be appointed."

Sect. 124 enacts "that in any action to be brought by the said company against any proprietor of any share in the said undertaking, to recover any money due and payable to the said company for or by reason of any call made by virtue of this act, it shall be sufficient for the said company to declare and allege that the defendant, being a proprietor of so many shares in the said undertaking, is indebted to the said company in such sum of money as the calls in arrear shall amount to, for so many calls of such sums of money upon so many shares belonging to the said defendant, whereby an action hath accrued to the said company by virtue of this act, without setting forth the special matters; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of such shares in the undertaking as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call or any other matter whatsoever; and the said company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, in respect of such calls, unless it shall appear that any such call exceeded 5l. for every share of 50l. or was made within the space of three calendar months from the last preceding call, or that calls amounting to more than 20l. in the whole had been made in some one year; and in order to prove such defendant was a proprietor of such shares in the said undertaking, as alleged, the production of the book in which the secretary of the said company is by this act directed to enter and keep a list of the names and additions, and places of abode of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, shall be *prima facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein."

Sect. 246 enacts "that no director of the said company to be appointed under the authority of this act shall by reason or means, or on account of his being party to, or making, signing or executing, in his capacity of director of the company, pursuant to

1836, the first general meeting of the company was held, when the first directors went out of office, and twelve persons were elected in their stead; that on the 21st of February 1837, the first half-yearly meeting of the company was held, when the directors reported that in the state of the finances of the company, they would not have been justified in commencing the intended works; that on the 28th of August 1837, the second half-yearly meeting was held, when the directors reported that they had been prevented commencing the intended works; and that they also felt that the shares were in too few hands to enable them to anticipate success to the undertaking, and it was then unanimously resolved that the affairs of the said company should be wound up, and the company dissolved as to all such parties as were desirous to retire; and the directors then stated that they would feel it their duty to carry such resolution into effect in such a way as should withdraw all responsibility as to the future from those who might be disposed to retire; that the defendant testified his wish to retire, and at the secretary's request forwarded to him his certificates of [278] shares with a consent to relinquish the same; that the chairman of the company and other directors did also thereupon withdraw from the company, together with the solicitors of the company and a numerous body of proprietors; that, in the belief of the defendant, from the period of such retirement, no legal body of directors, duly qualified and elected pursuant to the provisions of the act, had since been constituted, and that no legal or competent authority had since become substituted in any person or persons, for exercising or assuming the powers or authorities conferred by the act, for managing, directing, superintending, and controlling the business and concerns of the company; and that the present action had been brought, and that the style of the company had been adopted and used for that purpose without any sufficient authority, and in direct violation of the true intent and meaning of the act, and particularly of the 108th and 109th sections (ante, vol. iv. p. 553, n.); nevertheless the defendant admitted that, after the partial dissolution of the company which took place in 1837, by the withdrawal of the chairman, &c. as before mentioned, one H. A. the secretary of the company, together with certain individuals interested as land owners and otherwise in respect of the land, for the proposed docks and railway, did attempt to prevent the total dissolution of the company, and with that view the following proceedings took place; on the 13th of March 1838, a meeting was held, purporting to be a half-yearly meeting of the company, but which meeting, in the belief of the defendant, did not consist of twenty proprietors then present, holding 500 shares in the aggregate; that at such meeting no election of directors took place in conformity with the express provision of the 109th section (ante, vol. iv. p. 553, n.); but instead thereof the following resolution was passed, [279] "that the vacancies in the direction be left to be filled at the discretion of the directors themselves, who have so fully proved their interest and care of the company's affairs;" that other meetings, purporting to be half-yearly meetings, but none of which consisted of twenty proprietors as before mentioned, were held on the 29th of August 1838, and the 27th of February, and the 29th of August 1839; that, in the defendant's belief, no half-yearly meeting was either advertised or held in February 1840, and that, with reference to such omission, the then solicitors of the company addressed, in May 1840, to one T. P. who then acted as a director of the company, a letter from which

this act, any contract or other instrument for or on behalf of the said company, or otherwise lawfully executing any of the powers and authorities given to the said directors by this act, be subject or liable to be sued, prosecuted or impleaded, either individually or collectively, by any person whomsoever, in any court of law or equity, or elsewhere, and that the bodies, goods, chattels, lands or tenements of the said directors or any of them, shall not, by reason, on account, or in consequence of any such contract or other instrument so entered into, or made, signed or executed by them or any of them as aforesaid, or any other lawful act which shall be done by them or any of them in the execution of any of the powers and authorities given to them or any of them by this act, be liable to be arrested, seized, detained, or taken in execution, but that in every such case any person making any claim or demand upon the said company or upon any directors thereof, under or by virtue of any contract or instrument, or other lawful act, may sue and implead the said company in like manner as if such contract, instrument, or other act had been entered into and executed, and done under the common seal of the said company."

the following was an extract; "Understanding that some of the gentlemen who are, or at all events lately were, directors of The Thames Haven Company were to meet together last February, we thought it due to them personally to be in attendance. We pointed out to the gentlemen present the great doubts, to say the least, whether they now had any authority whatever, since the failure to hold the general half-yearly meeting in February last, when three of them ought to have gone out by rotation. It occurs to us that nothing can now be legally done, unless by virtue of the powers given to a special general meeting by the ninety-fifth clause (*supra*, p. 274, n.); and even in convening such meeting there may be technical difficulties, though perhaps not sufficient to invalidate the acts of the proprietors present. At present it appears to us, the creditors of the company have no remedy against the company, there being no secretary, no office, no assets, and no person existing to create assets by a call; that on the 29th of August 1840, another half-yearly meeting was held, which separated without any thing being done; that the said H. A. caused an advertisement to be inserted in [280] the *Post Magazine*, on the 28th of November 1840, in which he represented that the directors of the said company consisted of five persons resident in London, and seven persons resident in Manchester (the five first mentioned directors being J. Esdaile and some of the other parties against whom the rule was moved); and the said H. A. in the said advertisement stated as follows:—"some influential gentlemen in London have consented to supply the places of the Manchester directors, who have expressed their willingness to retire. The names of the new directors are necessarily omitted, till they are actually appointed in the form required by the act;"—that, in the belief of the defendant, no such appointment had since been made, either in the form required by the act, or in any other form; that the five London residents before mentioned had up to that time continued to act as directors; and that the only addition that had been made to their number was, that two persons (being two more of the parties against whom the rule was moved), had for about two years past been associated with them; that on the 25th of February 1840, another half-yearly meeting was held, which was adjourned to the 4th of March following, when it was again adjourned; it having been found impracticable, in the belief of defendant, to procure on either of those occasions the attendance of the proprietors, except that of the official parties or those who assumed to be such; that the said H. A. afterwards issued a prospectus of the company, dated May 1841, in which the names of the directors (J. Esdaile and the six others) were set forth; that another half-yearly meeting was held in August 1841, when no business was transacted; that on the 23d of February 1842, another half-yearly meeting was held, when the chairman, J. Esdaile, stated that, although the legal number of proprietors was not present, he thought it desirable to proceed to business, and accordingly, in defiance of [281] sect. 98 (*supra*, p. 275, n.), the meeting passed various resolutions, and the said H. A. read a report in which it was stated that J. Esdaile and two of the other parties would go out of the direction by rotation; but that being re-eligible would offer themselves for re-election, and they were accordingly re-elected, and had continued to that time to act as three of the seven persons constituting the direction; that a half-yearly meeting was advertised for the 31st of August 1842, but no such meeting was held, the office being closed; that the report read at the meeting of the 23d of February 1842, contained a statement of the receipts and expenditure of the company, from which it appeared that the receipts from September 1835, to December 1841, amounted to 26,213l. 2s. 6d.; that, with the exception of a small balance in hand, the company had expended the whole amount received, and, for the greater part in a useless manner, such as salaries, &c., &c.; that the further liabilities of the company were stated to amount to 8000l. for outstanding bills, &c.; that, in the belief of the defendant, the proposed works for which the act was passed had never been commenced, and there was no probability of their being commenced, the company being altogether destitute of the necessary means, and their powers for compulsory purchases of land having long since expired; that the attorney for the plaintiffs, in bringing this and other similar actions, was Sir George Stephen; that on the 18th of May last, and while this and other similar actions were pending, the said Sir G. S., as attorney for the said H. A., convened a meeting of the creditors of the said H. A.; that the defendant had been informed that the said Sir G. S. proposed that the creditors should give to the said H. A. a twelve-month's time for the payment of his debts, and represented to such creditors, that if they would accede [282] to such proposal, the said H. A.

would be enabled to satisfy his debts out of the proceeds of the actions brought at the suit of the company for recovery of calls; that the present was the third action brought against the defendant at the suit of the plaintiffs for calls; that in the first, which was brought in 1839, the plaintiffs withdrew the record; that in the second they were again defeated; and that, although the defendant might obtain a verdict in the present action, he had no remedy for recovery of his costs, the company being, as far as the defendant was aware, without any property that could be taken in execution, and, by sect. 246 (*supra*, p. 276, n.) of the act, the directors themselves are exempted both in person and property, from all liabilities for payment of such costs; that the defendant having, in December 1841, received a letter from the said Sir G. S. demanding payment of certain moneys alleged to be due from the defendant to the plaintiffs, the defendant wrote to the said Sir G. S., stating that he had no shares on which any demand could arise, and that when in 1839 the company made a similar demand, he resisted it, and obtained judgment in his favour and a written promise from their solicitors, that no further proceedings should take place against him, and if that were not satisfactory, he requested to be furnished with the names of the directors in order to bring the matter before them; that no reply was made to that letter; that the defendant was afterwards served with a copy of a writ at the suit of the plaintiffs, issued by Sir G. S. as their attorney; that the defendant made a second application for the names of the directors to the agent of Sir G. S.; that all information on the subject was refused; and that the defendant did not then know the names of the directors, but had since ascertained them. Other facts were then set [283] forth to connect Sir G. S. with the company, and to shew that statements contained in the prospectuses issued by the company from time to time, were devoid of truth, and that, by reason of the existing difficulties, Sir G. S. had given notice in the *London Gazette* of an intention on the part of the company to apply to parliament for a bill, to authorise the abandonment of the said line of railway, and the substitution of a different line in lieu thereof.

The learned serjeant urged that as the company was virtually extinct, there was nobody who could legally authorise the attorney to proceed for calls, and that the action was for the benefit of the secretary alone. The court having, therefore, though reluctantly, granted the rule,

Talfourd and Channell Serjts. (with whom was Carey) now shewed cause upon affidavits of H. A. the secretary, of J. Esdaile and the other persons mentioned in the rule, and of the clerk to Sir George Stephen. These affidavits, besides containing a denial of the principal allegations in the affidavits upon which the rule had been obtained and a history of the proceedings of the company, stated that the calls in respect of which the action was brought, had been made, and the proceedings in the present action had been taken, by the direction and with the consent of the seven directors mentioned in the rule, who had been duly elected according to the provisions of the act. It also stated that the writ of summons in the action was issued on the 6th of December 1841, which was served, but the writ and service were afterwards set aside for irregularity; that on the 15th of the same month a fresh writ of summons was issued and duly served; that issue was joined in the cause on the 12th of May 1842, and notice for trial [284] given for the adjourned sittings after the then next Trinity term; that on the 21st of June 1842 the record was passed, and the cause was entered for trial, and was appointed to be tried on the 19th of December then next; that the cause was afterwards, owing to pressure of business, made a remanet by consent; that the defendant had pleaded the following pleas (a)—first, never indebted; secondly, that defendant was not a proprietor; thirdly, that before the calls in the declaration mentioned were made and became due, at a meeting of the said company duly convened for that purpose, it was resolved and agreed that such of the proprietors as elected so to do, and gave due notice thereof to the company, should be at liberty to relinquish their shares and quit the company, and upon their so doing should receive back their quota upon the amount paid per share out of the funds of the said company then remaining in hand, after payment of expenses; that the defendant elected to quit the said company accordingly, and gave

(a) The record was referred to by the court; and it appeared that the declaration was in debt for calls, in the form given by the act (sect. 124), it being stated that the company appeared by Sir G. S., their attorney.

due notice of his intention so to do ; and that the defendant had from thence hitherto always been ready and willing to quit the company, and to execute all acts necessary for that purpose, of which the said company had notice ; but the company refused to allow him so to do, and hindered and prevented him from so doing ;—fourthly, that the said company was fraudulent and illegal, and a common nuisance, and not in any way a bona fide undertaking. It was also stated that an act for extending and enlarging some of the provisions of the former act, received the royal assent on the 30th of June 1842, by which, after reciting the former act, it was enacted that the said recited act, and [285] all the provisions, matters, and things therein contained, except so far as the same were varied or repealed, should extend to the latter act in as full a manner as if they had been re-enacted in the latter act, with reference to the objects and purposes thereof. And that at the time the latter act was passed, and for more than a year before, there were only seven directors of the company.

They contended that the application was unfounded and unprecedented ; that this court having already decided in *The Thames Haven Dock and Railway Company v. Rose* (ante, vol. iv. p. 552, 5 Scott, N. R. 524, 2 Dowl. N. S. 104), that the clauses in the act under which the company was incorporated, were only directory as to the number and election of directors, would not now decide upon motion that the company had no legal existence, or usurp the functions of a court of equity, and issue a perpetual injunction to restrain the company from suing any party for calls. [Erskine J. The rule was granted upon the ground that the attorney who brought the action was not authorised by the company in so doing, and that it was brought not for the legitimate purposes of the company, but for the private benefit of the secretary.] These suggestions are distinctly disproved by the affidavits in answer. [Tindal C. J. We certainly cannot try upon affidavit matter of fact which the plaintiffs have a right to submit to the consideration of a jury. When the rule nisi was granted, we did not know that the cause was ripe for trial ; and it would not have been granted but for the suggestion that the action was brought without proper authority.]

Bompas Serjt. (with whom was Petersdorff) in support of the rule. The court will interfere in any case [286] to prevent fraud ; and will set aside proceedings that have been instituted by an attorney without authority ; *Doe dem. Hammeck and Corporation of Plymouth v. Fillis* (2 Chitt. Rep. 170). [Cresswell J. The defendant has called upon the plaintiffs and their attorney to shew cause why the proceedings in the action should be set aside. What cause can they shew further than they have done ? It appears distinctly from their affidavits, that the proceedings were taken by the authority of the seven directors.] It is submitted that these parties had no power to give any such authority. The shareholders are not to be at the mercy of any individual who chooses to sue them in the name of the company. The parties in question were not directors, the company being virtually extinct. [Tindal C. J. How can that be, when there was an act passed last year which recognised the company ?] The act does not authorise the renewal of the company. [Tindal C. J. It must apply to the existing company.] Then there is clearly no authority to the attorney to bring the action under the seal of the company (b) ; and if there had been no valid authority, the proper course to adopt was, to apply to the court to set aside the proceedings. [Tindal C. J. It nowhere appears that the appointment was not under seal.] The defendant says that the attorney was not appointed at all ; it is for the attorney to shew that the appointment, if it existed, was a good one. [Maule J. It is quite consistent with the defendant's affidavits, that the attorney was appointed under the seal of the seven persons who, according to the defendant's statement, are not directors. Tindal C. J. This point as to the seal was not mentioned when the rule was moved for.] It is submitted that the attorney is bound to shew a valid appointment in all respects. The defendant is pre-[287]-vented by the 124th section (supra, p. 275, n.) from raising the objection either upon the record, or before the jury.

TINDAL C. J. It appears to me that the present application fails upon two grounds. In the first place it is too stale. I cannot understand why the defendant should lie by till the cause is ready for trial,—and would indeed have been tried before now, but for an accident,—and then comes with the present application. It clearly appears

(b) See *Arnold v. The Mayor of Poole*, ante, vol. iv. p. 860, 5 Scott, N. R. 741 ; *The Fishmongers' Company v. Robertson*, supra, p. 131.

from the affidavits, that he was aware of all the circumstances long ago, and he ought to have made his application immediately upon the facts coming to his knowledge. And this applies with greater force to the objection as to the want of an appointment of the attorney under seal. That objection should certainly have been brought to the notice of the parties when the rule was applied for. But upon this point it seems sufficient to say, that for ought that appears, there may have been a proper authority under seal; and unless something is disclosed to shew there was no seal, I think we have a right to assume that there was one.

But independently of that, I am of opinion that the defendant is substantially answered upon the merits. I agree that if seven persons unconnected with the company, had authorised an attorney to bring an action in the name of the company, it would have been very improper, and the court would undoubtedly have interfered. But the parties who have given the authority in this case have, at least, acted as directors. There are many nice points under the act as to the election of directors; and many of the enactments upon that subject are clearly directory only. And if the shareholders allow parties to act in the capacity of directors, it may be they have no right to turn round in a court of justice and say, that such parties were not [288] properly elected. But I give no opinion upon that, either one way or the other, as the application is sufficiently answered upon the other ground. I think, therefore, that this case, which is virtually an application founded upon the alleged misconduct of an attorney—calling upon him to pay costs—is not one in which we ought to interfere, and that if we did so, it would be taking away from the company their right to submit their case to a jury.

ERSKINE J. I am of the same opinion. Where it has happened that an attorney has instituted proceedings, and used the names of parties, without authority, the court, upon application, has set such proceedings aside; but the application has been with the sanction of both the plaintiff and defendant. In the present case, when the rule was moved for, it was said that the action was brought in the name of the directors of the company; that there were no persons competent to act in that character, and consequently the action was brought without the authority of the company, and that the attorney who had issued the process, was the attorney to a party who had formerly acted as secretary to the company, the object of the action being merely to raise money for the purpose of paying the arrears of his salary. Certain parties, who it appears have been, and still are, acting as directors of the company, were called upon to shew cause against the rule, and they appear for that purpose by the attorney, whom they say they authorised to bring the action in question. We have therefore the fact of the action being brought with the authority of seven persons who are acting as directors; and can we, on a summary application of this nature, institute an inquiry whether they were properly appointed? It is assumed, on behalf of the defendant, that by the 124th section of the first act, the [289] question as to the validity of their appointment cannot be raised, either upon the record or at the trial. Now that section either goes to exclude the question being raised by the defendant, or it does not. I think that it does not; but if it does,—the legislature having thought that a shareholder should not dispute the authority of the directors before a jury,—why should he have power to do so before the court? The defendant ought to have taken care that the company were in a condition to carry on the business.

MAULE J. I am of the same opinion. This is a motion to set aside the proceedings in an action, upon the ground that the action was not authorised by the company, who are the plaintiffs on the record; and the further point is now taken, that the attorney, by whom the action is brought, was not appointed under seal. But it appears on the record that the action is brought by an attorney, and his authority, in that respect, not being denied by the plea, must be taken to be admitted. Then the parties acting as directors are called upon to appear and shew cause against this rule. They have appeared by their attorney, and do not repudiate, but expressly adopt, the action. This is a sufficient answer to this application. It is conclusive that they are the plaintiffs, and have authorised the action.

The defendant, a shareholder in the company, seeks to institute an inquiry into their internal affairs; which perhaps it would not be open to him to do at the trial; for it is not competent to a defendant in an action for calls, to insist as a defence that every minute direction of the act has not been complied with. But independently of that, I think this rule must be discharged for this short reason,—that it was obtained

on the ground that the action was not authorised by the company, and the company now come and say it was authorised by them.

[290] CRESSWELL J. I am entirely of the same opinion. If the defendant is not a shareholder in the company, no danger or difficulty is imposed upon him, as there is an end of the claim against him, whether the action is brought by the directors or not. If he is a shareholder, he ought at least to have come sooner with his application, as he should have known the state of the company. But it is argued that he may come now and call upon the court to inquire into the authority of the directors, because the legislature have, by the 124th section of the act, shut him out from any inquiry at another period, or in another manner, by preventing him from pleading that the calls were not duly made, or that the directors were not duly appointed. But I agree that if he is precluded from raising this question before the jury or upon the record, that is no reason why he should do so in this summary way.

The rule was obtained upon a suggestion that the company were not suing. It appears clearly however that they are suing—that the seven parties who have for some time been acting as directors, have sanctioned the proceedings in the present action—and these parties being called upon appear to the rule expressly say that the action was brought by their direction.

Rule discharged with costs.

Bompas Serjt. afterwards applied for leave to plead the matters stated in the defendant's affidavits so as to raise the question on the record; but the court refused the application after there had been so full a discussion, as the facts must all have been known to the defendant at the time he pleaded; that the real merits in the case were, whether or not the defendant was a shareholder in an existing company.

The learned serjeant therefore took nothing.

[291] PARDOE v. TERRITT. Jan. 31, 1843.

The jurat of a joint affidavit must shew that the deponents were severally sworn.

Dowling Serjt., on a former day in this term (16th of January), obtained a rule nisi to set aside a distringas, upon the joint affidavit of two illiterate persons (a), the jurat of which was as follows:—

"Sworn, at Clare, in the county of Suffolk, the 23d day of January 1843, being read over to, and fully understood by, the said Joseph Price and Anna Maria Price.

"Before me,

"G. P. ARDEN, a commissioner, &c."

Talfourd Serjt. now shewed cause. After reading and commenting upon the affidavits, he raised an objection to the form of the jurat, as not being conformable to the R. M. 37 G. 3, r. 1 (b). It should have stated, that the parties were severally sworn, the affidavit being read over to them, &c.

Dowling Serjt., who was to have supported the rule, was called upon by the court. The jurat is substan-[292]-tially in compliance with the rule of court. It appears from the body of the affidavit that it was joint, as it is stated that the parties "severally made oath and say," &c. [Maule J. But it does not appear from the jurat that the affidavit was severally sworn. "Sworn" does not mean sworn by both. As it stands, it may be that one of them did not swear it, and it is impossible to say which.] The objection at all events is taken too late; it has been waived by the

(a) See R. E. 31 G. 3. 4 T. R. 284.

(b) "It is ordered, that from and after the first day of next term, upon every affidavit sworn in this court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; and that no affidavit be read or made use of in any matter depending in this court, in the jurat of which there shall be any interlineation or erasure." This was a rule of the court of K. B. A similar rule was made in the Exchequer T. 1 G. 4. And it is stated in 3 M. & P. 559 (*Houlden v. Fasson*), that the same practice, though not prescribed by rule, obtains in this court.

fact of the other side having gone into the merits. [Tindal C. J. It is perhaps an objection that the court are bound to notice.]

Per curiam. Rule discharged (a)¹.

THOMAS ROGERS v. JOHN PETER HOLLOWAY. Jan. 31, 1843.

The court refused to discharge a judge's order (made under the 1 & 2 Vict. c. 110, s. 14) to charge stock standing in the names of trustees for the defendant.—The stock had been transferred into the names of the trustees by a deed of settlement made pursuant to an order of the court of Chancery. Quære, whether a court of common law had jurisdiction to interfere in the matter.

By a deed of settlement, dated the 26th of July 1839, and made pursuant to an order of the court of Chancery, dated the 22d of March 1839, between John Peter Holloway, of the first part, Harriot Holloway (his wife), of the second part, and Clement [293] Dale, Philip James Chabot, and Richard Lake, of the third part, two sums of 1397l. 2s. 1d. bank three per cent. consolidated annuities, and 4489l. 10s. 9d. reduced three per cent. annuities, and the dividends, interest, or annual produce thereof, were transferred into the names of the said C. D., P. J. C., and R. L., upon trust to pay the dividends and annual produce of the said trust, stocks, or funds and premises thenceforth to arise, or become payable thereon, unto the said J. P. Holloway, "until the said J. P. H. should become bankrupt or insolvent, or should assign, alien, incumber or dispose of the said dividends, and annual produce or any part thereof; and upon trust, that in case the said J. P. H. should make any assignment, alienation, incumbrance or other disposition of or affecting the dividends and annual produce of the said trust funds and premises, or any part thereof, or in case a fiat in bankruptcy or a commission of bankrupt, should be issued against him, under which he should be declared a bankrupt, or in case he should take the benefit of any act for the relief of insolvent debtors, then, and in any or either of the aforesaid cases, and in case the said H. H. should be then living, and in the event of the death of the said J. P. H. leaving the said H. H. him surviving, upon trust to pay the dividends or annual produce of the said stock or funds, and premises, from time to time when and as the same should become due and be received into the proper hands of the said H. H., for and during her natural life, for her own separate use and benefit, free from the control, debts and engagements of the said J. P. H., and that her receipts should be good discharges for the same," &c.; with a similar trust for the children in case the husband should survive the wife.

On the 7th of September 1841 the defendant, J. P. H., being then in custody, the following order was [294] made in this cause by Wightman J.(a)², on the application of the plaintiff:—

(a)¹ In *Lackington v. Atherton*, Bompas had obtained, in the same term, a rule nisi for judgment as in case of a nonsuit upon a joint affidavit, the jurat being in this form:—"Sworn in court in Westminster Hall, this 24th day of January 1843, before me, C. Cresswell."

Channell Serjt. took the same objection as was taken in the principal case, and cited *Houlden v. Fasson*, 6 Bingh. 236, 3 M. & P. 559, supra, 291, n., but he accepted a peremptory undertaking.

(a)² Under the provisions of 1 & 2 Vict. c. 110.

S. 14 enacts "that if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster shall have any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, &c., or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall

[295] "*Thomas Rogers v. John Peter Holloway*.—Upon reading the affidavit, &c., and upon hearing the attorneys for the plaintiff and the defendant, and the trustees after-named, I do order that the sum of 4489l. 10s. 9d. reduced three per cent. annuities, and also the dividends, interest or annual produce thereof standing in the names of Clement Dale, Philip James Chabot, and Richard Lake, and the sum of 1397l. 2s. 1d. consolidated three per cent. annuities, interest, and annual produce thereof, standing in the names of the said C. D., the said P. J. C., and the said R. L., shall stand charged with the payment of the sum of 297l. 17s., damages and costs in this action, with interest thereon, at the rate of four pounds per cent. per annum, from the 13th of May 1841, on which day judgment was entered up."

This order was duly lodged at the Bank of England.

On the 13th of August 1842 J. P. H. obtained his discharge under the insolvent debtors' act, the debt mentioned in the above order being inserted in his schedule. The trustees afterwards applied to Cresswell J., to rescind the above-mentioned order, on the ground that the defendant had taken the benefit of the insolvent debtors' act. His lordship, however, after taking time to consider, declined to interfere.

[296] Sir T. Wilde Serjt. in last Michaelmas term (22d November) applied for a rule calling upon the plaintiff to shew cause why the said order should not be discharged—either unconditionally, or—on payment by the trustees, under the settlement of the 26th of July 1839, to the plaintiff or his attorney, of the amount of the charge which the court should adjudge the plaintiff to be entitled to under the said order.

The affidavit upon which he moved detailed the above facts, and also stated that H. H. was still living, and that since the adjudication application had been made at the bank, on behalf of the trustees of the settlement, for payment of the dividends due in respect of the said sums, which was refused in consequence of the order of Wightman J.

[Maule J. If the stock is improperly charged, is not the court of Chancery the

to be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

S. 15. "In order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares hereby authorised to be charged for the benefit of the judgment creditor under the order of a judge, be it further enacted, that every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the mean time, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the mean time shall be valid or effectual as against the judgment creditor; and further, that, unless the judgment debtor shall within a time to be mentioned in such order shew to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: Provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

proper tribunal in which to seek for a remedy? The act does not give any appeal from the judge's order to the common law courts.] In terms it does not give any jurisdiction to make an order charging the stock to the court in which the judgment is obtained, and it would seem that such court has no power to make such an order; *Brown v. Bamford* (9 M. & W. 42, 1 Dowl. N. S. 361); but the judge's order, which is made in an action in this court, must be subject to the revision of this court in the same manner as any other order. If the court declines to review the judge's order the parties must be driven to the tardy and expensive remedy of a suit in equity in order to obtain the payment of the dividends to Mr. Holloway. [Maule J. How does the order affect the payment of the dividends?] It charges the dividends incidentally; though, in terms, it only applies to the stock. [Maule J. There may be this difficulty, that although, where an order is made, the court of Chancery may be the proper tribunal to review it, yet [297] where an order is refused there might be no appeal, unless there is one to the court in which the judgment was obtained. Erskine J. By the sixth section of the act an appeal is expressly given to the court in the case of a judge's order made under sect. 3.]

The court granted a rule nisi in the terms prayed, against which

Shee Serjt. now shewed cause, upon an affidavit stating that the said deed of settlement, although made and executed with the approbation and under the sanction and order of the court of Chancery, in a suit depending in that court, yet such suit was a friendly suit, to which the plaintiff as one of the creditors of the defendant at that time was no party, nor were any other of the then existing creditors of the defendant parties thereto; that the defendant was indebted to several creditors in large sums at the time of the said deed of settlement being so prepared and executed, and that, amongst other creditors, the defendant was at that time indebted to the plaintiff in the amount of the debt for which this action was commenced; that such deed of settlement was made and executed without any valuable consideration paid or given to the defendant, or any consideration sufficient to sustain the same against the defendant's creditors generally, and that the same was made and executed with a view by the defendant and H. H. his wife respectively to defraud and hinder and delay the plaintiff, and other the creditors of the defendant, in their just and lawful debts; that the plaintiff had filed his bill in the court of Chancery against the defendant and Harriot his wife, the said C. D., P. J. C., and R. L., and Samuel Sturges, provisional assignee of the estate and effects of the defendant, praying that, notwithstanding such deed of settlement above mentioned, the plaintiff might be paid and satisfied the [298] said judgment debt of 297l. 17s., and also the interest due in respect thereof, mentioned in the order of the 7th of September 1841, or which had since accrued and arisen, or might thereafter accrue or arise from or in respect of the said sum of 4489l. 10s. 9d. reduced annuities, and 1397l. 2s. 1d. consolidated annuities; and that subpoenas to appear had been obtained on the part of the plaintiff in the said suit in Chancery, calling on the defendants to appear and answer the said bill, and that such subpoenas had been duly served.

The learned serjeant observed, that although nothing was said in the act as to the revision of the judge's order by the court, he would not dispute their general jurisdiction, in a case where the parties had come quickly; but they had not done so in this case; and therefore the question could not be entertained. And further as to that part of the rule by which it was sought to limit the operation of the learned judge's order, it would open the whole question as to the validity of the settlement, for which this court was not the proper tribunal.

Bompas Serjt. in support of the rule. Under the fourteenth section the judge could only charge the interest of the judgment debtor under the settlement; in the same manner as if the judgment debtor were a tenant for life with remainder over, the sheriff could only take his life interest in execution under the thirteenth section. [Tindal C. J. That section expressly provides that "every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall be entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest there-[299]on." Maule J. And the fourteenth section enacts that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had

been made in his favour by the judgment debtor." The order in this case charges the stock generally. [Maule J. Only to the same extent that the debtor could charge it; and he could not charge it otherwise than by giving the creditor a remedy in a court of equity.] The order is not limited to the debtor's interest, but charges the stock generally, in terms. [Tindal C. J. But not in effect.] It was intended to give the judgment creditor the same power over the stock as over the real estate of the debtor. [Erskine J. It does not appear that the bank has any power to transfer the stock.] There is no stock at present standing in the name of John Peter Holloway. [Tindal C. J. Then you are not hurt.] Mrs. Holloway will not be able to get her dividends, as the property is bound by the order.

TINDAL C. J. If we entered into the matter, it appears we should have to settle a complicated question of equity; and that we cannot do (a).

Per curiam. Rule discharged.

[300] ALEXANDER v. TOWNLEY. Jan. 20, 1843.

A plea (in assumpsit) setting out three commissions of bankrupt against the plaintiff, one fiat and two discharges under insolvent debtors' acts, and alleging that the plaintiff's estate did not on any occasion produce 15s. in the pound, is bad for duplicity.—The court permitted the defendant to amend on payment of costs, but refused to allow him to plead the various bankruptcies, &c. in several pleas.

Assumpsit upon four bills of exchange drawn by the plaintiff, payable to his own order and accepted by the defendant. The declaration also contained a count upon an account stated.

Plea: that before the accruing of the several causes of action, to wit, on the 30th of October 1809, and from thence continually until the suing out of the commission of bankrupt thereafter mentioned, the plaintiff was a broker and a trader within, and according and subject to, the laws and statutes then in force concerning bankrupts, and during all that time did exercise the trade, of a broker, and sought his living by buying and selling; and the plaintiff so exercising the said trade, and being such trader, and seeking his living as aforesaid, on the day and year aforesaid, became and was indebted to one Aaron Norton in 100l. and upwards, and was also indebted to other persons in other large sums of money, and the plaintiff being so indebted, and so exercising the said trade, and being such trader and seeking his living as aforesaid, afterwards, to wit, on, &c., the said debt to Norton and the said other debts being then unpaid, became and was a bankrupt within the true intent and meaning of the several statutes and laws then in force concerning bankrupts; and thereupon, afterwards, to wit, on, &c., a commission of bankrupt under the great seal, bearing date, &c., grounded upon the petition of Norton, was duly awarded and issued against the plaintiff, directed, &c., by which commission, &c., by virtue of which commission, and by force of the statutes, the major part of the commissioners named in [301] the said commission having severally and respectively duly taken the oath, &c., afterwards, on the 25th of November, in the year aforesaid, did, in due form of law, find that the plaintiff had become a bankrupt within the true intent and meaning of the said statutes, before the date and issuing forth of the said commission, and did then declare and adjudge him to be a bankrupt accordingly; that on the said 25th of November, in the year last aforesaid, due notice was given and published, &c., and that he had been declared and adjudged a bankrupt thereon, and required to surrender himself; that the several meetings were duly appointed for the plaintiff to surrender himself, &c.: and the plaintiff duly surrendered himself to the major part of the said commissioners, and submitted himself, &c.; and at the last of the said meetings, to wit, on the 6th of January 1810, finished his examination upon oath before the major part of the said commissioners; and the plaintiff afterwards, to wit, on the 5th of December 1810, duly obtained his certificate of conformity under the said commission, which certificate afterwards, to wit, on the day and year last aforesaid, was duly allowed, &c., nevertheless the estate of the plaintiff, under the said commission, did not produce, nor hath it as yet produced, sufficient to pay every creditor under the said commission

(a) Vide *Tucker, In re*, ante, vol. i., p. 519, vol. iv. p. 1079. *Tucker v. Inman*, ante, vol. iv. p. 1049, 1078, n.

15s. in the pound on the amount of their several debts proved, &c. : that afterwards, and after the issuing of the said commission, and before the accruing of the several causes of action in the declaration mentioned, to wit, on the 31st of October 1817, the plaintiff was actually a prisoner in the custody of the marshal of, &c., at the suit of one Robert Wardell and others, his creditors, within the meaning, &c., and did, according to the directions and provisions, &c., apply by petition, in a summary way, to the court for relief of insolvent debtors for his discharge from such [302] custody as aforesaid, according to the provisions of the said act; which petition was duly subscribed by the plaintiff, and was forthwith afterwards, to wit, on the 17th of November 1817, filed in the said court, pursuant, &c. ; that the plaintiff did afterwards, to wit, on the 17th of December 1817, duly execute a conveyance and assignment to, &c., then being the provisional assignee of the court, in such form as required by the statute in that case made and provided, of all the estate, &c., except, &c., and of all debts due or growing due (vide *Ford v. Dabbs*, post, 309) to the plaintiff; that the said court for the relief of insolvent debtors, being of opinion that the plaintiff was entitled to the benefit of the last-mentioned act, did afterwards, to wit, on, &c., order and adjudge that he was so entitled, and the plaintiff was, by the said order and adjudication, ordered and adjudged, to be discharged by virtue of the said act from custody, and from the said debt of Wardell, and other debts and demands of the plaintiff's creditors in that order specified; and that the estate of the plaintiff, under the said discharge, assignment, or conveyance, did not produce, nor hath it as yet produced, sufficient to pay every creditor from whose debt the said plaintiff was so discharged as aforesaid, 15s. in the pound on the amount of that debt. The plea then set out a second bankruptcy of the plaintiff as a coach-master in 1821, and alleged that the plaintiff obtained his certificate, and that his estate did not produce 15s. in the pound. The plea then set out a third bankruptcy of the plaintiff, as a stable-keeper and horse-dealer, in 1831, and alleged that the plaintiff obtained his certificate, and that his estate did not produce 15s. in the pound. The plea then set out a fourth bankruptcy of the plaintiff, as a horse-dealer, in 1836, and alleged that thereupon afterwards, to wit, on the 19th of December 1836, the [303] Right Hon. Charles Christopher Lord Cottenham then being Lord High Chancellor of Great Britain, upon reading the petition made to him by White (a creditor in 100l.), against the plaintiff, and White having made such affidavit, and given such bond as by law are required, duly made and issued his the said Chancellor's fiat in bankruptcy, under his hand, and directed to the court of Bankruptcy, and whereby the said Lord Chancellor then authorised White to prosecute his said complaint in the said court of Bankruptcy (prout patet); and that, by virtue of the said fiat, and by force of the statute in such case made and provided, J. S. M. Fonblanque, Esq., then being a commissioner of the said court of Bankruptcy, and appointed by virtue of the said statute, and having duly taken the oath in the presence, &c., to wit, on the 20th of December 1836, did, in due form of law, find and adjudge that the plaintiff had become a bankrupt accordingly, &c. before the issuing of the said fiat, and did thereupon adjudge and declare him to be a bankrupt accordingly (prout patet); that before and at the time of the making of the said adjudication one A. B. Belcher was, and from thence hitherto hath been, and still is one of the official assignees of the said court of Bankruptcy; that afterwards, to wit, on the said 26th of December 1836, the said J. S. M. Fonblanque, Esq., so being such commissioner as aforesaid, by writing under his hand, appointed Belcher to be the official assignee of the estate and effects of the plaintiff under the said fiat, to act with the assignee or assignees to be thereafter chosen by the creditors of the said bankrupt (prout patet per memorandum of the appointment). The plea then alleged the publication of a notice in the *London Gazette*, the appointment of meetings, that the said White was chosen creditors' assignee, that the plaintiff duly surrendered, and that his estate did not produce 15s. in the pound. The plea [304] then set out a second petition by the plaintiff to the Insolvent Debtors' Court, and his discharge from custody thereon in 1837, and that his estate did not produce 15s. in the pound. Averment, that the several causes of action in the declaration mentioned, and each and every of them, did accrue to the plaintiff after the several bankruptcies and insolvencies thereinbefore in that plea particularly mentioned and set forth. Verification.

Special demurrer, assigning for causes, amongst others, that the plea was double and multifarious, as it stated and relied on three several commissions of bankrupt

against the plaintiff, one fiat in bankruptcy against the plaintiff, and two several petitions by him for his discharge as an insolvent debtor, under each of which his estate was alleged not to have produced sufficient to pay his creditors thereunder respectively the sum of 15s. in the pound, and stated and relied on the proceedings under or in consequence of the said commissions, fiat, and petitions; whereas it would have been a sufficient answer to the action if the defendant had properly shewn and had relied on any two of the said commissions and the proceedings thereupon, or any of the said commissions, and the said fiat, and the proceedings thereupon respectively, or the said fiat and any previous one of the said petitions, and the proceedings thereupon respectively—that the defendant endeavoured to embarrass the plaintiff by stating and relying on many matters unnecessarily, to wit, several commissions, one fiat, and several petitions, and the proceedings thereunder or thereupon, as some of those matters would afford a defence to the action, and the plaintiff was perplexed thereby, as, on the one hand, by the rules of pleading, he could not deny the whole of the said plea, and, on the other hand, he could not traverse or reply to a part of the said plea without admitting matters which would of themselves be an answer to his [305] action—that the plea did not confine the defence to some one or two of the said proceedings in bankruptcy, and in the court for relief of insolvent debtors in the said plea mentioned—that the plea was uncertain, in not shewing to which of the proceedings in the plea mentioned the defendant meant more particularly to point his defence, and did not shew in whom (or whether in any person) in lieu of the plaintiff the right to sue in respect of the causes of action declared or was vested—that the plea was ambiguous, in not shewing and stating upon what commission or commissions, or fiat or other proceeding or proceedings in particular the defendant relied, but leaving it to the plaintiff to conjecture what was the precise defence, and in what persons, and under which of the said proceedings the defendant meant to contend that he had an answer to the action—that the defendant ought to have shewn (but had not) that there were or was, at the time of the commencement of the suit, some persons or person in whom the right to sue on the bills, and for the causes of action declared on, had vested, and the plea should have expressly alleged that the same or some of them had so vested, and so have given the plaintiff an opportunity of answering such averment—that it ought to have been shewn that an assignee or assignees was or were appointed, and at the time of the commencement of the suit in existence under the first-mentioned commission—that it ought to have been shewn that Harberd or some other person continued to be assignee under the secondly named commission—that it was not shewn that there were, at the commencement of the suit, any assignees or assignee existing under the commission thirdly mentioned, or under the fiat, and entitled to sue upon the bills or upon the statement of account in the declaration mentioned—that it was nowhere alleged and shewn in the plea that the debts alleged to have been due and owing [306] by the plaintiff were, at the time of the accruing of the causes of action in the declaration mentioned, or any of them, or at the commencement of the suit, or at the time of pleading the said plea, actually unpaid or still due from the plaintiff, nor that the said commissions, or the said fiat, or the assignments in the plea mentioned, or any of them, were still in force or operation—that the defendant was estopped from stating and relying on the fiats set forth in the plea, as he had, by accepting the bills and stating the account, conclusively admitted the plaintiff's competency to draw the bills and to state an account—that it was not now competent to the defendant to deny the validity of the drawing of the bills, or the said statement of account, or the right of the plaintiff to sue in respect thereof—that it was not alleged or shewn that the causes of action in the declaration mentioned were part of the estate and effects of the plaintiff that would, under the provisions of any statute, vest in his assignees or assignee under any commission or fiat in bankruptcy—that it did not appear that the plaintiff's supposed assignees, or any of them, had interfered with his bringing the action, or had dissented therefrom, or had claimed from the defendant the amount of the sums in the declaration mentioned, or any of them, &c. Joinder.

Channell Serjt. (with whom was Lush), in support of the demurrer. If this plea can be supported, it must be on the ground that, not denying the contracts in the declaration, it shews that the right of action thereon is vested in some other party than the plaintiff. The plea, however, does not allege that any of the proceedings took place between the drawing and accepting of the bills and the time of payment;

neither is it averred that any of the assignees have interfered with respect to these particular debts. Under these circumstances, [307] it can be no defence for an acceptor, to say that the payee cannot sue him upon the express contracts into which he had entered. It is apprehended that, according to the general rule, the defendant is estopped from setting up this defence; for, by accepting the bills, he admits the right of the payee to sue upon them (a)¹. It is clear, that if this had been an action by an indorsee, the defendant, by his acceptance, would have been precluded from denying the right of the payee to indorse; *Pitt v. Chappelow* (8 M. & W. 616).

The plea is also bad for duplicity. Where a plea sets up several defences it is open to this objection, though one of the defences may not be well pleaded; *Wright v. Watts* (3 Q. B. Rep. 89, 2 Gale & D. 386). It is impossible for the plaintiff to discover on which commission the defendant means to rely; and as it is conceived that the plaintiff could not, by replying *de injuriâ* to the plea, have put all the proceedings in issue, the defendant has no right to call on the plaintiff to say for him which is the material part of the plea. In *Till v. Wilson* (7 B. & C. 684, 1 M. & R. 580) a second commission issued against a trader before the first was disposed of was held to be a nullity. So, in *Nelson v. Cherrill* (8 Bingh. 316, 1 M. & Sc. 452), it was held, that pending a former commission of bankrupt a second is void, and that under it no rights pass to the assignees. Here, the defendant has left it uncertain in what assignees he means to contend the right to sue upon these bills is vested.

Bompas Serjt. (with whom was Ogle), contra. It is clear that immaterial matter will not operate so as to make a plea double. Stephen on Plead. 293, et seq., [308] 5th ed. The plea in question is founded on the 127th section of the 6 G. 4, c. 16, which vests in the assignees the future effects of any bankrupt whose estate has not produced 15s. in the pound under a second commission; *Young v. Rishworth* (8 A. & E. 470, 3 N. & P. 585), *Benjamin v. Belcher* (11 A. & E. 350, 3 P. & D. 317). [Cresswell J. In which set of assignees do you say this property is vested?] In the assignees under the third commission. [Cresswell J. Why not in those appointed under the second commission? Erskine J. How is the plaintiff to know that you rely on the third commission?] An executor, when sued in respect of a simple contract debt of his testator, may plead several judgments, each of which might of itself constitute a defence to the action. [Cresswell J. There the whole are component parts of one defence, namely, that the assets are exhausted.] *Young v. Rishworth* and *Benjamin v. Belcher* shew that if the plaintiff were to recover in this action the defendant would still be liable to an action at the suit of the assignees, to which the recovery by the plaintiff would be no bar.

TINDAL C. J. There can be no doubt that this plea is double, for it contains several matters, each of which would constitute a defence to the action. In *Trevetian v. Seccomb* (Carth. 8, 1 Show. 80, Comb. 162), where the defendant pleaded ten outlawries of the plaintiff on mesne process in disability of his action, and prayed judgment if any answer ought to be made whilst those outlawries were unreversed, it was held on demurrer that the plea was ill for duplicity, "because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required." So here, if either the second or the third [309] commission be taken in connection with the first, there is a complete answer to the action. I am not, however, prepared to say that the defendant ought not to be allowed to amend on payment of costs, although the defence is not a very gracious one.

Per curiam. Rule absolute to amend on payment of costs within fourteen days.

An application by Bompas Serjt. to divide the defence into several pleas was refused (a)².

(a)¹ Vide *Sanderson v. Collman*, ante, vol. iv. p. 209, as to drawee's being estopped by his acceptance, to deny the signature of the drawer.

(a)² If the defendant had originally applied for leave to plead these matters severally, such leave would scarcely have been refused. Compelled to elect between transactions to which he was a stranger, a defendant may fail in the formal proof of one of the two bankruptcies, &c., which he has selected; whereas some one or more of the others might have afforded a complete answer to the action. After being compelled to pay the debt to the bankrupt, he may be called upon to pay it over again to the assignees, who will not be bound by the restriction imposed upon the debtor.

FORD v. DABBS. Jan. 24, 1843.

A debt accruing to an insolvent between the vesting order and the final discharge, vests in his assignee under 1 & 2 Vict. c. 110, s. 37.

Debt, for goods sold and delivered, and upon an account stated.

Plea: first, *nunquam indebtedatus*; secondly, as to 8l. 18s. 8d., parcel of the sum demanded—that after defendant became indebted to the plaintiff in such sum, and before the commencement of the suit, to wit, on the 3d of March 1842, the plaintiff Ford, then being a prisoner in actual custody within the walls of the Fleet prison, upon process at the suit of one Henry Edwards, for the recovery of a debt then due from Ford to Edwards, did within fourteen days next after the commencement [310] of the said actual custody of Ford, to wit, on the day and year last aforesaid, duly and according to the direction and provisions of a certain statute made and passed in the second year, &c., for abolishing arrest on meane process in civil actions, except in certain cases, &c., &c. (1 & 2 Vict. c. 110), apply by petition in a summary way to the court for relief of insolvent debtors in the said act mentioned for his discharge from such custody as aforesaid, according to the provisions of the said act; in which petition the now plaintiff stated that he was willing that all his real and personal estate and effects should be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England, according to the provisions of the said act, and prayed to be discharged from custody, and to have future liberty of his person against the demands for which Ford was then in custody, and against the demands of all other persons who should be, or claim to be, creditors of Ford at the time of the presenting of the said petition; and which petition was then duly subscribed by Ford, and was forthwith, to wit, on, &c., filed of record in the said court pursuant to the directions in the said act contained; that on the filing of the said petition and before the commencement of the suit, to wit, on, &c., the said court, in pursuance of, and according to, the said statute, ordered that all the real and personal estate and effects of Ford both within this realm and abroad (except, &c.), and also all the future estate, right, title, interest, and trust of Ford, in or to any real or personal estate and effects within this realm or abroad, which Ford might purchase, or which might revert, descend, or be devised or bequeathed or come to him before he should become entitled to his final discharge in pursuance of the said act, and according to the adjudication made in that behalf, [311] or in case Ford should obtain his final discharge from custody without any adjudication being made by the said court before Ford should be finally discharged from custody, all debts due or growing due to Ford, or to be due to him before such discharge as aforesaid, should be vested in Samuel Sturgis, then and still being the provisional assignee, &c.; which order was then duly entered of record in the said court, &c., and notice of the said order was duly published, according to the directions of the said court; by virtue of which order, and of the said statute, the said debts and sums of money in the declaration mentioned, as far as the same relate to the said sum of 8l. 18s. 8d., parcel, &c., became and were vested in Sturgis as assignee as aforesaid of Ford; that after the making of the said vesting order, and before the commencement of the suit, to wit, on the 9th of June 1842, one Charles Morgan was duly appointed by the said court assignee of the estate and effects of Ford, for the purposes of the said act, and Morgan then accepted and signified to the said court his acceptance of the said appointment, which appointment and the acceptance were then respectively entered of record in the said court, &c.; and thereupon by virtue of the said appointment and the said acceptance thereof by Morgan, and by virtue of the said statute, the said debts and sums of money in the declaration mentioned, as far as the same relate to the said sum of 8l. 18s. 8d., parcel, &c., became and were, and now are, vested in Morgan as such assignee as aforesaid. Verification.

Replication: to the first plea, *similiter*; to the second plea, that the plaintiff did not, after the defendant became indebted to him in the sum of 8l. 18s. 8d., parcel, &c., he the plaintiff then being in custody as in that plea mentioned, apply by petition in a summary way to the said court for his discharge from such custody, according to the provision of the act, *modo et formâ*, concluding to the country. *Similiter*.

[312] The particulars of demand claimed a balance of 8l. 18s. 8d.

At the trial before the sheriff of Middlesex, on the 12th of January instant, the

following facts appeared: Ford the plaintiff, a pill-box maker, supplied the defendant, a druggist, between the 5th of March and the 14th of May last, with goods amounting to 18l. 4s. 2d., of which 9l. 5s. 6d. had been paid, leaving 8l. 18s. 8d. due.

On the 2d of March Ford was arrested, and on the next day his petition was filed, and a vesting order obtained. On the 10th of May he was discharged.

The under-sheriff told the jury that all debts accruing to the insolvent prior to his discharge, were vested in the assignee.

The jury having returned a verdict for the defendant upon the second issue, leave being given to the plaintiff to move to enter a verdict for the 8l. 18s. 8d.,

Channell Serjt. obtained a rule nisi for entering a verdict for the plaintiff for 8l. 8s. 8d. on the ground that the plea was not proved, or for a new trial on the ground of misdirection.

Dowling Serjt. now shewed cause. At the time this action was brought the right of action was vested in the assignee of the plaintiff by virtue of the provisions of 1 & 2 Vict. c. 110, ss. 35, 37, 45. It will be contended on the other side that the last two sections are modified by ss. 69, 75, 87, 88. But these sections do not control the clear provisions for the vesting of the estate contained in the thirty-seventh and forty-fifth sections. Sect. 69 requires the insolvent to deliver a schedule into court within fourteen days next after the making of the vesting order; but though no debts could be included in the schedule which were not then due or becoming due, it by no means follows that debts subsequently accruing should not vest in the assignee. Sect. 75 only compels the insolvent to charge property acquired after his discharge, clearly because it was considered that up to that period no such charging was necessary. Sect. 87 and 88 do not affect the question, which, after all comes back to the construction to be put upon the language of the thirty-seventh and forty-fifth sections. [Tindal C. J. Is the issue taken here a material issue? The question is, whether the defendant was indebted to the plaintiff before the discharge. Channell Serjt. If the allegation traversed by the replication had been omitted, the plea would have been insufficient. Cresswell J. You say that that only is immaterial which leaves a good matter of defence unanswered.] The essential part of the plea is that the debt accrued due before the plaintiff's discharge. [Tindal C. J. You contend that such is the meaning of the plea.] After verdict it may be taken as an allegation that the debt accrued before the plaintiff's final discharge. The substantial question between the parties has been submitted to the jury. [Cresswell J. If the direction of the under-sheriff was right, you are entitled to retain your verdict: if that direction was wrong, the verdict cannot help you.] The objection would, if it prevailed, only lead to a repleader, or an arrest of judgment. That is a sufficient answer to that part of the rule which relates to the entering of a verdict for the plaintiff, except on the plea of *nunquam indebitatus*; to which extent the defendant does not resist the present rule. Nor is there any ground for granting a new trial. The substantial merits are with the defendant; and the plea sets out a sufficient title in the assignees, to whom the property was vested by the thirty-seventh and forty-fifth sections.

Channell Serjt. in support of the rule. It may be admitted that the plaintiff cannot succeed upon the first [314] branch of his rule, which should have formed the subject of an application to the judge who tried the cause. That part of the case, therefore, may be left entirely out of consideration.

The first point to be considered will be, what property passed to the assignee. Secondly, assuming that debts accruing to an insolvent up to the period of his final discharge, vest in the assignee, whether the plea is adapted to the case set up.

If only the debts due at the time of the making the vesting order pass, then the issue is one which clearly ought to be found for the plaintiff. [Cresswell J. The words are "due or accruing due."] Looking at the whole of the act it appears that only two classes of debts were intended to vest or be vested in the assignee—debts due at the date of the vesting order, and debts then accruing due, as bills of exchange or promissory notes having a certain time to run. The petition may be presented either by the debtor or by a creditor. Within fourteen days a schedule is to be filed. The insolvent is then heard upon his petition, and is discharged forthwith, or according to his conduct. The judgment directed to be entered up on the warrant of attorney is a judgment against the person himself. The eighty-eighth section provides for the case of property acquired after the discharge.

The whole difficulty arises out of the words "or to be due to him or her before such final discharge." [Tindal C. J. The plea would leave an interval unprovided for. Erskine J. And all for the sake of putting a forced construction on the word "or."] The court will read the thirty-seventh section in connection with the others. The insolvent is discharged only for debts due from him at the time of the vesting order. [Cresswell J. As all the profits of the insolvent were vested in the assignee, he could not sell to the defendant. Tindal C. J. Does [315] it not appear that the issue, as framed, is an immaterial issue? Is there any other course than a repleader?] Whether there must be a repleader or not will depend upon the question whether there is error on the record. The plea is in confession and avoidance. [Tindal C. J. When they put the line of division in the wrong place, why did you not set it right by your replication?] The plea is good upon the face of it. It states, that after the debt became due, and before the bringing of the action, the plaintiff applied by petition to the insolvent debtors' court. It lies upon the defendant to shew that the plaintiff is disentitled to sue for the amount of the goods which he has sold to the defendant. The plea might have been framed more correctly, but it is not a bad plea. [Coltman J. Could we say that the defendant is to replead, he having made the first blunder?] If the pleading is good, it is so only by the allegation which is traversed. It may be doubted whether this is a case in which a repleader can be awarded. [Cresswell J. The defendant, by putting that allegation in his plea, excludes the supposition that it may have accrued after the plaintiff's discharge. That is not the effect of the traverse. Tindal C. J. Your ground is, that the defendant has not taken so favourable an issue as he might have done. The case came before us on a question of misdirection on the part of the under-sheriff, in submitting to the jury whether this was a debt accruing to the plaintiff before his first discharge instead of following the terms of the issue. Coltman J. May it not turn out in some cases that the issue is material or immaterial according to the finding?] It may be assumed that the judge would have amended. [Tindal C. J. It changes the line of division.]

TINDAL C. J. The direction of the under-sheriff seems to be right in the abstract with reference to the provisions of the act, but it was a wrong direction with [316] respect to the issue joined upon the record. I cannot say that the plea is bad, but if found one way it will be a ground for a repleader. If the parties choose to apply to amend, it will be granted; if not, it must take its own course. Any costs of the amendment should be costs in the cause.

Channell Serjt. on the part of the plaintiff, acceded to the terms of the defendant being allowed to amend without costs.

Rule accordingly.

WOOLLEY AND ANOTHER v. REDDELIEN. Jan. 25, 1843.

[S. C. 6 Scott, N. R. 199; 12 L. J. C. P. 152.]

A charter-party (or memorandum of charter), by which it is agreed that the ship, after delivering her outward cargo at Malta, shall, with all convenient speed, sail to one of several ports as shall be ordered at Malta, contains an implied promise, on the part of the charterer, that the ship shall be ordered at Malta to sail to such port within a reasonable time after her arrival at Malta.

Assumpsit. The declaration stated that on the 24th of December 1841, by a certain charter-party (memorandum of charter) then made between the plaintiffs, owners of the coppered ship called the "Robert A.," Johnson master, of the measurement of 300 tons or thereabouts, then lying in the port of London and on the point of sailing for Malta with government stores of the one part, and the defendant of the other part, it was witnessed that the said ship, being tight, &c., after delivering her outward cargo, should, with all convenient speed, sail and proceed to Marseilles, Genoa, or another safe port on the west coast of Italy, or a safe port on the east coast of Italy, not higher than Manfredonia, as should be ordered at Malta, or so near thereunto as she could safely get, and there load from the factors of the defendant a full and complete cargo of wheat or other lawful merchandize, not exceeding [317] what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture; and being so loaded should therewith proceed to a good and safe port in

the United Kingdom (Gloucester excepted) calling at Cork or Falmouth for orders, or so near thereunto as she could safely get, and deliver the same on being paid freight as follows, 6s. per imperial quarter, &c. &c., the act of God, &c. always excepted; one half of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by good approved bills on London, at three months following; forty running days to be allowed the defendant (if the ship should not be sooner dispatched) for loading and delivery, and ten days on demurrage over and above the said laying days, at 7l. per day. The declaration, after setting out a penalty for non-performance of the agreement, stated that the charter-party being so made, afterwards, to wit, &c., in consideration thereof, and that the plaintiffs had then promised the defendant to perform and fulfil the charter-party in all things on their part to be performed and fulfilled, the defendant promised the plaintiffs to perform and fulfil the charter-party in all things on his part to be performed and fulfilled, and that the said ship should be ordered at Malta to sail and proceed to such port as in the said charter-party is mentioned within a reasonable time after the arrival of the said ship at Malta aforesaid. Averment: that although the plaintiffs had performed and fulfilled, &c., and although the said ship within a reasonable time of making of the said charter-party, to wit, on the day and year aforesaid, did set sail and proceed to Malta aforesaid, and although the same ship within a reasonable time in that behalf after her arrival at Malta aforesaid and the delivery of her outward cargo, to wit, on the 26th of March 1842, was tight, staunch, and strong, and every way fitted for the voyage in the charter-party mentioned, and although the same ship was then ready [318] with all convenient speed to sail and proceed to Marseilles, Genoa, or another safe port on the west coast of Italy, or a safe port on the east coast of Italy, not higher than Manfredonia, as should be ordered at Malta, yet the defendant did not nor would within a reasonable time in that behalf cause the said ship to be ordered at Malta to sail and proceed to such port as aforesaid, but detained the said ship at Malta waiting for such orders for a long and unreasonable space of time, to wit, twenty-eight days, whereby the plaintiffs were put to much cost and charge, and expended a large sum of money, to wit, 300l., in and about the maintenance of the master and mariners of the said ship during the time aforesaid, and lost and were deprived of great gains and profits which they would otherwise have had and acquired by the use of the said ship during the said time; and although the defendant afterwards, to wit, on the 22nd of April 1842, ordered the said ship to proceed to a certain port within the meaning of the charter-party, to wit, Barletta, and although the said ship did then accordingly sail and proceed to Barletta, and the master was then ready and willing to load, and did afterwards, to wit, on the 3d of June 1842, load on board the said ship at Barletta from the factors of the defendant a full and complete cargo of wheat, and being so loaded did proceed therewith to Falmouth for orders, and being there ordered to proceed to a certain good and safe port in the United Kingdom, to wit, Dublin, did then accordingly proceed to the same port and there deliver the said cargo to the defendant's agents, according to the tenor and effect of the charter-party, yet the defendant did not nor would, within the number of days in the charter-party mentioned, load the said ship with the said cargo at Barletta, and dispatch her from thence on the said voyage and deliver the said cargo at the said port of discharge, according to the true intent and meaning of the charter-party and of the defendant's pro-[319]-mise in that behalf, but, on the contrary thereof, detained the said ship after she was ready to receive her cargo aforesaid at Barletta, and the defendant had notice thereof, and after she was ready to deliver the same at Dublin, and the defendant had notice thereof, in and about the loading and unloading of the said ship at the said places respectively a long space of time, to wit, fifty days, over and above the said running days and ten days of demurrage in the charter-party mentioned, whereby the plaintiffs were put to further great costs and charges to a large amount, to wit, 500l., in and about further maintaining the master and mariners of the said ship for the time last mentioned, and lost and were deprived of the use of the same and all profits thereof during the time aforesaid; and although by reason of the premises a large sum of money, to wit, 722l. 9s. 6d., became due and payable to the plaintiffs as and for the freight of the said ship for the voyage aforesaid according to the terms of the charter-party, to be paid as therein mentioned; and although the defendant had paid more than half of the sum due for the said freight, to wit, 689l. 12s. 6d., and although the plaintiffs, to wit, on the 16th of August in the year aforesaid, requested the

defendant to pay them the remainder of the said sum of 722l. 9s. 6d., so due for freight as aforesaid, by good approved bills on London at three months following, yet the defendant had not paid the remainder of the said sum of 722l. 9s. 6d. by such good approved bills upon London or otherwise; and although by reason of the premises a further large sum of money, to wit, 210l., became due and payable to the plaintiffs as and for demurrage for the detention of the said ship at Barletta and Dublin for the days of demurrage in the charter-party mentioned, yet the defendant had not paid to the plaintiffs the last-mentioned sum of money or any part thereof, but to pay the same, &c.

General demurrer and joinder.

[320] Channell, in support of the demurrer. The declaration avers "that the defendant promised that the ship should be ordered at Malta to sail and proceed to such port as in the charter-party is mentioned." The defendant made no such promise. The ship was to discharge her cargo, and from that time the contract was to take effect. [Cresswell J. The ship is to sail immediately or with all convenient speed after the discharge of the outward cargo. But it may have been the duty of the defendant to give his orders before the discharge.] The declaration is bad if the promise alleged is not co-extensive with the consideration. There is nothing to shew that the defendant was bound to give orders for the homeward voyage before the outward cargo was discharged. [Erskine J. It is not so alleged. The allegation in the declaration is that orders were to be given within a reasonable time after the ship's arrival at Malta.] The declaration, in setting out the consideration for the defendant's promise, contains no allegation of a request on the part of the defendant^(a).

Bompas Serjt., contra. In the contract of charter entered into between these parties is implied an engagement, to give orders within a reasonable time after the arrival of the "Robert" at Malta, for that ship to proceed to a port of loading. The declaration, therefore, properly states a promise on the part of the defendant to that effect; *Whitwill v. Scheer* (8 A. & E. 301, 3 N. & P. 398). [Cresswell J. The question is, whether if the special promise had been omitted, the plaintiff could have assigned a breach in not giving orders within a reasonable time after the arrival of the vessel at Malta.]

[321] Channell Serjt. in reply. It is not contended that a plaintiff may not state in his declaration a promise to the effect of any implied engagement necessarily arising out of the written contract. But it is submitted that here no such engagement is to be implied.

TINDAL C. J. The question in this case is, whether the terms of the written contract will support the promise on which the plaintiff has declared. The words "with all convenient speed" clearly apply to the sailing of the ship, and not to the orders under which she is to sail. But the convenience of the parties, and the good reason of the thing require that the orders for sailing from Malta should be given within a reasonable time after the arrival of the vessel at that port; and the language of the contract being susceptible of that construction, I am of opinion that the promise is well laid, and that the demurrer must be overruled^(a).

ERSKINE J. I am of the same opinion. I think the declaration properly alleges a promise to give orders within a reasonable time after the arrival of the ship at Malta. What would be a reasonable time after the arrival, would, if put in issue, be a question for a jury. Upon the trial it might appear to be reasonable that the orders should be deferred until after the discharge of the outward cargo; but it does not appear to me that the promise resulting from the memorandum of charter is limited to that period.

CRESSWELL J. I am of the same opinion. There is nothing to shew that the orders are not to be given before the discharge of the outward cargo, if it be reasonable that they should be so given.

Judgment for the plaintiff.

(a)¹ Vide *Osborne v. Rogers*, 1 Wms. Saund. 264, n., ante, vol. i. 266, n. *Victors v. Davis*, 21 Law Journal, 214.

(a)² Vide ante, vol. i. 202.

[322] HARRISON AND OTHERS v. HENRY HEATHORN, JOSEPH LIDWELL HEATHORN, AND OTHERS. Jan. 20, 1843.

[For subsequent proceedings see 6 Man. & G. 81.]

The declaration stated, that theretofore to wit, on the 24th of Dec. 1835, by an agreement in writing then made, it was agreed that certain bills which had been drawn upon a company (of which the defendant was a member), should be taken up by the plaintiffs; that in the event of the plaintiffs declining to take shares in the company, which they had the option to do, the defendant should repay the sums advanced by the plaintiffs at any time after the 1st of October then next, on the company having three months' previous notice requiring such repayment. The declaration, entitled of the 16th of December, alleged that after the making of the agreement, and more than three calendar months before the commencement of the action, the plaintiffs gave notice to the company that they declined to take the shares, and required payment, at the expiration of three calendar months then following, of the sum advanced by them.—Held, that, notwithstanding the day of the making of the agreement was under a *videlicet*, it sufficiently appeared on the face of the declaration, that a 1st of October had elapsed before action brought.

Assumpsit. The first count of the declaration stated that before and at the time of making the agreement and promise thereafter mentioned, the defendants were partners and shareholders in a certain company or association called the Anglo-American Gold Mining Association; that theretofore, to wit, on the 24th of December 1835, by a certain agreement in writing then purporting to be made between Henry Blundell (one of the defendants) and certain other persons, then being the agents of the said other defendants in that behalf, for and on behalf of themselves, and of the said company of the one part, and the plaintiffs of the other part—after reciting that the members of the said company or association being desirous of obtaining the co-operation of the plaintiffs in carrying on the concern, and having determined to increase the number of shares of the company, proposed to the plaintiffs to become shareholders and directors in the company, and that the plaintiffs having found, on investigating the concerns of the company, that questions and disputes had arisen and were pending between the company and one John Penman, its late superintendent or agent in North Carolina, who had drawn bills of exchange to a large amount on the said Henry Blundell on account [323] of the company, declined to become shareholders until they had an opportunity of ascertaining the state of the company in reference to the questions and disputes so referred to; but that the directors and members of the association being desirous that the bills so drawn by the said John Penman on the said Henry Blundell should not go back dishonoured, but should be taken up for the honour of the drawer under the guarantee and indemnity of the directors and of the company, the plaintiffs consented and agreed to take up the said bills to an amount not exceeding 6000*l.* upon the footing so proposed, and that the sum to be so advanced by them, together with such further sum, if any, as should be required to make up the said sum of 6000*l.* should, in the event of their determining to join the company at the period thereafter mentioned for that purpose, go in payment of shares to the amount to be taken by them accordingly; and after reciting that at a meeting of shareholders of the company duly convened and held at, &c. on the 17th of December, it was resolved and determined that 100 additional shares of 100*l.* each should be created for the purposes, and be disposed of by the directors for the benefit, of the company; and that sixty of such shares had been set apart with a view to, and in compliance with, the proposal thereinbefore mentioned in that behalf—it was and is witnessed, and it was thereby mutually concluded and agreed as follows, that is to say; that bills not exceeding the amount of 6000*l.* drawn by Penman on Blundell on account of the company, should be taken up by the plaintiffs for the honour of the drawer; and that the plaintiffs should follow the instructions of the company or of its agent or agents duly authorised for that purpose, whether as to proceeding against Penman or against the property of the company, or otherwise, in respect of the said bills; and that in the event of the said bills, or any or either [324] of them, not being paid, and of the plaintiffs not making their election to take the sixty shares so reserved and set apart for them, the defen-

dants engaged and agreed for the payment of such bills or bill, with interest at five per cent. on the amount advanced, and all costs and expenses attending such bills at any time after the 1st of October then next, on the said company and directors of the said company having three calendar months' previous notice requiring the same; and that in case the plaintiffs or any or either of them should within two months after receiving from the directors of the said company a communication of the result of the questions or differences between the company and the said John Penman, and of the state of the company's affairs (and which communication the directors were to make in as full and explicit a form, and at as early a period, as should be in their power), or at any earlier period determine to take the sixty shares so reserved and set apart as before mentioned, such shares to be taken at par as thereinbefore mentioned, they or he should be at liberty so to do; and in that case the money so advanced in taking up the bills as thereinbefore mentioned, with such further sum, if any, as should be necessary to make up the sum of 6000l., should go in payment of such sixty shares; but the plaintiffs should, in that case, be entitled only to the costs and expenses attending the said bills, and not to any interest. And it was and is thereby further agreed that in the event of the plaintiffs or any or either of them taking the said sixty shares they or he should, if they or he at the time of taking such shares should declare such to be their or his wish, be elected directors or a director of the company jointly with the then directors as by said agreement fully and at large appears. Mutual promises. Averment—that after the making of the said agreement, to wit, on the day and year last aforesaid, and on divers other days and times after that day, and more than three calendar [325] months before the commencement of this suit, the plaintiffs paid, laid out, and expended divers large sums of money not exceeding, in the whole, the said sum of 6000l. mentioned in the said agreement, to wit, the sum of 5800l. in and about the taking up and discharging of the honour of the drawer divers of the said bills of exchange in writing, before drawn by the said John Penman on the said H. Blundell for and on account of the said company, for the payment respectively of divers large sums of money, amounting in the whole to a large sum, to wit, the sum of 5800l. at certain times, which respectively elapsed long before the commencement of this suit pursuant to and upon the terms of the said agreement, the said bills being respectively bills which had been and were dishonoured, and not paid or taken up by any or either of the parties thereto; that the plaintiffs had always been ready to follow, and had followed the instructions of the company, and of their agents duly authorised for that purpose in respect of the said bills as aforesaid; that afterwards, and more than three calendar months before the commencement of this suit, the plaintiffs gave due notice, to wit, to the said company and to the said directors, that they the plaintiffs declined to take the said sixty shares in, or to become members of, the said company, and the plaintiffs then elected not to take, and had not, nor have any or hath any one of them taken, such shares, nor have nor hath any or either of them become such shareholders or shareholder; and the plaintiffs then gave the company and the directors notice to pay, and required payment to them the plaintiffs according to the said agreement, at the expiration of three calendar months then following, of the said sum of 5800l. so advanced by them in taking up the said bills of exchange as aforesaid, with a certain sum, to wit, 500l. being interest for the same at the rate of 5 per cent. per annum, then due and claimable thereon [326] and in respect thereof; and also a certain sum, to wit 300l. being the amount of the costs and expenses of the plaintiffs attending the taking up of such bills and in relation thereto, and by the plaintiffs then incurred in that behalf according to the said agreement; and although the time for payment of the said several sums of 5800l., 500l. and 300l. elapsed before the commencement of this suit, yet the defendants, not regarding their said agreement or their said promises, had not paid or caused to be paid to the plaintiffs, or to any or either of them, the said sums of 5800l., 500l., and 300l. or any or either of them, or any part thereof, but had and each of them had therein failed and made default, and the last-mentioned three several sums of money still remained wholly due and unpaid and unsatisfied and in arrear and unpaid to the plaintiffs, nor had any part thereof been paid to the plaintiffs, by or on behalf of either of the said parties to the said bills so taken up by the plaintiffs, or by or on behalf of the said company, or otherwise satisfied. The declaration also contained counts for money lent, money paid, and money found due upon an account stated.

The defendant Joseph Lidwell Heathorn pleaded fifthly to the first count, so far

as it related to two of the bills therein mentioned to have been taken up by the plaintiffs, that the defendants were not, at the time when the said bills were drawn, and which were not accepted, partners or shareholders in the said company. Verification

Sixthly, to the same count, that the bills in the first count mentioned were drawn for debts contracted before the said Heathorn became a shareholder in the said company; and that he did not in any manner become a party to, or assent to the drawing or issuing, or negotiation of, the said bills. Verification.

There was a special demurrer to these pleas, assign-[327]-ing for causes, that they did not deny, or confess and avoid, the causes of action to which they were pleaded, and that they amounted to the general issue, &c. Joinder.

W. H. Watson, in support of the demurrer, submitted that these pleas disclosed no answer to the action; it being perfectly immaterial whether the defendants were parties to the bills, as there was abundant consideration for the promise to repay the plaintiffs the amount advanced by them in taking up the bills.

Channell Serjt. was then called upon by the court. It is conceded that these pleas cannot be supported; but it is contended that the declaration is bad, which represents the obligation on the defendants to be, to repay the money to the plaintiffs "at any time after the 1st of October then next, on the company's having three calendar months' previous notice requiring the same." The question is, whether the defendants are liable to repay the money at any time after the 1st of October, or at three months' notice from the 1st of October. It is submitted that the proper meaning is, that the defendants are to pay the money on three months' notice after the 1st of October; but whether that or the other construction be adopted, there is no allegation that the 1st of October had passed before the commencement of the suit. For the date of the agreement being laid under a *videlicet*, it is clear that the plaintiffs might, on non assumpsit being pleaded, prove an agreement of any other date. *Parkinson v. Whitehead* (ante, vol. iii. p. 329), resembles this case. There the declaration stated, that theretofore, to wit, on the 31st of May 1825, by an agreement in writing then made, the defendant's testator agreed, [328] among other things, within two years from midsummer then next, to build certain houses, and alleged for breach, that the houses at the commencement of the action (1839) were unbuilt, contrary to the agreement. The declaration was held bad on general demurrer, for not shewing distinctly that two years from midsummer next after the making of the agreement had elapsed previously to the commencement of the suit.

ERSKINE J. The declaration, which is entitled of the 16th of December 1837, alleges that, after the making of the agreement, and more than three calendar months before the commencement of the action, the plaintiffs gave the company due notice that they declined to take the shares, and required payment at the expiration of three calendar months then following, of the moneys advanced by them. Does not that allegation meet your objection, that it does not appear on the declaration that a 1st of October had elapsed before action brought?

Per curiam. Judgment for the plaintiff.

[329] COOK AND OTHERS, Assignees of William Hitchcock, a Bankrupt, v. PRITCHARD. Jan. 15, 1843.

[S. C. 6 Scott, N. R. 34; 12 L. J. C. P. 121.]

In an action by assignees of a bankrupt to recover money paid by the latter to the defendant, the judge, assuming, in favour of the defendant, that there had been importunity and pressure by him, left it to the jury to say whether the bankrupt had made the payments in consequence of such importunity and pressure, or with a view of giving the defendant a fraudulent preference in contemplation of bankruptcy: Held, that this was a direction of which the defendant had no right to complain.

Assumpsit, for money had and received. Plea, non assumpsit.

At the trial before Tindal C. J., at the adjourned sittings in London after Michaelmas term last, it appeared that this was an action brought by the plaintiffs to recover from the defendant the sum of 2000l., alleged to have been paid to him by

the bankrupt by way of fraudulent preference in contemplation of bankruptcy. The facts were as follows :—

The bankrupt had for some years carried on the business of a linendraper in Regent Street. The defendant was the holder of two bills of exchange for 1000l. each, accepted by the bankrupt, bearing date respectively the 19th of April and 10th of May 1841, and both payable three months after date, the consideration for these bills being money lent by the defendant to the bankrupt. Upon the first of these acceptances becoming due on the 22d of June 1841, it was dishonoured. Four days before the second bill became due, namely, on the 9th of August, the bankrupt paid to his solicitors, Messrs. M. and P. (who were also the attorneys of the defendant), 200l. on account of the first bill. The bankrupt made a second payment of 200l. to the defendant through the same parties, on the 18th of the same month, and between that day and the 31st, paid them the several sums of 600l., 590l., 400l., and 10l., amounting to the sum sought to be recovered in this action. The bankrupt was greatly embarrassed when these payments were made. Some time previously he had sent large quantities of goods to a commission agent in the city, [330] with orders to sell them at a sacrifice of 25 per cent. During the months of July and August, he had dishonoured numerous bills; several actions had been brought against him; and eight affidavits filed by different creditors for debts to a considerable amount, under the stat. 1 & 2 Vict. c. 110, s. 8; to the whole of which he had given bail. It also appeared that the bankrupt had told the holder of one of his dishonoured bills, that he should not pay some of his creditors, on the ground that they had not used him well, but that he should not give any fraudulent preference. At the time the payments were made, the defendant was abroad. The 200l. paid on the 9th of August, was paid without any demand on the part of the defendant; but it was proved that Messrs. M. and P. had made numerous and pressing applications on behalf of the defendant, previously to the subsequent payments, although no legal proceedings had been commenced. The defendant's debt was guaranteed by George Hitchcock the brother of the bankrupt. The fiat against the bankrupt was sued out on the 16th of September 1841. The act of bankruptcy was an assignment executed by him for the benefit of his creditors.

It was contended for the plaintiffs, that the evidence clearly shewed that the payments in question were made by the bankrupt with a view to give a fraudulent preference, and in contemplation of bankruptcy.

On the part of the defendant it was submitted, that it was not necessary for the defendant to shew that coercive measures had been adopted, or even threatened, it being sufficient that payment had been demanded; and that even supposing that William Hitchcock had contemplated bankruptcy, and made the payments in order to protect his brother, who was liable for the amount under his guarantee, that would not affect the defendant's right to retain the money.

[331] The Lord Chief Justice told the jury, that to entitle the plaintiffs to recover, they were bound to establish that the payments by the bankrupt to the defendant were made with a view to a fraudulent preference, and in contemplation of bankruptcy; and that, notwithstanding there had been pressure and importunity on the part of the defendant, the question they had to consider was, whether the payments were made in consequence of that pressure and importunity, or they were voluntary, and with a view to give a fraudulent preference to the defendant over other creditors.

The jury returned a verdict for the plaintiffs for the 2000l.

Channell Serjt. now moved for a new trial on the ground of misdirection. It may be conceded in this case that the bankrupt was proved to be in very embarrassed circumstances, and that at the time the payments were made to the defendant, he had bankruptcy in contemplation. The question, however, is, whether the payments were voluntary; and the ground in which the summing up is excepted to is, that the Lord Chief Justice assumed that pressure was necessary to prevent a payment being voluntary; whereas it is sufficient if there has been a demand, and a payment afterwards. Although it seems to have been held in the older authorities that pressure is necessary, later cases have decided that it is not the proper test whereby to ascertain whether the payment is voluntary. In *Doe dem. Lamb v. Gillett* (Tyrwh. & G. 114, 2 C. M. & R. 579) the court of Exchequer were called upon to put a construction on the word "voluntary" as used in the insolvent debtors' act. It was there held that

in order to support a security made by an insolvent to a creditor within three months before he was committed [332] to prison, it was not necessary for the latter to prove pressure by him of the insolvent; it was for the assignees of the insolvent who sought to avoid the security under the provisions of the 7 G. 4, c. 57, s. 32, to make out that it was the voluntary act of the bankrupt. So in *Mogg v. Baker* (4 M. & W. 348), in which case *Cook v. Rogers* (7 Bing. 438, 4 M. & P. 573) and *Doe v. Gillett* were cited, it was held that where a conveyance or transfer of goods is made by a party in insolvent circumstances to a creditor in pursuance of a bona fide demand by the creditor, it is not voluntary within the meaning of the same section. It is submitted upon these authorities, that importunity and pressure need not be shewn, but that it is sufficient if there has been a demand, and a payment in pursuance thereof. In the summing up of this case, however, the jury were led to conclude that pressure, or importunity amounting to pressure, was requisite. [Tindal C. J. The first payment of 200l. on the 9th of August, was previous to any demand being made. Maule J. Was there any evidence, that the bankrupt was paying other creditors? A single demand and payment might shew that the bankrupt did not select the particular creditor. But if ten creditors apply to him, and he puts off nine and pays the tenth, a jury may fairly infer a fraudulent preference in favour of the latter.] It is not contended that the jury might not have properly found that the bankrupt intended to give a preference to the defendant, but the complaint is, that from the summing up, the jury would not give the defendant the advantage of considering whether there had been a bona fide demand, and a payment in consequence of such demand. Had that point been left to them, the case might have been attended with a different result. [Erskine J. His lordship seems to have used the words "importunity and preference," [333] with reference to this particular case, and not as laying down any general proposition.]

TINDAL C. J. As already observed, in summing up this case to the jury in the manner adverted to, I was not laying down any general rule of law, but merely applying myself to the facts of the case, I appear to have used the words "pressure" and "importunity" instead of demand; for all I intended to do, was to embody the evidence given in favour of the defendant. If the rest of the court think what I said was likely to mislead the jury, there ought to be a new trial.

ERSKINE J. It does not appear to me that the jury could have been misled by the way in which this case was left to them by the Lord Chief Justice. There was no question as to whether there had been importunity and pressure for the payment of this debt; for it was proved that both had been used. If his lordship had left it to the jury to say whether there had been any demand amounting to importunity and pressure, and had told them that if they came to the conclusion there was not, then the payments were not a fraudulent preference, the objection, now taken, would have arisen. The summing up turned, not upon any abstract proportion of law, but upon the particular facts of the case; and it was left to the jury to say, whether the bankrupt had bona fide made the payments in consequence of demands made upon him by the defendant's solicitors, or with the view of giving the defendant a preference over his other creditors. The evidence strongly shewed that the bankrupt sought to give the defendant a preference over his other creditors; for one payment was made to the defendant before there had been any demand at all, and all the payments took place while the bankrupt was in a state of hopeless embarrassment. Under these [334] circumstances I cannot think that the jury could have been at all misled so as to suppose that importunity and pressure were necessary, in order to prevent the payments from amounting to a fraudulent preference.

MAULE J. I also think that there is no objection to the direction of the Lord Chief Justice. His lordship seems to have assumed that importunity and pressure had been proved, and, assuming that as a fact in the case, to have thought that the plaintiffs would still be entitled to recover, provided the jury came to the conclusion that the payments were made, not in consequence of the importunity and pressure, but in order to give a preference to the defendant. His lordship, in assuming the importunity and pressure, may be said to have decided matter of fact; but that constantly occurs. Nothing is more common, where the fact has been distinctly proved, and has not been contradicted by the other side, than for a judge to assume the fact and not to leave it to the jury, although he undoubtedly would be bound to submit it to them if required to do so by either party. For example, in an action

on a bill of exchange, where the issues raised are as to the acceptance and indorsement of the bill, supposing the acceptance to be proved by a witness, whose evidence is not attempted to be contradicted, would it be a misdirection if the judge were to tell the jury that the only question for their consideration was as to the indorsement? In this case the party to object to the assumption of importunity and pressure would have been the plaintiffs, and not the defendant; for the assumption was in favour of the latter.

CRESSWELL J. If the Lord Chief Justice had told the jury that the facts produced did not amount to importunity and pressure, I should have thought the case required reconsideration; but that appears to have [335] been very far from his intention. For if he thought that there was not any evidence of importunity and pressure, then there was no question for the jury, as it is quite clear that the payments were made by the bankrupt in contemplation of bankruptcy. It appears that the Lord Chief Justice left it to the jury to say whether the bankrupt had paid the money as a free agent or in consequence of the demands made by the defendant's solicitors. I do not see that any fault can be found with the summing up.

Rule refused.

FOOT v. BAKER. Jan. 25, 1843.

[S. C. 6 Scott, N. R. 301; 7 Jur. 131.]

Semble, that money lent for the purpose of enabling the borrower to play at skittles for a less stake than 10l. may be recovered by the lender.—Secus, where the lender is a licensed publican who lends money to his guests to enable them so to play.

Debt, for 8l. 4s. money lent, and also for 8l. 4s. upon an account stated.

Plea: that the sum of 8l. 4s. in the first count mentioned, was borrowed by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant, in a skittle-ground, in and part of a messuage wherein the plaintiff then carried on the trade and business of a publican and victualler (a), for the purpose of the defendant's illegally playing and gaming therewith, at and in the said skittle-ground, at a certain illegal game, to wit, the game of skittles, contrary to the statute in such case made and provided; and that the account in the last count mentioned, was stated of and concerning the said sum of 8l. 4s. in the said first count mentioned, and so borrowed and lent as aforesaid, and for, and in respect of, no debts or moneys whatsoever (b). Verification.

[336] Special demurrer to the plea—for that the defendant alleges therein that the sum of 8l. 4s. in the first count mentioned was borrowed by the defendant, as the plaintiff well knew, and was knowingly lent by the plaintiff to the defendant, for the purpose of the defendant's illegally playing and gaming therewith at a certain illegal game, to wit, the game of skittles, contrary to the statute in such case made and provided; whereas, in fact, there is no statute in such case made or provided, nor is there any statute rendering the game of skittles, or the playing or gaming at the game of skittles, illegal, nor is there any illegality in the game, or in the lending of money under the sum of 10l. to play at or therewith;—that if the defendant meant to say that the game of skittles, mentioned in his plea, was illegal under the provisions of the 16 Car. 2, c. 7, then his plea was bad and insufficient for not averring that such game was to be played, with the plaintiff's knowledge, otherwise than with and for ready money; and that, on the face of the plea, it must be intended that such game was with and for ready money;—that the plea contained no allegation or averment to bring the case within the provisions of the last-mentioned statute;—that if the

(a) The plea was afterwards amended, by describing the plaintiff as a licensed publican and victualler. Vide post, 339.

(b) This plea appears to be bad for duplicity. As the plaintiff claims two sums of 8l. 4s., the account stated must be understood, as alleged by the plaintiff, to have been stated of sums other than that separately demanded in the first count, whether it be so expressed in the count or not. Thus the plea, besides the special answer, operates as a plea of nunquam indebitatus to the last count, or to an undivided moiety of both counts.

defendant meant to say that the game of skittles in the plea mentioned is illegal under the provisions of the 9 Anne, c. 14, then the plea was bad and insufficient for not averring that such game of skittles was a game at which the defendant, with the plaintiff's knowledge, was to play and game thereat for a sum amounting to 10l. or more;—that the plea contained no averment whatsoever to bring the case within the provisions of the last-mentioned statute.

Joinder in demurrer.

[337] Channell Serjt., in support of the demurrer. The plea is bad, inasmuch as the sum to which it is pleaded is under 10l. The defendant is driven to contend that the game of skittles is, in all cases, illegal. [Cresswell J. That is, if played at for money.] The act of 16 Car. 2, c. 7, was passed, not for the purpose of denouncing certain games, but with the view of suppressing the deceitful practising of those games, and the playing at them for stakes of an excessive amount. This appears from the second and third sections of that statute; and it contains nothing which makes any game illegal. The 9 Ann. c. 14, is also an act "for the better prevention of excessive and deceitful gaming." [Cresswell J. It was held in a case in *Wilson (Jeffreys v. Walter*, 1 Wils. 220), that cricket was a game within that statute, and that a bond or security given by a third person for money won at cricket, was void.] That was an attempt, by the defendant, which proved successful (b), to avoid a security. But the bond given in that case was for money won exceeding 10l. The law upon this subject is distinctly laid down in the judgment delivered by Lord Abinger in *M'Kinnell v. Robinson* (3 M. & W. 434). In the argument in that case, *Baryeau v. Walmsley* (2 Stra. 1249), *Robinson v. Bland* (2 Burr. 1077, 1 W. Bl. 256), and *Wettenhall v. Wood* (1 Esp. N. P. C. 16) were cited. Where a bet is made for a sum under 10l. the amount may be recovered by the winner from the loser; *Hodson v. Terrill* (1 C. & M. 797, 3 Tyrwh. 929), *Daintree v. Hutchinson* (10 M. & W. 85).

Talfourd Serjt. contra. The game of skittles is a game ejusdem generis with those which are enumerated [338] in the statute of Anne. These games are, cards, dice, tables, bowls, followed by the words, "or other game or games whatsoever." A horse-race has been held to be within the clause. Cricket, a game formerly unknown, has been held to be within the 16 Car. 2, c. 7, s. 3. The only question will be, whether the court of Exchequer came to a right decision in *M'Kinnell v. Robinson*. If, as was there held, the action upon the security is gone, the right to recover the moneys secured thereby, is also taken away. In some cases, indeed, it seems to have been considered that the original debt might remain in force, although the security was destroyed. In the first of those cases, *Robinson v. Bland*, the circumstances were very peculiar, and the principle is not recognised in *Blagdon v. Pye*, which was decided after *Robinson v. Bland*, and in the same year, and *Young v. Mason* does not appear to have been adverted to. The mischief intended to be remedied, was, the inducing persons to game, by assisting them with the means of indulging a common and dangerous passion. [Cresswell J. Does it appear by the plea that the plaintiff was a licensed publican? A licensed publican cannot recover money advanced by him for the purpose of enabling the borrower to do an act which the publican is prohibited by his licence from suffering to be done.] That would bring the case within the principle of *M'Kinnell v. Robinson*, the publican being prohibited under a penalty from knowingly suffering any unlawful game or any gaming whatsoever (a) upon the licensed premises. [Channell Serjt. The plea does not allege that the plaintiff was a licensed victualler. Tindal C. J. The case is not within the statute of Anne, because it does not appear that the money was lent at the time of play, the words of the statute being "lent or advanced [339] at the time and place of such play." The language of the 9 Ann. c. 14, s. 1, is in the disjunctive, "knowingly lent or advanced for such gaming or betting as aforesaid, or lent and advanced at the time and place of such play." The plea in this case is framed upon the first branch of the clause. [Cresswell J. If the money is lent at the time and place, the purpose of the loan is assumed. Erskine J. There is no penalty against an unlicensed person who suffers gaming on his premises.] It will not be presumed that the plaintiff is

(b) "The parties agreed, ut audiui," ib. 221.

(a) Quære, whether playing at a game lawful in itself, for a stake not prohibited in point of amount, can be said to be "gaming," within the meaning of the publican's licence.

guilty of the offence of carrying on his business without a licence (a). [Cresswell J. asked Talfourd whether the defendant would amend his plea by inserting an allegation that the plaintiff was a licensed publican. Channell Serjt., submitted that this was not a case for amendment. Tindal C. J. The lending of money by a publican to his own guests for the purpose of inducing them to game, is a very improper proceeding. Channell Serjt. The twenty-first section of 8 G. 4, c. 61, imposes penalties upon persons licensed under that act, who are convicted of offending against the form of the licence, and in that form there is a proviso against knowingly suffering "any unlawful games or any gaming whatsoever." The amendment therefore would still leave open the question, whether playing at skittles for less than 10l. was an unlawful act. Cresswell J. The term "excessive gaming," applied to playing or betting for an amount exceeding 10l., implies that betting or playing for money to a less extent than 10l. is gaming (b).]

Leave to amend, on payment of costs.

[340] WARWICK v. ROGERS AND OTHERS. Jan. 11, 1843.

[S. C. 6 Scott, N. R. 1; 12 L. J. C. P. 113. See, *Pollard v. Bank of England*, 1871, L. R. 6 Q. B. 627. Approved, *Prince v. Oriental Bank Corporation*, 1878, 3 App. Cas. 325.]

A. was the holder of a foreign bill drawn upon B., in England, and accepted by B., payable at the banking-house of C. On the morning when the bill became due, D., as A.'s banker, took the bill to the clearing-house in London, and put it into C.'s drawer. C. having examined the bill, and having funds of B.'s in his hands at the time, cancelled the acceptance by drawing lines across B.'s name, without rendering the acceptance illegible. In the course of the day B. finding himself to be insolvent, ordered C. not to pay the bill; whereupon C. wrote thereon "cancelled by mistake—orders not to pay:" and the bill was returned in this state to D. at the clearing-house before the settling hour. It is the usage in the trade in London so to cancel bills intended to be paid, and where a cancellation has occurred through mistake, to indicate the same by writing on the bill;—Held, that under these circumstances, no legal liability was cast upon C., from which a promise could be inferred that he would pay the amount of the bill or return it without having cancelled or destroyed the acceptance;—That the duty cast upon C. was no more than to take due care of the bill, and if he did not choose to pay it, to return it uncanceled unless it had been cancelled by mistake, and in that case to indicate the same by writing on the bill;—That C. did use due care to prevent the acceptance from being defaced;—That the acceptance was an acceptance defaced and cancelled in point of fact, but that it was an acceptance cancelled by mistake.—Semble, that a banker who omits to return, or defaces, a bill is not, in all cases, under an obligation to pay the amount;—But semble, if he do so wrongfully he becomes liable to an action on the case if the holder has sustained damage by his breach of duty.—Held also, that under the circumstances above stated, A. could not sue C. for money had and received.—The facts having been found by a special verdict in the ordinary way:—Held, that the case was not within the 3 & 4 W. 4, c. 42, s. 24:—Held also, that after special verdict, the pleadings could not be amended.

Assumpsit. The first count of the declaration stated, that certain persons using the style or firm of H. R. and S. Barker and Co., before the making of the promise thereafter next mentioned, to wit, on the 15th of October 1835, at Smyrna, in parts beyond the seas, made and drew their certain bill of exchange, directed to Mr. Richard

(a) The legislature having declared it to be unlawful for a licensed publican to suffer gaming on the premises, and having also made it penal to act as a publican without a licence, quære, whether the publican who disobeys the act by omitting to take out a licence, thereby acquires an exemption from its provisions, those provisions having reference not to the licence, but to the trade carried on.

(b) The amendment would, therefore, seem to have been merely *ex abundanti cautela*.

Jellicoe, London, and thereby requested the said R. J., at sixty-one days after sight thereof, to pay by that their first bill of exchange to the order of Mr. Alexander Bargigli the sum of 300l. sterling, value of the same; which bill the said A. B. [341] afterwards, to wit, on the day and year aforesaid, indorsed and delivered to a certain person in such indorsement mentioned, to wit, one Vincent Bavertrelly, who afterwards, to wit, on the 21st of October in the year aforesaid, indorsed and delivered the same to a certain person in such indorsement mentioned, to wit, Michael Badetty, who afterwards, to wit, on the 17th of November in the year aforesaid, indorsed and delivered the same to certain persons in such indorsement mentioned, to wit, A. Hesse and Co., who afterwards, to wit, on the day and year last aforesaid, indorsed and delivered the same to a certain person in such indorsement mentioned, to wit, one Jonas Hagerman, who afterwards, to wit, on the 30th of November in the year aforesaid, indorsed and delivered the same to certain persons in such indorsement mentioned, to wit, B. L. Fould and Foulds Oppenheim, who afterwards, to wit, on the day and year last aforesaid, indorsed and delivered the same to the plaintiff: that, after the making and drawing of the said bill, to wit, on the 23d of November in the year aforesaid, the said R. J. duly accepted the said bill, and by such acceptance, written upon the said bill, made the same payable at the banking-house of the defendants: that, after the said several indorsements, and after the said acceptance, when the said bill became due and payable, according to the tenor and effect of the said bill and of the said acceptance thereof, to wit, on the 26th of January 1836, the said bill was duly presented and shewn to the defendants, at their said banking-house, for payment thereof according to the tenor and effect of the said acceptance, and the defendants were thereupon then requested by the plaintiff to pay him the same; and thereupon afterwards, to wit, on the day and year last aforesaid, in consideration that the plaintiff would deliver the said bill to the defendants without receiving the sum of money expressed therein, at the time of such [342] delivery, the defendants promised the plaintiff that they the defendants would, until they should have determined whether they would pay the sum of money in the said bill expressed or return the said bill to the plaintiff, use due care to prevent the said acceptance from being defaced or obliterated, and would, upon being requested so to do, in a reasonable time in that behalf, pay to the plaintiff the said sum of money or return the said bill to the plaintiff without having cancelled or destroyed the said acceptance. Averment: that the plaintiff, confiding in the said promise, did thereupon then deliver the said bill to the defendants without receiving, at the time of such delivery, the said sum of money expressed in the said bill, or any part thereof: yet the defendants did not nor would, after such delivery to them of the said bill, and before they had determined whether they would pay the said sum of money in the said bill expressed or return the said bill to the plaintiff, use due care to prevent the said acceptance from being defaced or obliterated; but, on the contrary thereof, the defendants, after such delivery, and before such determination, to wit, on the day and year last aforesaid, used so little care in that behalf, that the said acceptance, through the want of care of the defendants in that behalf, became and was defaced and obliterated: that afterwards, and in a reasonable time in that behalf, he the plaintiff requested the defendants to pay to him the said sum of money expressed in the said bill, or to return the said bill to him the plaintiff, without having cancelled or destroyed the said acceptance; yet the defendants, further disregarding the said promise, did not nor would, when they were so requested as aforesaid, or at any other time, pay to the plaintiff the sum of money in the said bill expressed, or any part thereof; or return the said bill to the plaintiff without having cancelled or destroyed the same; but, on the contrary [343] thereof, the defendants on that occasion refused to pay to the plaintiff the said sum of money in the said bill expressed, and cancelled and destroyed the said acceptance, and returned the said bill to the plaintiff with the said acceptance so cancelled and destroyed; by reason of which premises, not only had the plaintiff lost and been deprived of the benefit of the said acceptance and of his recourse and remedies against the drawer and indorsers of the said bill respectively, but certain persons, to wit, Heath, Furze, and Co., to whom the said bill had been addressed in case of need by certain indorsers of the said bill through whom the plaintiff became such indorsee and holder thereof as aforesaid, to wit, the said A. Hesse and Co., and who, but for such defacing and obliterating of the said acceptance, would have taken up and paid the said bill for the honour of the said indorsers of the said bill, to wit, A. Hesse and

Co., wholly refused to take up and pay the said bill, and the said bill and the said sum of money still remained wholly unpaid, due, and unsatisfied to the plaintiff.

There were also counts for money had and received, and upon an account stated.

The defendants pleaded, first, non assumpsit.

Secondly—to the first breach, in the first count—that they did, after the delivery to them of the said bill of exchange as in the declaration mentioned, and before and until they had determined whether they would pay the sum of money in the bill expressed or return the bill to the plaintiff, use due care to prevent the acceptance from being defaced or obliterated—concluding to the country.

Thirdly—to the same breach—that the acceptance did not become, nor was, defaced or obliterated, *modo et forma*—concluding to the country.

Fourthly—to the last breach in the first count—that the defendants did return the bill to the plaintiff without [344] having cancelled or destroyed the acceptance—concluding to the country.

Fifthly—as to so much of the breach in the first count of the declaration lastly assigned as imputed to the defendants that they cancelled the said acceptance, and returned the bill to the plaintiff with the acceptance cancelled—that the said promise in the said first count mentioned was made by the defendants to the plaintiff with and subject to a certain proviso, to wit, that, if they the defendants, after such delivery to them of the said bill as in the said first count mentioned, should, with a view to the payment of the said money therein mentioned, cancel the acceptance thereof, to wit, by drawing lines along and across the same, but without rendering the acceptance illegible, and afterwards, and before actually paying the said bill, and within a reasonable time for returning the said bill to the plaintiff unpaid, should discover that they had not funds or had not authority of or from the said R. J. to pay the said bill, or if such authority should, after such cancelling, and before such actual payment, and within such reasonable time as aforesaid, be revoked, that then in either of such cases the defendants should be allowed, within such reasonable time as aforesaid, to return the same bill to the plaintiff with the said acceptance in manner and form aforesaid cancelled, without paying or being required to pay the money in the said bill mentioned, they the said defendants first writing upon such bill that the said acceptance had been cancelled by mistake, or other words to the like effect: that, after the said bill had been so as aforesaid delivered to the defendants by the plaintiff, to wit, on the said 26th of January 1836, they, the defendants, with a view to the payment of the said sum of money in the said bill mentioned, did cancel the said acceptance, to wit, by drawing lines along and across the same, but without rendering the [345] said acceptance illegible; and that afterwards, and before actually paying the said bill, and within a reasonable time for returning the said bill to the plaintiff unpaid, to wit, on the day and year aforesaid, the authority theretofore given them by the said R. J. to pay the said bill was revoked by the said R. J.; whereupon they the defendants did thereupon, afterwards, and within such reasonable time as aforesaid, and when they were so requested by the plaintiff as in the said first count mentioned, return the said bill to the plaintiff with the said acceptance in manner and form aforesaid, and in no other way whatever, cancelled, and without paying the same, they the defendants having first, to wit, on the day and year last aforesaid, written upon the said bill that the said acceptance thereof had been so as aforesaid cancelled by mistake, as it was lawful for them to do for the cause aforesaid.—Verification.

The plaintiff joined issue on the first four pleas, and replied *de injuriâ* to the last.

At the trial, before Tindal C. J., at the sittings for London after Trinity term, 1838, a special verdict was found, which stated as follows:—

The bill of exchange in the first count mentioned was drawn, indorsed, and accepted as in that count mentioned, and the drawers and indorsers of the said bill in that count mentioned, at the time the same was so drawn and indorsed as aforesaid, were, respectively, merchants residing in parts beyond the seas: and at the time the said A. Hesse and Co. indorsed the said bill, as in that count mentioned, the said A. Hesse and Co. addressed the said bill, in case of need, to “Messrs. Heath, Furze, and Co.,” as in that count mentioned.

On the 4th of December 1835 the plaintiff discounted the said bill, with others, amounting altogether to the sum of 10,000*l.* or thereabouts, with Messrs. Overend, Gurney, and Co., bill-brokers in [346] London. On the 26th of January 1836 the said bill became due, and, being then in the hands of Messrs. Barclay and Co., of the

city of London, as bankers for the plaintiff, was, about eleven o'clock in the morning of that day, taken by a clerk of Messrs. Barclay and Co. to the clearing-house, and there presented to a clerk of the defendants for payment according to the practice of London bankers as thereafter mentioned, that is to say, by his putting the same into the drawer belonging to the defendants at the said clearing-house; and that the said bill was thereupon taken by the said clerk of the defendants from their said drawer to their banking-house in the said city, that the defendants might determine whether they would pay the same. During the whole of the day of the 26th of January 1836, the said R. J. had unincumbered funds in the hands of the defendants, sufficient in amount to pay the said bill. The said bill being so taken to the defendants' banking-house, they examined the same, and cancelled the acceptance upon the said bill about half-past eleven in the morning of the same day, by drawing lines along and across the same in the form usual amongst the London bankers when they pay or intend to pay bills made payable at their house; and the said bill was entered by a clerk of the defendants in manner following:—"R. Jellicoe 300l.,"—in a book called "The paid-clearing-book," kept by them for the purpose of entering therein bills and cheques brought from the clearing-house paid or intended to be paid by the said bankers, and which said entries are made that the bankers may know the general amount paid at the clearing-house in the course of the day: according to the course of business in the defendants' said banking-house, the entries made in the last-mentioned book are shortly afterwards, in the course of the same day, transferred into a book of the defendants called "The ledger," to the debit of [347] the parties on whose account the bills or cheques therein referred to are paid by the defendants; and the said entry so made in the said paid-clearing-book was not ever transferred into the said ledger of the defendants.

In consequence of letters received from abroad at half-past nine in the morning of that day, the said R. J. on the 26th of January, about twelve o'clock in the day, advised with some friends, and afterwards with his solicitor, and determined to stop payment, and did in fact on and from that day stop payment, and shortly afterwards became bankrupt, and a fiat in bankruptcy duly issued against him; and, having so determined to stop payment, the said R. J. knowing that the said bill of exchange fell due on the said 26th of January, went to the banking-house of the defendants about half-past twelve o'clock on that day, and then ordered them not to pay any bills on his account; and on that occasion the said bill so cancelled as aforesaid was shewn to the said R. J. The defendants, having received such orders as aforesaid, soon afterwards wrote upon the said bill the words "cancelled by mistake—orders not to pay;" and the said bill was afterwards, at three o'clock of the same day, taken by one of their clerks to the clearing-house, and by him deposited in a drawer belonging to the said Messrs. Barclay and Co., having at the time the said words "cancelled by mistake—orders not to pay," written thereon; and the same was so as aforesaid brought back and deposited within the usual time at which bills or cheques are brought back and deposited at the clearing-house when bankers refuse to pay them. The clearing clerk of the said Messrs. Barclay and Co., on seeing the said bill so returned with such cancellation, and such words written thereon as aforesaid, applied to his principals, the said Messrs. Barclay and Co., to know what he was to do, and they, after some hesitation, answered they supposed they must keep the bill; and the [348] bill was accordingly retained by the Messrs. Barclay and Co., and taken into the account between them and the defendants, on striking the day's balance, as thereafter mentioned.

The clearing-house above referred to is a room situate in the city of London, generally used by the bankers of London and Westminster for the purpose of facilitating the receipts and payments between themselves. The manner of presenting and receiving and passing bills, notes and cheques at the clearing-house, is as follows:—The clerks from the different banking-houses using the clearing-house, assemble there daily at eleven o'clock in the forenoon, and remain, or go backwards and forwards, as the case may be, until half-past five, when the clearing-house is closed. Each banker has a separate drawer, into which drawer all bills, notes, and cheques then due, and which are payable at such banker's, are put by the other respective bankers' clerks holding the same, on arrival, at eleven o'clock, and so from time to time through the day. Up to four o'clock (but not later), bills, notes and cheques are put into the drawer as they arrive. Shortly after eleven o'clock, the clearing clerk of each banker

takes out of his drawer all the bills, notes and cheques which have been then put into it by other bankers' clerks claiming payment, and takes or sends the same to his principal's banking-house, in order that the banker may examine them and determine as to the payment of them respectively; and the same course is pursued again at three o'clock in the afternoon, and from time to time afterwards during the remainder of the day until four o'clock. Each banker examines the bills and cheques so sent or taken to him by their respective clerks, and the customers' accounts to which they refer; and such bills or cheques as are at the time intended to be paid, are cancelled by drawing lines along and across the name of the party for whom [349] such payment is intended to be made. Such of the bills and cheques as the bankers determine not to pay, are returned by them to and deposited in the drawer at the clearing-house of the bankers by whom the same were that morning brought to the clearing-house. Sometimes this is done when the clerk returns at three o'clock to the clearing-house, and sometimes the bankers (if they so please) retain them until three minutes before five o'clock, and then return and deposit them in the said drawer: and all bills not so returned and deposited by the last-mentioned time are considered by the respective bankers as paid, the claims of the several bankers on each other being settled at five o'clock, and the final balance between them then struck; though each banker's clerk makes up his account from time to time during the day, as may suit his convenience, until five o'clock, correcting it by the addition of such subsequent receipts and payments as may be necessary according to the items which afterwards come in. When a cancellation has occurred through error or mistake, the same has been indicated in writing on the bill, note or cheque returned.

Upon taking the account between Messrs. Barclay and Co. and the defendants at the clearing-house at five o'clock in the afternoon of the 26th of January 1836, of the claims on each other through the clearing-house on that day, there was a balance due from Messrs. Barclay and Co. to the defendants, which amounted, after disallowing Messrs. Barclay and Co. credit for the amount of the said bill in the first count mentioned, to the sum of 629l. 7s. 10d., and on allowing to them the said bill as a credit, amounted to 329l. 7s. 10d.; and on the settlement of the said account at half-past five on the same afternoon between Messrs. Barclay and Co. and the defendants at the clearing-house, the amount due to the defendants was taken as 629l. 7s. 10d., [350] and was then paid by Messrs. Barclay and Co. to the defendants; and the said bill was retained by Messrs. Barclay and Co. with the acceptance of the said R. J. thereon cancelled, and the words "cancelled by mistake—orders not to pay," written thereon by the defendants.

On the 27th of January 1836, the said bill was returned to the plaintiff, who paid to Overend, Gurney and Co. the amount thereof.

On the said 27th of January 1836, the plaintiff duly presented the said bill to the defendants at their banking-house for payment thereof, and demanded payment of the same, when the defendants refused to pay the same, and declared to the plaintiff that they made such refusal by the order of the said R. J., and that they should keep the funds of the said R. J. in their hands until any question about the said bill was disposed of; and thereupon the plaintiff caused the said bill to be protested for nonpayment thereof.

On the said 27th of January 1836, the plaintiff presented the said bill to Messrs. Heath, Furze and Co. for payment thereof; but the said Messrs. Heath, Furze and Co., who were correspondents of the said A. Hesse and Co., and to whom reference had been made on the said bill in case of need, and who were authorised, by the indication on the said bill, to pay the same, refused to pay it, stating, at the time, the said cancellation of the acceptance as the reason for their so refusing to pay: and thereupon the plaintiff caused the said bill to be again protested for nonpayment thereof: and John B. Heath, one of the partners in the said house of Heath, Furze and Co., was called as a witness on the part of the plaintiff on the trial, and swore that his firm would have paid the bill provided the acceptance had not been cancelled.

It is entirely optional with a party to whom a bill is [351] referred in case of need, whether he will or will not pay the same for the honour of the party making such reference; and parties to whom reference is so made do not usually pay the bill if they have any doubt at all as to the regularity of the proceedings.

On the said 27th of January 1836, the plaintiff gave the defendants notice of such

refusal to pay by the said Messrs. Heath, Furze and Co., and that the said bill would be returned under protest by that night's post to Paris, and that the defendants would be held responsible for all damages and consequences arising from the cancellation of the acceptance of the said R. J. as aforesaid.

On the said 27th of January 1836, the plaintiff returned the bill by post, under protest, to Messrs. B. L. Fould, and Foulds Oppenheim, at Paris; and, in due course of post, the said Messrs. B. L. Fould, and Foulds Oppenheim, returned the bill to the plaintiff unpaid, and refused to pay the same; and stated that they did so on account of the said cancellation, and that it would be impossible for them to recover the amount of the said bill from the prior indorsers or drawers, in consequence of such cancellation as aforesaid.

On the said 26th of January 1836, between the hours of two and three o'clock in the afternoon, the said R. J. wishing to pay back to a correspondent a sum of 500l. which that correspondent had remitted to him a few days before, for the purpose of taking up a bill upon which that correspondent was liable, and which was to fall due on the 2d or 3rd of February following, carried a certain bill of exchange for the sum of 500l. to the banking-house of the defendants, and applied to them to discount the same for him, which they consented to do, and in fact did, in manner following, that is to say, the said R. J. indorsed the last-mentioned bill, and handed it to the defendants, and, at the same time, drew a cheque upon them across the counter for the like sum [352] of 500l. The defendants then and there cancelled the said cheque, and paid the sum of 500l. to the said R. J., and at the same time the defendants credited the account of the said R. J. with the sum of 500l., being the amount of the said bill, and debited the same account with the like sum of 500l., and also with the sum of 3l. 2s. 6d. for the discount of the said bill.

Foreign indorsers of bills are in the habit of refusing to pay where the acceptance of a bill indorsed by them has been cancelled; but, whether such foreign indorsers are or are not, by the law of France, compellable to pay where the acceptance of a bill indorsed by them has been cancelled in manner and form as the acceptance of the said bill in the first count mentioned was so as aforesaid cancelled, the jurors know not, nor can they say.

When bills of exchange are paid, or intended to be paid, by bankers, it is the custom and practice for such bankers, to cancel the acceptance in the manner in which the said bill of exchange in the first count mentioned was cancelled.

The defendants have ever since retained, and now hold, the amount of the said bill in their hands, in order (if they can) to pay the said bill in the event of a judgment being recovered against them.

The special verdict then left it, in the usual terms, to the court to determine for which party the finding upon the issues should be entered; and the damages of the plaintiff were contingently assessed at 345l.

The point marked for argument on the part of the plaintiff, was as follows:

"That the defendants by the cancellation of the acceptance of the said R. J. on the said bill of exchange in this special verdict mentioned, in the manner and under the circumstances therein stated, became liable to pay to the plaintiff the said sum of 300l. in the said [353] bill mentioned, with interest at 5 per cent., or damages for such cancellation equal to that amount."

The points on the part of the defendants were,—

"First. That from the facts stated in the special verdict, the law will not imply any such unqualified promise to have been made by the defendants as that stated in the special count of the declaration, viz. that they would either pay the money in the bill mentioned, or return the bill to the plaintiff without having cancelled or destroyed the acceptance: and that the defendants were therefore entitled to the judgment of the court on the plea of non assumpsit.

"Secondly. That the facts stated in the special verdict did not shew that the acceptance became defaced or obliterated or cancelled or destroyed, within the meaning of those terms as used in the declaration; still less did they shew that they became so (if at all) through the defendants' failing to use due care to prevent the acceptance from becoming defaced or obliterated; and that, consequently, the defendants were entitled to judgment on the second, third, and fourth pleas.

"Thirdly. That the true nature of the contract, to be implied from the facts as found by the jury, was that set forth in the fifth plea; and that the allegations therein

contained were justified by the finding of the jury, so as to entitle the defendants to the judgment of the court on the replication to the said fifth plea.

"Lastly. The defendants will insist, generally, that, by the law of England, a banker, at whose house a bill is made payable by the acceptor, being a customer of such banker, comes under no irrevocable liability, by cancelling the acceptance in manner stated in the special verdict, to pay such bill; but that under the circumstances stated in the special verdict, the banker, notwithstanding such cancellation, is justified, by the law of England, in returning the bill unpaid to the persons [354] presenting the same at maturity, if, before those persons call for the same, or have notice of such cancellation, the acceptor has enjoined the banker not to pay it, such banker in that case, intimating, on the face of the bill, that the acceptance has been cancelled by mistake: and, if it be necessary to discuss the question, the defendants will contend that such is also the law of foreign countries."

The case was argued in last Trinity Term (June 3d. Before Tindal C. J., Coltman, Maule, and Cresswell JJ.).

Manning Serjt. (with whom was Sir John Bayley) for the plaintiff. All that the plaintiff has to shew in order to be intitled to judgment is, that the promise alleged to have been made by the defendants is to be implied from the facts of the case, a breach of such promise on their part, and that some damage has resulted therefrom to the plaintiff. The amount of damage is not in question; though the jury have found that if he is entitled to recover at all, he is entitled to the whole amount of the bill. [Maule J. If the fifth plea is proved the verdict must be entered for the defendants upon that plea, and also upon the general issue.] That would be so, as the fifth plea amounts to non assumpsit, and would have been bad on demurrer. It alleges, in effect, that when a cancellation is made upon a bill by error or mistake, a certain course is to be taken, and that the promise made by the defendants was a conditional one,—to follow that course,—and not absolute, as stated in the declaration. The facts as found by the special verdict shew that this was not the case of a cancellation by mistake, and therefore it does not fall within the usage found. At the time the cancellation was made, the acceptor had not revoked the authority of the defendants to pay the bill, nor had he even made up his own mind not to pay it. In *Mar-[355]-zettli v. Williams* (1 B. & Ad. 415) it was held that a customer might maintain an action against a banker who had received sufficient funds, for refusing to pay his cheque;—even although the customer had not sustained actual damage. So, in this case, the acceptor might have sued the defendants if they had in the first instance refused to pay the bill. [Tindal C. J. An action might have lain if they had sent back the bill to the clearing-house uncanceled; but not if they had kept it lying on their counter up to the time when they first knew his intention to stop payment. Maule J. The question is, whether the acceptance was cancelled by mistake.] It is submitted that it was not. The acceptance was cancelled intentionally and with full knowledge. *Novelli v. Rossi* (2 B. & Ad. 757. S. C. more full, 9 Law Journal, Rep. K. B. 307) will be relied upon by the other side. It was there held that where an acceptance is cancelled by mistake, and the mistake is immediately discovered, and an explanation is written on the face of the bill, the rights and liabilities of the parties remain as before. But there the cancellation was clearly made by mistake, at the time the bill was presented, under an impression that the bankers had funds of the acceptor at the time in their hands. In this case there was clearly no mistake as to any fact at the time of cancellation. Besides, in *Novelli v. Rossi* the action was between parties to the bill; and the question was, whether the holder was precluded from enforcing the bill; for he was in the same situation as if he were suing upon it. And it was held that the holder would be entitled to recover against the indorser if the cancellation had not the effect of destroying the bill. But that is very different from the question in this case. It is sufficient here for the plaintiff to shew that he is in a worse situation by the cancellation. Where any alteration is apparent on the face of a [356] negotiable instrument, the onus is thrown upon the holder to shew the circumstances under which the alteration was made; *Henman v. Dickinson* (5 Bingh. 183; 2 M. & P. 289). A greater burden of proof is consequently thrown upon the plaintiff, which might be too heavy to be borne. He might be unable to prove the circumstances under which the cancellation took place. The witness to the transaction might be dead. In *Novelli v. Rossi* no point was raised as to the altered condition of the parties. It was assumed that if the right of action against the acceptor

was not gone, that would be sufficient; without considering how that right might be affected as to the burden of proof. Assuming, then, that the cancellation in this case did not amount to a legal destruction of the document, still the plaintiff's course of proceeding against prior parties would be altered; and that is sufficient damage to give him a right of action. If the cancellation in question had been made with the consent of the holder, his remedy against prior parties would have been gone. [Maule J. Is that quite clear?] If the cancellation were without payment. [Maule J. It does not appear to have been so held in *Novelli v. Rossi*.] Perhaps the position may be stated somewhat too strongly; but it is clear that the situation of the holder would have been materially altered as to the burden of proof. [Maule J. Suppose the bill had been defaced by unavoidable accident while it was in the hand of the banker, would the action have lain?] It is submitted that it would, upon the present form of declaration and the plea of non assumpsit. [Tindal C. J. Suppose there had been several bills lying on the counter at the same time, and a clerk, intending to cancel another bill, had by mistake cancelled the one in question.] Still that would have been negligence; and the declaration [357] alleges a promise that the defendants would use due care to prevent the acceptance from being defaced or obliterated. [Maule J. The promise as to taking care to prevent the bill from being defaced might be struck out; there would then remain an allegation of a promise to pay the bill, or return it with the acceptance uncanceled.] And that would be sufficient; as if a promise were made to pay 100l. at York or 1000l. somewhere else, at the election of the promisee, and he elected to receive the 100l. at York, the promisor would be liable for that sum, though not for the 1000l. So here, assuming that the plaintiff consented to have the bill returned to him, the defendants were bound to return it without having cancelled the acceptance. If, as suggested, the cancellation had been made merely by the manual act of the defendants without any intention on their part, it might perhaps not have been sufficient to support the declaration. [Maule J. It appears to me that you must go the length of contending that *Novelli v. Rossi* is not law.] Possibly that decision ought to be received with some grains of allowance. In *Master v. Miller* (4 T. R. 320. S. C. affirmed on error, 2 H. Bl. 140) it was held that an alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument, and that no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration. The necessity of preserving negotiable instruments in an unaltered state is strongly commented upon in that case. [Maule J. There is no exception in the promise here, not to cancel the acceptance without the consent of the plaintiff.] It was not necessary. *Exceptio eorum quæ tacitè insunt nihil operatur*. It is not like the case of an assault where a permission to beat the plaintiff would be no defence to an action. [Maule J. There seems to me to be great difficulty in converting a duty into an implied promise.] If the promise is somewhat inaccurately stated, still the plaintiff might have judgment, as the case is within the operation of the 3 & 4 W. 4, c. 42, s. 24, whereby a judge, instead of directing an amendment in the record, is authorised to have the special facts found by the verdict, and the court then are to give judgment "according to the very right and justice of the case." Or the court might amend the declaration at common law, independently of the statute. [Tindal C. J. Not after special verdict. To amend would be to give a new ground of action, and that would have to be submitted to a new jury.] The promise as alleged must be understood to mean that the defendants would not cancel the bill in such a way as to render it less available than it was before. [Tindal C. J. The second plea goes to the first breach: the fourth plea to the second breach: the third plea alleges that the defendants did use due care to prevent the acceptance from being defaced or obliterated. Now the facts are that the acceptance was cancelled when the bill was taken to the defendants, the acceptor then having funds in their hands, and the defendants intending to pay the bill,—but in the course of the day they receive instructions from the acceptor not to pay it. Was that a want of ordinary care on their part? How could they tell that the acceptor would come in and order them not to pay the bill?] Assuming the acceptor to have had the option to revoke the acceptance, the defendants ought not to have cancelled the acceptance before such option had been exercised. [Tindal C. J. Suppose the defendants had fifty bills presented to them in the course of the day; the cancellation could not be put off till the last moment. Some reasonable time must be allowed to them. Then the question is

whether this bill was cancelled in an unreasonable time. The fourth plea says that the defendants returned the bill without having [359] cancelled or destroyed the acceptance; and upon that the question will be whether what took place amounted to a cancellation by the law of England.] The cancellation destroys the bill *pro tanto*; and, at any rate, encumbers the plaintiff with the burden of additional proof; and, under some circumstances, it might destroy his right of action altogether. If the acceptance remains to all intents and purposes as available as before, it must be admitted that there was no legal cancellation. But that is not the effect of the alteration. The plaintiff has clearly sustained some damage. It is expressly found by the special verdict that foreign indorsers of bills are in the habit of refusing to pay where the acceptance of a bill indorsed by them has been cancelled. It does not indeed appear whether such foreign indorsers are or are not by the law of France, compellable to pay in such a case; but it may be presumed that they are not compellable, as they do not pay; and that if they refuse, they refuse lawfully.

At any rate the plaintiff is entitled to recover under the count for money had and received. In *F. N. B. 121 F.* it is said, "If a man have a patent from the King to have a certain sum for term of years, or for life, out of the customs of London, and thereupon he have a liberate to the customer to pay him, which he delivereth to the customer, at which time the customer hath enough in his hands to pay him; now by the delivery of the liberate, and the assets in the hands of the customer, the customer is debtor unto him, and he shall upon this matter have debt against him." [Maule J. There are later authorities upon the subject. In *De Bernales v. Fuller (a)*, where money was paid into a banking house for the purpose of taking up a particular bill, which was lying there for payment, it was held [360] to be money had and received to the use of the then owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor who paid in the money; though the banker's clerk had said at the time the money was paid in, that he could not give up the bill till he had seen his master. But that decision turned upon the fact that the money having been expressly paid in to the defendant's house for the specific purpose, declared at the time, of taking up that particular bill; and that purpose not having been directly repudiated till afterwards, it must be taken to have been received at the time for the use of the holder of the bill. But the principle of that case would appear to be rather against you. *Cresswell J.* In the passage cited from *F. N. B.*, it appears that the liberate was delivered to the party.] The defendants having assets of the acceptor's in their hands, and the acceptance being made payable at their bank, they became debtors to the holder of the bill. The making the acceptance so payable was a mandate or order to them to pay the money, which would operate in the same way as the delivery of the liberate in the instance cited. But the plaintiff here may go further; for the defendants have, by cancelling the acceptance, done an act which not only amounts to an assent on their part to the order from the acceptor, but which also disables them from putting the plaintiff in the same situation he was in before.

As to the form of the promise—assuming that the second alternative is not correctly set forth, it might be rejected as immaterial. If A. promises to do a thing absolutely, and the promisee alleges that the promise was to do that thing and also another which is immaterial, it is of no consequence; and if the promisee shews that A. did promise to do that thing, and proves a breach of such promise, he supports his allegation. [Maule J. Is [361] that so?] He proves all that is material. But at any rate, the words in the declaration—"or return the said bill to the plaintiff without having cancelled or destroyed the acceptance," may be read thus—"or return the said bill to the plaintiff, without having done any act of cancellation that should prejudice the rights of the plaintiff:"—and if that were so, a breach has been proved, because the plaintiff's rights have been prejudiced.

Talfourd Serjt. (with whom was F. Robinson) for the defendants. There is no statement in the declaration that the defendants had funds belonging to the acceptor in their hands. The promise alleged is, therefore, not inconsistent with their having no funds. And it amounts merely to a promise that they will either pay the bill, or return it with the acceptance uncanceled. It imports, therefore, an absolute promise without reference to the state of the accounts between the acceptor and the defen-

(a) 14 East, 590, n. (and see *ibid.* p. 598, in the judgment). S. C. not S. P. 2 Campb. 426.

dants, that if they were unable to return the bill, from whatever cause, they would pay it. It is not an alternative promise, but an absolute promise to do one thing or another. Even apart from the usage stated in the special verdict, there is no ground for contending that any such obligation, as would give rise to an implied promise as alleged, would result from the state of facts alleged in the declaration. [Maule J. The promise is not quite as you state it—it is, that the defendants will pay the amount of the bill, or return the bill “without having cancelled or destroyed the acceptance.” That would mean that the acceptance was not to be cancelled by any act of theirs.] At any rate, the plaintiff now contends that the defendants would be bound if they had cancelled the acceptance by the merest accident. But that cannot be so. No legal remedy in that case would be lost to the holder. At [362] the most a trifling inconvenience to him would have arisen. So, if the bill had been accidentally burnt, there would have been inconvenience no doubt to the plaintiff; but his remedy in respect of the bill would not have been destroyed. So, if the bill had been altered by a stranger (a). In *Master v. Miller* the alteration was made, though it did not appear by whom, while the bill was in the possession of a prior indorser, through whom the plaintiff claimed.

At all events the contract is laid too widely. There may possibly be a duty on the part of the defendants not to deface the bill, which may give rise to an implied contract to the same extent; but there is no duty to pay the amount of the bill.

The practice among bankers in London, as stated in the fifth plea, is borne out by the special verdict. If the plaintiff had presented the bill himself at the defendant's, it would have been paid at once; but as he chose to present it through his bankers, all the known usages of bankers must be taken as imparted into the transaction. In hæc fœdera venit. And it appears that the cancellation in question took place in the ordinary course of proceedings. The plaintiff was therefore bound, under the circumstances, by the practice in the city; as where a bill is made payable at a banker's, it must be presented within banking hours; though it is different where the bill is payable at a private house; *Wilkins v. Jadis* (2 B. & Ad. 188), *Elford v. Teed* (1 M. & S. 28), *Parker v. Gordon* (7 East, 385). The usage as to the clearing-house, as found by the special verdict, is this—that the cancellation of an acceptance denotes the intention of the bankers to [363] pay the bill; but that such intention may be revoked till the settling at the close of the day. It may often be an advantage to an acceptor that matters should thus remain in fieri, as he may thereby be enabled to pay in funds into his banker's in the course of the day to meet acceptances which would otherwise have been dishonoured. In *Fernandey v. Glynn* (1 Campb. 426, n. S. C. cit. (nom. *Fernandez v. Glynn*) 3 B. & C. 438), it was held, that, by the usage of trade in London, a cheque may be retained by the banker, on whom it is drawn, till five in the afternoon of the day on which it is presented for payment, and then returned, although it has been previously cancelled by mistake. [Tindal C. J. There may be a distinction between a cheque and a bill of exchange. Maule J. There may be several parties to a bill.] In *Cox v. Troy* (5 B. & A. 474), where a drawee, having once written his acceptance upon a bill with the intention of accepting it, afterwards changed his mind, and before it was communicated to the holder, or the bill was delivered back to him, obliterated his acceptance, it was held that the drawee was not bound as acceptor. In the present case it may be admitted, that if the indorsers had been discharged by the cancellation, the action would have lain. [Tindal C. J. The plaintiff contends, that at any rate he has suffered some damage in this case by reason of the further proof imposed upon him in an action against the previous parties to the bill.] The same difficulty would have arisen in *Cox v. Troy*, in an action against the drawer; or in *Wilkinson v. Johnson* (3 B. & C. 428; 5 D. & R. 403), where certain bills of exchange, purporting to have, amongst others, the indorsement of H. and Co., bankers, Manchester, were presented for payment in London, at a house where the acceptance appointed them to be paid. Payment being refused, the notary [364] who presented them took them to the plaintiff, the London correspondent of H. and Co., and asked him to take up the bills for their honour. He did so, and struck out the indorsements subsequent to that of H. and Co.; and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered that the bills were not genuine, and

(a) See *Lord D'Arcy's case*, 1 Lev. 282; *Waugh v. Bussell*, 5 Taunt. 707; *Henfree v. Bromley*, 6 East, 309; *Irvine v. Elnor*, 8 East, 54; *French v. Patten*, 9 East, 355.

that the names of the drawers, acceptors, and H. and Co., were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonour could be sent the same day to the indorsers: and it was held, that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendants had lost their remedy against the prior indorsers; and that the rights of the parties were not altered by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence. Abbott C. J., in giving the judgment of the court in that case, citing *Fernandey v. Glynn*, observed—"Now this case shews, that the act of drawing a pen through a name in such instruments, is not considered among mercantile men to be an act so absolute in itself as not to be recalled and annulled, if done by mistake. We think that, in the present case, the mistake may be shewn, and that the indorsers are not discharged. If, indeed, it shall hereafter appear that the defendants are put to any additional expense, by extra proof or otherwise, on account of this improvident act of the plaintiff, which is very unlikely, they may possibly maintain a special action upon the case to recover a compensation to the extent of the injury they sustain; but this does not necessarily extend to the whole consideration, and if not, it furnishes no defence to the present action." These cases are authorities to shew that [365] neither this special assumpsit, nor an action for money had and received, will lie under the circumstances of the present case. There was no contract at all between the plaintiff and defendants—certainly none of the kind alleged. There was no privity between them. The defendants throughout have acted according to the known usage of the trade among bankers. They had a right to change their mind, and destroy the symbols of their intention to pay the bill. They did not debit their customer, the acceptor, with the amount of the bill; and therefore never appropriated the money so as to be holders of it to the plaintiff's use. This distinguishes the present case from that cited from *F. N. B.*, where there was an act of appropriation by handing over the liberate. Suppose the defendants, after the cancellation of the acceptance, had actually paid other bills or cheques of Jellicoe's with his money, and it was found before the settling, that he had overdrawn his account; could it be contended that they were liable to the plaintiff for money had and received? In *Stewart v. Fry* (7 Taunt. 339), an acceptor of a bill payable at his London bankers', remitted them funds to pay it, or to take it up if overdue; which last being the case, the bankers, who were bankers in London, called on the holders, intending to take it up; but finding the bill was sent back to Ireland as dishonoured, they remitted the money back to the acceptor, and upon a subsequent presentment of the bill, refused payment; and it was held that this was not such a specific appropriation of the money, as to render the bankers liable to the holders for the amount remitted. That case is an authority to shew that even the application of money may be revoked.

Upon the first point, therefore, it is submitted that no such promise as is alleged in the declaration, arises [366] from the facts therein stated. This is independent of the special circumstances stated in the fifth plea and found by the special verdict; and even if a promise might be implied from the general facts, there could be none under these special circumstances. *Novelli v. Rossi* is a strong authority for the defendants. The alteration in the situation of the parties was referred to in the argument in that case.

The second plea, which alleges that the defendants did use due care to prevent the acceptance from being defaced or obliterated, is supported by the facts of the case. For the defendants, in acting in the ordinary course of business, and adding the words on the bill, "cancelled by mistake, orders not to pay," did exercise every care that could reasonably be expected of them.

The fourth plea, which alleges that the defendants did return the bill without having cancelled or destroyed the acceptance, is also supported. What was done to the bill did not amount to a cancellation in law—there was no *animus cancellandi* on the part of the defendants. If an issue were joined whether or not a will had been cancelled, and it were shewn that the testator had drawn his pen across it without any intention to revoke it, it would be found to be no cancellation.

It is clear there is no ground for the amendment suggested. [Tindal C. J. It would entirely vary the measure of damages and the situation of the parties.]

Manning Serjt. in reply. The second breach alleged in the declaration is, that the

defendants would not pay the amount of the bill, or return the bill without having cancelled or destroyed the same, but, on the contrary, cancelled and destroyed the acceptance, and returned the bill with the acceptance so cancelled and destroyed. [Maule J. The term cancelling, as used in the declaration-^[367]ation, seems to mean invalidating the bill.] If that were so, there would be no meaning to be attributed to the word destroying. The cancellation purports *prima facie* that the bill has been paid; and, therefore, a bill, the acceptance of which has been cancelled, cannot be sued upon without an explanation of the circumstances under which the cancellation took place. The rights of the parties have therefore been altered by the cancellation. A banker is not a servant or agent of his customer, but a debtor; and in this case there had been a transfer of the debt. [Maule J. The arrangement as to the clearing-house is for the convenience of both parties. Suppose the plaintiff had himself presented the bill at the defendants' counting-house and they had torn it, would that have given rise to a contract?] It would be more like the present case to suppose that when the plaintiff brought the bill to the defendant's counting-house, one of them had said, "I must shew this bill to my partner;" and had taken it into a back room, and had then brought it back torn or cancelled; and it is submitted that such a state of circumstances would give rise to an implied contract. In *Fernandey v. Glynn* it clearly appeared that no rights of any third parties would be injured. So, in *Cox v. Troy*, the remedy against the drawer of the cheque would remain the same. [Maule J. The holder of the cheque would be exactly in the same difficulty as to evidence, as the plaintiff in the present case.] The point was not raised in that case; but clearly no third party was concerned. In *Novelli v. Rossi* also no question was raised as to the increased difficulty in the proof. The only point taken was, as to the difference effected in the situation of the partners by the decision of the French court. Indeed, the point could not have been raised, as the French court had decided that the parties were discharged from liability on the bill. The latter part of the judgment in *Wilkin-son v. Johnston* is in favour of the plaintiff. Abbott C. J. suggests, and the suggestion has been adopted in the course of the present argument, that a special action on the case might lie to recover compensation to the extent of the injury sustained by an improvident cancellation. Perhaps the plaintiff here might have sued in tort; but he may waive the tort and bring *assumpsit*; as in the case of actions against carriers, who may be either sued in case upon their common law duty, or in *assumpsit* upon the implied contract arising out of such duty. [Maule J. Suppose the acceptor had paid the bill in the course of the day, could you have still brought your action against the defendants? You might have done so, if this is a contract. If the action were in tort the case would be quite simple, because no damage could be shewn.] The payment by the acceptor would have been a satisfaction of the contract; it would have enured as a payment by an agent of the defendants. If A.'s goods are distrained for rent on a tenant's premises, the rent is thereby satisfied. It does not signify from what party the satisfaction comes. [Maule J. Could you say that in such a case of payment there had been accord and satisfaction?] The argument need not go that length. It is sufficient that there would have been a payment, and thus one alternative of the promise would have been satisfied. [Cresswell J. When you speak of the rights of the parties having been altered, you mean their position.] There is no substantial difference between the rights of the parties and their means of enforcing them.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court, as follows:—This is an action of special *assumpsit*. The declaration states, that H. R. and S. Barker and Co. drew a bill of exchange upon Richard Jellicoe for 300l., payable, sixty-one days after sight, to the order ^[369] of Alexander Bargigli; that it was indorsed by him and by several others successively, the last of whom, B. L. Fould and Foulds Oppenheim, indorsed to the plaintiff; that the drawee, Richard Jellicoe, on the 23d of November 1835, accepted the bill, by writing upon it and making it payable at the banking-house of the defendants. The declaration further states, that, when the bill became due, on the 26th of January 1836, it was duly presented for payment to the defendants at their banking-house, and that the defendants, in consideration that the plaintiff would deliver the bill to them without receiving payment at the time of the delivery, promised the plaintiff that, until they should have determined whether they would pay the bill or return it, they would use due care to prevent the acceptance from being defaced or obliterated, and would, upon being requested in a reasonable time, pay the

plaintiff the amount of the bill or return it without having cancelled or destroyed the acceptance. The declaration then goes on to state that the defendants did not use due care, but that through their want of care the acceptance became defaced and obliterated; that the plaintiff requested the defendants to pay the bill or return it with the acceptance uncanceled, but the defendants would not pay the money, and returned the bill with the acceptance cancelled and destroyed; by reason whereof the plaintiff has lost the benefit of the acceptance, and his remedies against the drawers and indorsers; and also that certain persons to whom the bill had been addressed in case of need by certain indorsers thereof, and who but for the obliteration of the acceptance would have paid the bill, refused to pay it. The declaration also contains a count for money had and received by the defendants to the use of the plaintiff, and a count on an account stated.

The defendants have pleaded—first, that they did not [370] promise as alleged in the declaration; secondly,—to the first breach in the first count,—that they did use due care to prevent the acceptance from being defaced or obliterated; thirdly,—to the same breach,—that the acceptance did not become, nor was it defaced or obliterated, as complained of by the plaintiff; fourthly,—to the last breach in the first count,—that they did return the bill without having cancelled or destroyed the acceptance; fifthly,—as to so much of the last breach in the first count as imputes to the defendants that they cancelled the acceptance, and returned the bill with the acceptance cancelled,—that the promise mentioned in the first count was subject to a proviso, that, if the defendants should, with a view to the payment of the bill, cancel the acceptance without making it illegible, and afterwards within a reasonable time for returning the bill should discover that they had not funds or had not authority from the acceptor to pay the bill, or such authority should be revoked, the defendants should be allowed to write on the bill that it had been cancelled by mistake, and to return it cancelled, without paying it: the plea then goes on to aver the matters necessary to bring the breach to which it is pleaded within the terms of this proviso, and concludes with a verification.

The plaintiff joins issue on the first four pleas, and replies *de injuriâ*, &c. to the fifth; on which replication, also, issue is joined.

The cause came on to be tried before me, at the sittings in London after Trinity term, 1838, when the jury found a special verdict, which states, in effect, that the bill in question was drawn, indorsed, and accepted as stated in the declaration; that the drawers and indorsers are foreign merchants residing beyond the seas; that certain indorsers, to wit, A. Hesse & Co., addressed the bill, in case of need, to Messrs. Heath, Furze, & Co.; that, on the morning of the 26th of January 1836, a [371] clerk of the plaintiff's bankers took the bill to the clearing-house, and put it into the defendants' drawer, from whence it was taken by the clerk of the defendants to them at their banking-house in order that they might determine whether they would pay it or not; that the defendants had funds of the acceptor sufficient to pay the bill; that the defendants cancelled the acceptance by drawing lines along and across the name of the acceptor in the manner usual with London bankers when they intend to pay bills made payable at their houses, and entered the bill in a book called the "paid-clearing-book," which they keep in order to know the total amount paid to the clearing-house in the course of the day; that Richard Jellicoe, the acceptor, on the same day, having determined to stop payment, ordered the defendants not to pay the bill, who thereupon wrote on it "cancelled by mistake—orders not to pay," and in that state returned it to the plaintiff's bankers at the clearing-house within the usual time for returning the bills which the bankers, at whose houses they are made payable, determine not to pay. The special verdict then sets out the course of business at the clearing-house, shewing that (except so far as the cancellation of the bill is concerned) the course usual when bills are not paid, was pursued in the present case. As to the cancellation, it finds, that it is usual to cancel such bills and cheques as are intended to be paid, by drawing lines along and across the name of the party for whom the payment is intended to be made, and that, when a cancellation has occurred through error or mistake, the same has been indicated in writing on the bill, note, or cheque returned; that Messrs. Heath, Furze, & Co., to whom the bill was addressed in case of need, refused to pay it, stating the cancellation as their reason; that it is optional with parties to whom bills are so addressed to pay them or not; that the plaintiff gave the defend-[372]-ants notice of such refusal to pay; that the bill was sent by the plaintiff

to his immediate indorsers, who refused to pay it, stating that they did so on the ground of the cancellation; that Richard Jellicoe, on the day the bill became due, wishing to pay back to a correspondent a sum of 500l., which the correspondent had remitted to him for the purpose of taking up a certain bill, applied to the defendants, and obtained discount of a bill of 500l.; and that the defendants retain in their hands the amount of the bill in question, in order to pay it to the plaintiff in the event of a judgment against the defendants. The special verdict then, in the usual form, leaves to the court to determine in whose favour the issues are to be found; and the jury assess the damages, in the event of the plaintiff being entitled to recover, at 345l.

In this state of the record, the court has to consider how each of the five issues is to be determined by the facts stated in the special verdict.

The first of these issues raises the question whether the defendants made the promise stated in the declaration, that is, that they would use due care to prevent the acceptance from being obliterated, and would, upon request within a reasonable time, pay the amount of the bill or return it without having cancelled or destroyed the acceptance. The facts stated in the special verdict, from which a legal liability and consequent promise to this effect are, if at all, to be inferred, are, in substance, that the plaintiff was the holder of a bill which the acceptor had made payable at the defendants' banking-house, and that the bill was delivered to the defendants by the plaintiff's bankers on the morning of the day it became due, that they might determine whether they would pay it or not, and return it to the plaintiff if they did not choose to pay it; that it is usual to cancel bills intended to be paid, by drawing lines along and across the name of the party for whom the payment is intended to be made; and that, where a cancellation has occurred [373] through error or mistake, the same has been indicated in writing on the bill returned. The duty to be inferred from these facts appears to us to fall short of the promise laid in the declaration; that duty being no more than to take due care of the bill, and, if the banker does not choose to pay it, to return it uncanceled, unless it has been cancelled by error or mistake, and in that case to indicate that it has been so cancelled, by writing on the bill; but that there is not, as it appears to us, any promise to pay if the bill is not returned, or to pay or return the bill, as laid in the declaration, nor an unqualified promise to return the bill uncanceled if not paid, but a promise only to return the bill, if not paid, uncanceled, unless cancelled by error or mistake. If the plaintiff's argument be well founded, a banker who omitted to return a bill would be bound by a promise to pay the amount of it, though it should be of no value, by reason of all the parties being insolvent, or all the names forgeries. According to our view, the banker does not become liable to pay the amount of the bill by defacing or not returning it; but by so doing, if it be wrongfully done, he becomes liable to damages for his breach of duty. He has no duty to pay: it is, as between him and the holder of a bill, always optional whether he will pay it or not, till he actually pays it. For these reasons, we think the plea, that they did not promise, is to be considered as found for the defendants.

The question on the second issue is, whether the defendants did use due care to prevent the acceptance being defaced. The only way in which the bill has been defaced being the cancellation made by the defendants when they might reasonably expect they would have to pay the bill, and such cancellation being made in the usual course, and the mistake indicated in the usual manner, it appears to us that this issue is also in effect found for the defendants.

The third plea denies that the acceptance was defaced [374] or obliterated. It appears to us, that though it was defaced in a manner and under circumstances which excuse the defendants, yet in fact it was defaced within the meaning of the allegation traversed by the plea; the issue therefore, on this plea, must be considered as found for the plaintiff.

And, in like manner also, the issue on the fourth plea is in effect found for the plaintiff, inasmuch as the special verdict shews that the defendants did not, in fact, return the acceptance uncanceled.

The fifth plea states, in effect, that the promise was different from that laid in the declaration, and is therefore a denial of that promise. But, the matters in this plea being put in issue, it is necessary to decide how it is to be considered as found: and we think that the facts stated in the special verdict shew that the promise of the defendants was subject to such a proviso as is stated in this plea, and that the other allegations of this plea, bringing the case within the terms of the proviso, are also supported;

the cancellation, under the circumstances stated, was a cancellation within the meaning of the statement of the usage on that fifth plea must be considered as found for the defendant.

But, that, supposing he could not succeed in the action for money had and received by the defendants that the plaintiff has no such right. There are no grounds which his principal has ordered him to pay to any person in whose favour the order is made, when the order is presented to the order and communicated his assent to the order. No such assent or communication took place; the [375] order is to the holder of the bill being its return, with a statement that it was made by mistake, and that the defendants had orders not

suggested by the learned counsel for the plaintiff,—though not much to be said, even though the issues should be found against him, the court will give judgment for him according to the very right and justice of the case, and not to the pleadings, under the provision of the 3 & 4 W. 4, c. 42, s. 24. This provision applies only where the jury at the trial have actually found the facts for the purpose of obtaining such a judgment of the court, and not to a case like the present, where the facts are found by the jury in order to enable the court to determine the issues on the record, and for that purpose only.

As, therefore, the defendants are in our opinion entitled to succeed on some of the issues which go to the whole cause of action, our judgment must be for the defendants. Judgment for the defendants.

DOE DEM. GOWAR v. ROE. Jan. 16, 1843.

Service of a declaration in ejectment at the office of the tenant, an attorney, upon his clerk, who accepted the service, was held sufficient.

Bompas Serjt. moved for judgment against the casual ejector. There were several tenants. Upon one of them, an attorney, the service of the declaration and notice had been effected by delivering a copy to a clerk of the tenant at his office, the clerk saying at the time that he would accept service for his principal, who was out of town. Per curiam. Rule granted.

[376] WILKES v. PERKS. Jan. 16, 1843.

The three days following Christmas day, though made holidays at the offices by 3 & 4 W. 4, c. 42, s. 43, are reckoned in legal proceedings.—The plaintiff applied to sign judgment on the 3d of January (when the time for pleading expired), but upon the officer suggesting that there was a doubt whether those three days were to be reckoned in the time for pleading, he forbore to sign judgment. On the same day the defendant died. The court refused to allow the plaintiff to sign judgment *nunc pro tunc*.

The writ of summons in this action was reserved on the 16th of December 1842, and the declaration filed and notice thereof served on the 24th of the same month, with notice to plead in eight days. On Tuesday, the 3d of January 1843, the time for pleading having expired on the preceding day (reckoning the Christmas holidays), and no plea having been delivered, the plaintiff's attorney went to the Master's office for the purpose of signing judgment, when he was told by the officer that a doubt existed as to whether or not Christmas day and the three days succeeding, during which the office was closed, were to be reckoned in the time for pleading, and it was suggested to him that the safer course would be to abstain from signing his judgment then. The plaintiff's attorney thereupon forbore to sign judgment. The defendant died on the same 3d of January.

Talfourd Serjt., upon an affidavit of the foregoing facts, now moved that the plaintiff might be at liberty to sign judgment as of the 3d of January. No doubt

could properly arise. It is clear that the three days after Christmas day are not excluded from the computation of time to plead, though, by the 3 & 4 W. 4, c. 42, s. 43, they are retained as holidays at the offices. They are not mentioned in the R. H. 6 W. 4, by which additional holidays are appointed; or in the R. E. 2 W. 4, r. 1, which specifies certain days which are not to be included in rules or notices or other proceedings. The plaintiff in this case was entirely misled by the officer of the court, and ought therefore to have relief.

[377] TINDAL C. J. The plaintiff might have had ground for the present application if the officer had refused to sign judgment. But he merely suggested a doubt, which it was in the option of the attorney to assent to or not. I think we cannot interfere.

ERSKINE J. concurred.

MAULE J. The attorney did not insist on his right to sign judgment; but appears to have rather too readily yielded to an erroneous suggestion gratuitously made by an irresponsible party. If we granted the rule, we should be interfering with the rights of others who are free from all blame.

CRESSWELL J. concurred.

The learned serjeant took nothing.

WARD v. DUCKER. Jan. 17, 1843.

Where the notice of an application to postpone a trial omitted to offer to pay the costs of the postponement, the court, on making the rule absolute, gave the plaintiff as well the costs of the postponement of the trial as also the costs of the motion, notwithstanding cause was shewn in the first instance.

Dowling Serjt., on behalf of the defendant, moved to postpone the trial of this cause on the ground of the absence of a material witness.

Talfourd Serjt. shewed cause in the first instance. The court were proceeding to make the rule absolute on payment of the costs occasioned by the postponement, when the learned serjeant submitted that the [378] plaintiff was also entitled to the costs of the application, as he had been compelled to appear, in consequence of there being no offer of costs in the notice of motion.

Dowling Serjt. contended, that, according to the usual practice as laid down in all the books (a)¹, no costs are given when cause is shewn in the first instance.

Per curiam. That is undoubtedly the general rule; but here the defendant has omitted in his notice of motion to offer the costs of the postponement of the trial, and consequently he must pay for having perhaps unnecessarily brought the plaintiff here.

Rule absolute accordingly.

EX PARTE ANN TANNER DUFFILL. Jan. 20, 1843.

Form of rule to dispense with the concurrence of a husband in the conveyance of property to which the wife alone is entitled, under 3 & 4 W. 4, c. 74, ss. 77, 91.

Bompas Serjt., in last Michaelmas term, obtained a rule under the 3 & 4 W. 4, c. 74 (a)², on behalf of Ann Tanner Duffill, a feme covert, to dispense with the [379]

(a)¹ See Tidd's Pr. 503, 9th ed.; Lush. Pr. 771.

(a)² By sect. 77 it is enacted, "that after the 31st day of December 1833 it shall be lawful for every married woman, in every case except that of being tenant in tail, &c., by deed, to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited or reserved to, her in regard to any lands of any tenure, or in any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed

concurrence of her husband, Henry Holland Duffill, in the conveyance of certain property to which he was separately entitled.

The affidavit of Mrs. Duffill, upon which the rule was obtained, stated (*inter alia*), that by a sentence or decree of the Arches Court of Canterbury, passed on the 15th of February 1836, in a suit instituted by the deponent against the said H. H. D., the said H. H. D. was divorced from bed, board, and mutual cohabitation with the deponent; and that shortly before the said divorce was decreed, that is to say, on or about the 31st of January 1836, the said H. H. D. left England, and, as the deponent had been informed and believed, went to the [380] United States of America, and had not since returned to this country, to the knowledge or belief of the deponent.

The mandatory part of the rule was in the following terms:—

"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to make disposition of, and to convey, all her estate and interest, of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing by the said affidavit that the said Henry Holland Duffill left England some years since, and hath not since returned to this country."

Bompas Serjt. now moved that the rule might be amended (in order to make it conform more closely to the language of the act), by introducing the words "to dispose of, release, surrender, or extinguish," in lieu of the words, "to make disposition of and to convey;" and also by substituting for the statement that the husband had "left England some years since, and had not since returned to this country," an allegation that the parties were living apart under sentence of divorce. It appeared that the conveyancer, who acted for the purchaser, had objected to the sufficiency of the rule as drawn up.

Per curiam. It is certainly better that the language of the statute should be adhered to as closely as possible. It is not inconsistent with the rule as at present framed, that the parties may be living abroad together.

The rule was accordingly drawn up in the following form:—

"It is ordered that the said Ann Tanner Duffill be [381] at liberty, by deed or surrender, to dispose of, release, surrender, or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce."

BADMAN v. PUGH. Jan. 20, 1843.

Where the defendant delivers a plea duly signed by counsel, and afterwards, under a judge's order, delivers additional pleas without such signature, *quære*, whether the plaintiff can treat such additional pleas as nullities; but—Held, that the plaintiff was

by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed," &c.

By sect. 91, it is provided and enacted, "that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall, from any other cause, be incapable of executing a deed or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders, to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and when done, executed, or made by her, shall (but without prejudice to the rights of the husband, as then existing independently of this act) be as good and valid as they would have been if the husband had concurred," &c.

not entitled to sign judgment upon the whole declaration as for want of a plea; inasmuch as even assuming the additional pleas to be nullities, they did not avoid the first plea, which was well pleaded.—A rule making a judge's order a rule of court was dated the 16th of July, and entitled "as of Trinity term" preceding: Held, to be properly drawn up.—By the order the judgment was set aside, with costs to be taxed: they were taxed at 6l. 5s., and not paid. The rule of court recited the order verbatim, and ordered the payment of the costs of making the order a rule of court; which were afterwards taxed. A *fi. fa.* was sued out directing the sheriff to levy 9l. 6s. 8d., as the sum which had been ordered to be paid to the rule of court, together with interest at 4 per cent. (pursuing the form No. 8 appended to R. H. 2 Vict.): Held, that the *fi. fa.* and the levy thereunder were irregular, the form (No. 8) being applicable only to cases where the payment of a specific sum of money is ordered.

On the 10th of March 1842 a declaration in *assumpsit* in this action was delivered, consisting of four counts. On the 14th of the same month the defendant delivered a special demurrer to the first count, and the plea of non *assumpsit* to the last three counts. On the 18th the demurrer to the first count was set aside by a judge's order as frivolous; and on the 19th judgment was signed by the plaintiff on the first count for want of a plea. On the 22d this judgment was set [382] aside for irregularity by a judge's order, by which, however, leave was given to the plaintiff to amend the declaration on payment of costs, the amount of which was by a subsequent order fixed at 4l., and ten days were allowed for the payment of that sum; at the expiration of which time, on failure of payment by the plaintiff, the defendant was to be at liberty to sign judgment for want of a joinder in demurrer. The costs not having been paid within the time allowed, the defendant signed judgment on the first count. On the 6th of June the defendant obtained a judge's order that he should be at liberty to add a plea of payment and a plea of set-off to the plea of non *assumpsit* already pleaded to the last three counts. This order having been made a rule of court, pleas of payment and of set off were in due time delivered, with a copy of the rule of court: but the pleas so delivered were neither dated nor signed by counsel, and thereupon the plaintiff, on the 7th of July, signed interlocutory judgment for want of a plea to the last three counts of the declaration, and on the 9th served the defendant with notice of a writ of inquiry before the sheriff: whereupon the defendant obtained a summons for setting aside this judgment on the last three counts; and on the 14th of July an order was made by Coleridge J. that the judgment so signed by the plaintiff on the 7th of July should be set aside with costs to be taxed, to be paid by the plaintiff to the defendant, his attorney or agent. On the 16th of July, the costs of setting aside the judgment of the 7th were taxed, and allowed by the Master at the sum of 6l. 5s.; and the *allocatur* was indorsed on the order of Coleridge J.; and that sum was on the same day demanded of the plaintiff's attorney, who declined to pay it, on the ground of his not having at that time received any instructions from his client for that purpose. No other demand was made of payment of such costs. On the [383] same 16th of July a rule of court was drawn up, which was instituted as of Trinity term, 5 Victoria, but dated Saturday, 16th of July, and which, after reciting verbatim the order of Coleridge J. of the 14th of July, made that order a rule of court, and further ordered that the plaintiff should pay to the defendant or his attorney the costs of, and occasioned by, that application to the court, to be taxed by one of the Masters of the court. The costs of that application and rule were afterwards taxed, but no notice of such taxation was given to the plaintiff's attorney. On the 18th of July a writ of *fieri facias* was sued out by the defendant, directed to the sheriff of Middlesex, which was in this form:—"We command you that, of the goods and chattels of Henry Badman in your bailiwick, you cause to be made 9l. 6s. 8d., which lately in our court before our justices at Westminster, by rule of our said court, intituled 'Trinity term, in the fifth year of the reign of Queen Victoria—Badman against Pugh. Saturday, 16th of July,'—were by the said court ordered to be paid by the said Henry Badman to the said John Pugh; and that, of the goods and chattels of the said Henry Badman in your bailiwick, you further cause to be made interest upon the said sum of 9l. 6s. 8d., at the rate of 4l. per cent. per annum from the 18th of July 1842," &c. &c. By the indorsement upon the writ, the sheriff was directed to levy 9l. 6s. 8d., and interest thereon at 4l. per cent. per annum from the 18th of

July, till paid, besides 16s. for the writ, sheriff's poundage, officers' fees, costs of levying, and all other incidental expenses. The costs of the rule of court were never demanded of the plaintiff, and they formed part of the sum of 9l. 6s. 8d. mentioned in the said writ and the indorsement thereon. On the 18th of July the sheriff seized the plaintiff's goods under the writ, and on the 23d an application was made by the plaintiff to Coleridge J. at chambers, [384] to set aside the rule of court and the writ of fieri facias issued thereon, for irregularity; and upon such application an order was made, that, upon payment by the plaintiff of 15l. into court in a week, to abide the event, the sheriff should withdraw, and that all proceedings under the said rule of court should be stayed until the fifth day of the then next Michaelmas term. The sum of 15l. was paid into court, and the sheriff withdrew the execution, pursuant to such order.

Sir T. Wilde Serjt., in Michaelmas last (November 5th), upon an affidavit of the foregoing facts, obtained a rule nisi to set aside the order of Coleridge J. of the 14th of July, the rule of court of the 16th of the same month, and the writ of fi. fa., for irregularity; and that the sum of 15l., paid into court pursuant to the order of Coleridge J. of the 23d of the same month, should be paid out of court to the plaintiff or his attorney.

The learned serjeant submitted that as the added pleas were not dated or signed by counsel, the plaintiff was in a situation to sign judgment, and that therefore the last-mentioned order of Coleridge J. for setting aside the judgment was irregular—that assuming the order to have been right, the rule of court was wrongly entitled (upon this point he cited *The King v. Price* (2 C. & M. 212, 2 Dowl. P. C. 233))—that even if it were properly entitled as of the previous term, it could not be effectual as a judgment of that term under the statute 1 & 2 Vict. c. 110, so as to warrant the issuing of the fi. fa. in vacation—that the fi. fa. itself was irregular because there had not been any personal demand of the costs upon the plaintiff; because the writ was not in the form prescribed by the rule of court framed in pursuance of the stat. 1 & 2 Vict. c. 110; and because the indorsement to levy the [385] expenses and poundage was bad, (upon this point he cited *Baker v. Sydee* (7 Taunt. 179), Archb. Prac., p. 416, 7th edit.)—and that, at all events, the levy itself of such expenses and poundage, would be irregular (b).

Channell Serjt., on a subsequent day in the same term (November 24th), shewed cause upon affidavits by the managing clerk of the defendant's attorney, and by the plaintiff's late attorney. In the first of these it was sworn that, at the time the added pleas were delivered, the attention of the plaintiff's attorney was called to the fact of their not being either dated or signed; that the defendant's attorney suggested that, under the circumstances, no date or signature was necessary; and that the plaintiff's attorney acquiesced. It was also sworn that a copy of the rule and appointment to tax had been served on the plaintiff's attorney; and it was further sworn, by the managing clerk, that the sum of 15l. never was paid into court under the judge's order of the 23d of July, but that the sheriff, having received the amount of the levy, had, under a judge's order, paid to the defendant's attorney 10l. 2s. 8d., as the amount of the levy under the fieri facias.

Sir T. Wilde Serjt. (whose argument, as well as that of Channell Serjt., is fully stated in the judgment of the court,) was heard in support of the rule.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. (After stating the substance of the affidavits, his lordship proceeded thus.) Upon these affidavits, my brother Wilde was compelled to abandon that part of his rule which asked for the payment of the 15l. out of [386] court, and also to relinquish his objection that no notice to tax the costs under the rule of court had been given to the plaintiff; but he still insisted—first, that the judgment signed on the 7th of July, for want of a plea to the last three counts of the declaration, was regular, and therefore that the order of my brother Coleridge, of the 14th of July, setting the judgment aside, and all the proceedings, ought to be set aside by the court; secondly, that, even if the judgment was irregular, and my brother Coleridge's order right, the rule of court was irregular, and ought to be set aside, because, the order having been made in vacation, the rule

(b) It did not distinctly appear from the affidavits that any poundage had been in fact levied.

of court ought to have been intituled as of the next succeeding term; thirdly, that, if the rule of court was properly intituled as of the preceding term, it could have no effect as a judgment of that term to warrant the issue of the fieri facias in the vacation, and, therefore, that the fieri facias and the levy under it were, at all events, irregular: and he further objected that the writ and execution ought to be set aside—first, on the ground that, as the effect given to rules of court for the payment of money or costs was intended as a substitute for the remedy by attachment, a personal demand of the costs ought to have been made upon the plaintiff before the execution was issued; secondly, because the writ of fieri facias was not in the form prescribed by the rules of all the courts, framed under the statute 1 & 2 Vict. c. 110; and, thirdly, because the indorsement to levy expenses of the writ and sheriff's poundage was erroneous, and rendered the writ itself bad; and lastly, he objected, that, at all events, the levy of the expenses of the writ and sheriff's poundage was irregular, and ought therefore to be set aside.

It will be necessary to consider each of these grounds of objection in their order.

As to the objection, on the ground of the irregularity of the judgment, it was contended, on the part of the [387] plaintiff, that the judgment signed on the 7th of July, for want of a plea to the last three counts of the declaration, was regular, inasmuch as the pleas of payment and set off were neither dated nor signed by a serjeant, and that the plaintiff might therefore treat them as nullities. But as, in this case, the general issue had been well pleaded already to the last three counts, which plea had not been withdrawn, we cannot see how the subsequent delivery of two pleas, even admitting them to be nullities, for the reasons before urged (on which, however, we give no opinion) (a), can be held to avoid the effect of the plea of non assumpsit. We are, therefore, of opinion that the judgment signed by the plaintiff was irregular, and that the order of my brother Coleridge ought not to be disturbed.

The second objection is as to the sufficiency of the rule of court. That rule is intituled of Trinity term, and is dated the 16th of July, and, after reciting the order of my brother Coleridge, dated the 14th of July, makes that order a rule of this court; and the objection is, that the rule is inconsistent with itself, and bad, because it affects to give to an order dated the 14th of [388] July the effect of a judgment by this court of the preceding Trinity term; and the case of *The King v. Price* was cited, as an authority that no such effect could be given to it. Upon reference to our officers, it appears that it always has been the practice of this court for the officer to draw up, and deliver out in vacation, rules of court making orders of judges issued in vacation rules of court as of the preceding term. And the same practice appears to have been at one time adopted by the court of Exchequer. But, in the case of *The King v. Price*, that court, in 1833, refused to grant an attachment for disobedience to a judge's order obtained in vacation, which had been made a rule of court as of the preceding term, on the ground of the incongruity of such a proceeding; observing, that the practice of drawing up such rules as of the preceding term ought to be discontinued, and that the order might be made a rule of court of the succeeding term.

The practice was, nevertheless, still continued in this court, and has since been sanctioned and established by a rule of all the courts, made by the judges in Hilary term, 1 Victoria, under the provisions of the statute 3 & 4 Will. 4, c. 42, s. 1, whereby it is ordered, "that every rule of court delivered out in vacation, shall be dated the

(a) In the course of the argument the following observations were made by the learned judges upon this point. Tindal C. J. The question is whether the added pleas are to be considered as pleaded nunc pro tunc. Maule J. Or whether they are not in the nature of an amendment, by addition. Erskine J. The plea of non assumpsit remains; and that is not a nullity. At most, the objection would amount to this, that the leave to add pleas has not been taken advantage of by reason of the absence of signature. Sir T. Wilde Serjt. submitted that the same observation would apply if the pleas had been pleaded at the same time with the general issue, which, of itself, would not require signature; but if it was pleaded with other pleas which required signature, the plaintiff might sign judgment upon the whole record if the signature were omitted. So, if a defendant were under terms to plead issuably, and he pleaded one unissuable plea, the plaintiff might sign judgment. Maule J. The defendant would not, in that case, have complied with the order.

day of the month and week on which the same is delivered out, but shall be intituled as of the term immediately preceding such vacation."

The rule, therefore, has been drawn up according to the form prescribed to the officers by this general rule; and we see no reason why this form should not be adopted in cases like the present, where it is sought to enforce the payment of costs under a judge's order, as well as in the ordinary cases of rules to plead several matters, or rules to compute, which, by reference to the title of the term, would (since the new practice of dating the summons and pleadings) in very many cases appear [389] to have been prematurely made, but which are placed in their proper order by reference to the date, inserted according to the general rule. The insertion of that date protects the parties from any undue use of the title of the term, while the party entitled to the payment is enabled to avail himself of the more speedy remedy provided by the statute 1 & 2 Vict. c. 110; and the incongruity is, in substance, removed by shewing the real day when the rule of court was drawn up, and from which it commences its practical operation. We think, therefore, that the rule of court was properly drawn up, and that it warranted the issuing in vacation of a writ of fieri facias, to enforce the payment of the costs awarded.

The remaining objections relate to the regularity of issuing the fieri facias, and the levy under it: but, although several objections have been raised against them, it will be unnecessary to consider any other than that which relates to the form of the writ; upon which objection we agree that the writ of fieri facias is irregular, and must be set aside.

The objection, in point of form, is, that the writ is not such as is prescribed by the general rule framed by the judges under the provisions of the statute 1 & 2 Vict. c. 110, s. 20. That rule is to be found in 9 Ad. & E. 986, and 7 Scott, 1; and, in form No. 8, is found the form of a writ of fieri facias on an order of court for payment of money, and in No. 9 the form of a similar writ on an order of court for the payment of money and costs; but there is no form for the payment of costs only.

The defendant has in this case adopted the form prescribed by No. 8, from which, on the face of the writ, it would appear that the rule of court had specified the sum of 9l. 8s. 8d. as the sum to be paid by the plaintiff to the defendant; whereas the rule of court names no sum, but, by adopting my brother Coleridge's order, in effect orders the plaintiff to pay to the defendant the [390] costs of setting aside the judgment of the 7th of July, to be taxed by the Master, and then explicitly orders the payment of the costs of, and occasioned by, the application to make that order a rule of court. The form, therefore, most applicable to the case is, the latter part of the form No. 9, by which the order to pay the costs, and the taxation of those costs at a specified amount, are set out in succession. But it was said by the defendant's counsel, that, as there was no form precisely applicable to this case, and as the order to pay costs to be taxed was in substance an order to pay the amount eventually allowed by the Master, the variation came within the saving clause of the rule prescribing the forms, by which saving it is declared that any variance, not being in matter of substance, shall not affect the validity of the writs sued out; for that no variance, in matter of substance was to be found in this writ from the form prescribed. But we think, that although the costs of setting aside the judgment, the amount of which had been ascertained by taxation before the rule of court was made, might be considered as at that time a definite sum of money (though not specifically ordered by the court to be paid by the plaintiff), yet the costs of the rule, not then ascertained, could not be so considered; and that, as the form No. 9 expressly points out how the costs of the rule are to be stated on the face of the writ, making the date of the taxation the period from which the interest is to commence, we must assume that the judges considered that statement material, and a matter of substance, so as to make the total omission of it an irregularity at least. It is true that, in this case, the date from which the interest is to be calculated is, in fact, the date of the taxation of the costs of the rule, and is therefore the correct date; but there is nothing on the face of the writ to shew such date; and to hold this writ sufficient would be, in effect, to hold the form No. 9 to be [391] altogether superfluous; and that, in all cases, even where the costs of the rule are included in the levy, the form No. 8 will be sufficient.

We are therefore of opinion, that so much of the rule as seeks to set aside the writ and the levy under it should be made absolute; and, as it becomes unnecessary to say

anything about the two remaining objections to the indorsement of the writ (a)¹ and the levy, the rest of the rule will, of course, be discharged.

But we think that the best conclusion to this harassing proceeding would be, for the defendant to take, by consent, a rule, that, on payment of the costs of this application and refunding the costs of the writ and the sheriff's poundage within one week, the defendant shall be at liberty to amend the writ, by substituting the sum of 6l. 5s. for that of 9l. 6s. 8d. at the commencement of the writ, and adding the clause for the costs of the rule, as prescribed by form No. 9, and at the same time omitting the costs of the writ and the sheriff's poundage in the indorsement, the plaintiff undertaking to bring no action; otherwise, the rule must be made absolute for setting aside the writ and the levy under it (b).

[392] ALLNUTT AND OTHERS v. ASHENDEN. Jan. 20, 1843.

[S. C. 6 Scott, N. R. 127; 12 L. J. C. P. 124; 7 Jur. 113. Followed, *Broom v. Batchelor*, 1856, 1 H. & N. 262. Commented on, *Wood v. Priestner*, 1866-67, L. R. 2 Ex. 71, 282.]

The following guarantee,—"I hereby guarantee B.'s account with A. for wines and spirits, to the amount of 100l."—there being at the time of the giving of such guarantee, an existing account between A. and B., upon which B. was indebted to A. (though in a less sum than 100l.), was held to be a guarantee for the payment of such existing account, and not to extend to future supplies of goods.

Assumpsit. The declaration stated that the plaintiffs, before and at the time of the making of the guarantee thereafter mentioned, carried on the business of wine-merchants, and that one John Jennings had, before the making of the said guarantee, applied to, and requested, the plaintiffs to supply him, on credit, with wine and spirits, which the plaintiffs had consented, and agreed to do upon receiving the guarantee of the defendant thereafter mentioned; and that thereupon the defendant, on the 14th of April 1838, in consideration that the plaintiffs, at the request of the defendant, would sell and deliver to the said John Jennings, upon credit, certain wines and spirits, to wit, all such wines and spirits as the said John Jennings should have occasion for and require, promised the plaintiffs to guarantee the account of the said John Jennings with the plaintiffs to the amount of 100l. The declaration then alleged, that the plaintiffs, confiding in the said promise, did afterwards sell and deliver to the said John Jennings, on credit, divers large quantities of wine and spirits, which the said John Jennings then had occasion for and required of the plaintiffs, at and for reasonable prices then agreed upon by and between the plaintiffs and the said John Jennings, amounting to a large sum, to wit, 300l.; that although the said credit had expired, yet the said John Jennings had not, although requested so to do, paid for the same or any part, of which the defendant had notice; and that the defendant had not, although requested so to do, paid to the plaintiffs the sum of 100l. or any part thereof, on account of the said wines and spirits, pursuant to his said guarantee.

[393] The defendant pleaded, first, non assumpsit (a)², secondly and thirdly, two

(a)¹ Maule J., in the course of the argument, said—How does the indorsement vitiate the writ? The indorsement is a mere direction to the sheriff. If there were an indorsement on a *fi. fa.* directing him to seize the freehold, would that vitiate the writ itself?

(b) The proposed arrangement not having been acquiesced in, the rule was drawn up for setting aside the writ and levy, and the plaintiff brought an action of trespass against the defendant.

Channell Serjt. moved in this term to stay the proceedings in the second action; but the court were of opinion, that although they might have interposed, if the rule had been made absolute with costs, on the ground that the costs had been awarded to the plaintiff upon an implied undertaking that no action should be brought, as the case stood the plaintiff had not entered into any such implied engagement, and consequently they had no power to restrain him from pursuing his legal rights.

The plaintiff obtained a verdict, with 100l. damages.

(a)² Quære, whether the plea of non assumpsit admits the matter stated by way of

other pleas, upon which nothing turned, and which before the argument were struck out of the record by agreement; fourthly, payment by Jennings, and acceptance by the plaintiffs, of 800*l.*, in satisfaction.

The replication traversed the payment and acceptance in satisfaction; upon which issue was joined.

The cause came on to be tried before Tindal C. J., at the adjourned sittings for London after Michaelmas term 1841, when a verdict was found for the plaintiffs, damages 200*l.*, subject to the opinion of the court upon the following case, with liberty for either party to turn the same into a special verdict; the court to have the same power to amend the record, if necessary, as a judge at nisi prius:

The plaintiffs are wholesale wine-merchants, carrying on business in Mark Lane, in the city of London, under the style and firm of Allnutt and Arbouin. The defendant is a brickmaker, residing near Sittingbourne in Kent. Previously to the guarantee hereinafter mentioned being given, viz. on the 3d of April 1838, the plaintiffs had supplied spirits to John Jennings, mentioned in the declaration and in the guarantee hereinafter mentioned, to the amount of 83*l.* 1*s.*

John Jennings, at the time when the spirits were supplied as aforesaid, and also at the time when the spirits were supplied as hereinafter mentioned, kept the King's Hotel at Canterbury.

On the 14th of April 1838, the defendant, at the request of Jennings, and on the application of Mr. Simons, the commercial traveller of the plaintiffs, signed [394] and gave a guarantee, of which the following is a copy, and which guarantee was written by Mr. Simons:—

“Messrs. Allnutt and Arbouin, 50 Mark Lane.

“Sirs,—I hereby guarantee Mr. John Jennings's account with you for wines and spirits, to the amount of 100*l.* (Signed) E. ASHENDEN.

“Sittingbourne, April 14th, 1838.”

At the time when the defendant gave and signed the said guarantee, addressed to the plaintiffs as aforesaid, the only account between Jennings and the plaintiffs was the account for the said spirits so supplied as aforesaid, to the amount of 83*l.* 1*s.*, the said supply of spirits being the only transaction which the plaintiffs and Jennings had had together prior to the time when the said guarantee was given. After the guarantee had been given, the plaintiffs continued, upon the orders and at the request of Jennings, to supply him from time to time with spirits up to the 24th of November 1840.

Between the date of the guarantee, and the said 24th of November 1840, the plaintiffs, from time to time, sold and delivered to Jennings, upon credit (which had expired before the commencement of this suit), spirits of the value altogether of 81*l.* 3*s.* 4*d.*, at prices amounting to that sum, and the plaintiffs, between the date of the guarantee and the said 24th of November 1840, received payments from Jennings to the amount of 61*l.* 1*s.* 2*d.* on account of the spirits so supplied, leaving a balance against Jennings in favour of the plaintiffs upon the whole account, of 21*l.* 9*s.* 2*d.* (a)¹, which was the amount due to the plaintiffs from Jennings at the commencement of this suit.

Before the commencement of this suit the defendant had notice of the facts above stated, and was requested [395] to pay the plaintiffs, under his aforesaid guarantee, the sum of 100*l.*, part of the moneys so due from Jennings to the plaintiffs for spirits so supplied as aforesaid; which the defendant refused to do.

The questions for the consideration of the court are, first, whether the said guarantee was binding upon the defendant in point of law; secondly, whether the same was a continuing guarantee (a)².

inducement to the promise, namely, that Jennings applied for further credit, and that the plaintiff agreed to give such further credit upon receiving the prospective guarantee mentioned in the declaration.

(a)¹ This would apparently leave 16*l.* due on the old account.

(a)² These questions appear to be substantially the same; as unless the guarantee related to goods to be subsequently delivered, it would fail to be binding for want of consideration.

If the court shall be of opinion that the guarantee was binding upon the defendant in point of law, and that the same was a continuing guarantee, the verdict is to be entered for the plaintiffs for 100l. damages.

If the court shall be of opinion that the guarantee was not by law binding upon the defendant, or that it was not a continuing guarantee, a verdict is to be entered for the defendant.

Channell Serjt. (with whom was Peacock) for the plaintiffs. The first question is, whether this is a binding guarantee; and it is submitted that a sufficient consideration appears on the face of it. *Haigh v. Brooks* (10 A. & E. 309, S. C., in error, ib. 323; 2 P. & D. 477, S. C., in error, 3 P. & D. 452), which was an action of assumpsit on a promise made by the defendant in consideration that the plaintiffs would give him up a guarantee then held by them, is in favour of the present plaintiffs. There, the guarantee was in these terms:—"Messrs. H. (the plaintiffs), in consideration of your being in advance to L. in the sum of 10,000l. for the purchase of cotton, I do hereby give you my guarantee for that amount, on their behalf. J. B." It was held by the court of Queen's Bench, and afterwards by the Exchequer Chamber, that the guarantee [396] did not necessarily imply a past advance, and that, on a trial, the plaintiffs might have given evidence to shew that future advances were contemplated. [Cresswell J. The main ground for the decision in that case was, that the thing given up was of some value.] *Raikes v. Todd* (8 A. & E. 846, 1 P. & D. 138). It is submitted that the words of this guarantee, by fair and necessary intendment, mean wine and spirits not already furnished, but to be supplied. In *Kennaway v. Treleavan* (5 M. & W. 498) it was held that a sufficient consideration was disclosed on the face of a guarantee, which was in these words:—"I hereby guarantee to you the sum of 250l., in case Mr. P. should make default in the capacity of agent and traveller to you." With respect to the second question, if this is a binding guarantee, it is clearly a continuing one. In *Mayor v. Isaac* (6 M. & W. 605) the guarantee was as follows:—"In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of 200l." It was held that the guarantee was a continuing one, and that the defendant was liable upon it, although, after the guarantee, goods to a greater amount than 200l. had been supplied to, and paid for by, V. Here, the guarantee is clearly given, not for any particular wine and spirits, but for wine and spirits generally. This case is distinguishable from *Jenkins v. Reynolds* (3 B. & B. 14, 6 J. B. Moore, 86); for there the guarantee contained no statement of what the account was for; and as the nature of the consideration did not appear, it might be for an illegal debt.

Bompas Serjt., for the defendant, was stopped by the court.

[397] TINDAL C. J. Applying to this guarantee, that rule of construction which has been so often laid down, that we must give to the words used their natural meaning, I do not see how this can be considered as a prospective guarantee; and if not, there is no consideration disclosed upon the face of it. The words are, "I hereby guarantee Mr. John Jennings's account with you for wine and spirits, to the amount of 100l." By "account," I understand the parties to mean some account contained in some ledger or book; and the case shews that there was such an account existing at that time. The natural construction of the guarantee therefore is, that it relates to that account. In order to hold the construction contended for to be the sound one, we must say that the word means some account between the parties, which is to run on until a future time; but we cannot come to that conclusion when it is shewn that there was, at the time that the guarantee was given, an account to which it might apply. I think the proper construction of the instrument is, that it is an undertaking merely to be answerable for some existing account.

ERSKINE J. I am of the same opinion. The question which we have to determine is, not whether a good consideration appears on the face of the declaration, but whether a good consideration is disclosed on the face of the document itself. If my brother Channell could have established his first position, he would probably have had little difficulty with respect to the second; for if the operation of the instrument was prospective, it seems to me that it would have been a continuing guarantee. But, as has been stated by the Lord Chief Justice, the document contains no express words which point to any prospective supply of goods, neither does any thing appear from which it can be inferred that the parties contemplated any such supply. The

primary [398] meaning of the language used can only have reference to an existing account.

CRESSWELL J.(a). The utmost that can be said on behalf of the plaintiffs is, that the guarantee is ambiguous. If I am to put a construction upon it, I should say that it applies to some present existing account.

Judgment for the defendant (b).

[399] GIBSON AND OTHERS, Assignees of George Martin, a Bankrupt, v. BRUCE AND ANOTHER. Jan. 23, 1843.

[S. C. 6 Scott, N. R. 309 ; 12 L. J. C. P. 132.]

In 1837 A., being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7s. in the pound. B., a creditor, refused to sign the deed until A. made B. a promise to give him security for the difference between the composition and the full amount of the debt. Pursuant to that agreement A. subsequently handed over to B. his promissory notes, payable to B. or order. B. indorsed the notes, and paid them in to his bankers at Leeds, to whom B. was in the habit of indorsing all bills and notes received by him, and drawing generally on account. When the notes were at maturity the London correspondents of the Leeds bankers presented them to A., by whom they were paid. A. continued to deal with B. down to his bankruptcy (in 1840) without ever complaining of the transaction or attempting to set off the payments made in respect of the notes against the subsequent demands of B. against him. No evidence was given to shew the state of the account between B. and the Leeds bankers at the time of the payments, or that A. knew the character in which the notes were held by the bankers who presented them. In an action for money paid by A. to the use of B., brought by the assignees of A. to recover back the amount of these notes, the judge left it to the jury to say whether or not the payment was voluntary, and told them that if the payment was made to the bankers as agents only, it must be considered as voluntary ; and that if they found the payment to be voluntary, and to have been made with a full knowledge of the circumstances, they must find for B., otherwise for the plaintiffs.—The court directed a new trial, in order that the attention of the jury might be more precisely called to the question—whether A. knew the character in which the bankers presented the notes for payment, namely, whether as agents of B. or as holders for value.

Assumpsit, brought to recover money alleged to have been paid by Martin, before his bankruptcy, to the use of the defendants at their request. Plea: non assumpsit.

At the trial before Tindal C. J., at the sittings in London after last Trinity term. it appeared that Martin, being in embarrassed circumstances, on the 15th of February 1837, entered into a deed of composition with his creditors to secure to them the payment of 7s. in the pound upon the amount of their respective debts. The defendants, amongst other creditors, executed the deed ; but before they did so they obtained from Martin a [400] promise that he would give them security for the difference between the amount of the composition and the amount of their original debt. Pursuant to that agreement, Martin subsequently gave the defendant certain promissory notes, payable to themselves or order, which notes the defendants indorsed and paid into their bankers, Messrs. Williams, Williams, Brown, and Co., at Leeds, who indorsed and remitted them to their London correspondents, Brown, Janson, and Co. The

(a) Maule J. was absent from indisposition.

(b) Had mercantile witnesses been examined at the trial, it is probable that they would have concurred in stating, that the word "account" in this guarantee, would be understood in the commercial world, as equivalent to the word "dealings."

It may also be observed, that the guarantee was for an account between a publican and his wine merchant, "to the amount of 100l.;" and that the existing account, or existing item of account, consisted of one sum (resulting from a single dealing) of 83l. 1s.

And see further as to continuing guarantees, *Hitchcock v. Humphrey*, post, 559.

latter afterwards presented the notes to Martin, who took them up. The defendants were in the habit of indorsing and paying into their bankers all securities which they received, and of drawing generally on account. Martin continued to deal with the defendants from the payment of the notes until his bankruptcy in October 1840, and never complained of the transaction, or claimed to set off the money so paid by him against their subsequently accruing demands against him. The precise state of the account between the defendants and their bankers at the time the notes in question were indorsed and handed over to them was not shewn; neither did it appear that Martin, at the time of paying the notes, knew the character in which they were presented by the bankers, whether merely as agents or as indorsees or holders for value.

For the defendants, it was contended that the payment of these notes was a voluntary payment by Martin, with a full knowledge of all the circumstances, and therefore that the transaction could not be re-opened and the money so paid recovered back; and *Wilson v. Ray* (10 A. & E. 82, 2 P. & D. 253) was cited. There the plaintiff being about to compound with his creditors, the defendant, a creditor, refused to subscribe the deed unless he were paid in full, the plaintiff, to obtain his signature, gave a bill payable to the [401] defendants' agent for the difference between 20s. in the pound and 8s., the proportion compounded for, the defendants then signed the deed; the plaintiffs did not honour the bill when due, but on subsequent application he paid it, some months after the dishonour, by two instalments to the payee, and the defendants received the money; the other creditors were paid according to the deed. It was held that the plaintiffs could not recover back the amount paid to the defendants above 8s. in the pound; for that the transaction had been closed by a voluntary payment, with full knowledge of the facts, and ought not to be re-opened; and that it made no difference that the sum in question had not been recovered by action.

On the part of the plaintiffs it was submitted that the assignees were entitled to recover the amount of the notes; because inasmuch as these had been extorted from the bankrupt in fraud of the other creditors, the subsequent payment of them to the indorsees could not be considered as a voluntary payment.

His lordship in leaving to the jury to say whether or not the payment by Martin was voluntary, told them that if made to the bankers as agents only for the defendants it must be considered as a voluntary payment; and that if they thought the payment to have been voluntary and with a full knowledge of the circumstances, their verdict, upon the authority of the case of *Wilson v. Ray*, must be for the defendants, otherwise for the plaintiffs.

The jury having returned a verdict for the defendants,

Sir T. Wilde, Serjt. in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against the evidence (a).

[402] Bompas Serjt. (with whom was F. Robinson) in the same term shewed cause. As the court gave no opinion on the point of law, the argument of counsel is not reported. The learned serjeant cited the following authorities. *Cockshott v. Bennett* (2 T. R. 763); *Bilbie v. Lumley* (2 East, 469); *Smith v. Cuff* (6 Maule & S. 160); *Brisbane v. Dacres* (5 Taunt. 143); *Farmer v. Arundel* (2 W. Bla. 824); *Lowry v. Bourdieu* (1 Dougl. 468); *The Duke de Cadaval v. Collins* (4 A. & E. 858, 6 N. & M. 324), and *Kelly v. Solari* (9 M. & W. 54).

Sir T. Wilde Serjt., contra, cited *Smith v. Bromley* contained in a note to *Jones v. Barkley* (2 Dougl. 684), *Browning v. Morris* (Cowp. 790); *Bize v. Dickson* (1 T. R. 285); *Grove v. Dubois* (ib. 112); *Martin v. Morgan* (1 Br. & B. 289); *Stevens v. Lynch* (12 East, 38); *Milnes v. Duncan* (6 B. & C. 671, 9 D. & R. 741); *Tuck v. Tooke* (9 B. & C. 437, 4 M. & R. 393), and *Turner v. Hoole* (s).

TINDAL C. J. now delivered the judgment of the court.

This was an action of assumpsit for money paid by the bankrupt to the use of the defendants at their request; to which the defendants pleaded non assumpsit, with

(a) See the grounds on which the rule was moved for, stated, post, p. 404.

(s) Dowl. & R. N. P. 27. The learned serjeant stated, from the private notes of Lord Tentarden (which were handed up to the court), that the report of this case was erroneous in stating that the defendant proceeded against the plaintiff on the bills; for the bills were outstanding in the hands of third parties, who received payment.

two other pleas which it is not material now to consider. At the trial before me at Guildhall at the sittings after Trinity Term last, it appeared that Martin, some time before his bankruptcy, being then in embarrassed circumstances, executed a deed of composition to his creditors, in order to secure the payment of so much in the [403] pound, and that the defendants, amongst other creditors, executed the deed, but that the defendants, before they would execute, obtained a promise from Martin that he would give security for the payment of the whole of their debt. It appeared also that Martin, after the execution of the deed in pursuance of such agreement, gave the defendants his promissory note payable to themselves, or order, for the difference between the amount of the composition and the amount of their debt; which promissory notes were indorsed by the defendants, and paid by them into the hands of their bankers at Leeds, and afterwards, upon being presented by the London correspondents of the Leeds bankers the amount of the notes was paid by Martin. It was further proved by the defendants, in order to shew that this was a voluntary payment on the part of Martin, that he continued to deal with the defendants for three years after this payment of the notes, and never complained of the transaction, or that he attempted to set off the payment against the subsequent demands which the defendants had against him. It appeared, however, on the cross-examination of the defendants' witnesses, that the defendants were in the habit of paying in to their bankers all the securities they received, and drawing on them as they wanted money.

Upon the state of facts the defendants' counsel insisted at the trial that the payment of these notes was a voluntary payment by Martin with a full knowledge of all the circumstances, and that, consequently, the transaction could not be re-opened and the money recovered back, referring to the case of *Wilson v. Ray* (10 Ad. & E. 82, 2 P. & D. 253) as an authority directly in point. And thereupon I left it to the jury to say whether the payment was voluntary or not, telling them, that if the payment was made to the bankers [404] as agents only it must be considered as a voluntary payment; and that if they found the payment to be voluntary and made with a full knowledge of the circumstances, then, upon the authority of the case referred to, they should find their verdict for the defendants, otherwise for the plaintiffs; upon which direction the jury found for the defendants.

In Michaelmas term last my brother Wilde obtained a rule to shew cause why there should not be a new trial on the ground, first of misdirection; secondly that the verdict was against the evidence. The misdirection complained of was the adopting as law the decision of the court of Queen's Bench in the case before cited; and it was stated by my brother Wilde that the main object of his motion was to review the grounds of that decision. The verdict was contended to be against the evidence in the cause, on the ground that the notes having been indorsed by the defendants and paid in to their bankers at Leeds, under the circumstances stated, the bankers became the holders of the notes for value, and there was no ground for supposing that Martin knew or indeed could know if the fact were so, that the notes were not presented for payment by them as such holders for value, in which case the payment by him must have been involuntary on his part. And it was further stated that this view of the case was not distinctly left to the jury.

We have heard a very learned and laborious argument on both sides upon the first ground; but as the rule of law laid down by the court of Queen's Bench, if it be not correct, ought rather to be overruled by a court of error than a court of co-ordinate jurisdiction, and as we feel ourselves justified upon the second ground of objection in sending this case to a new trial, and thereby giving either party the opportunity of putting the question of law on the record, we give no opinion [405] on that question. But upon the question of fact we think sufficient weight may not have been given by the jury to the evidence attending the payment of these notes, whether such payment was voluntary or not; and that it would be more satisfactory that this question should be submitted to a second jury with their attention called and directed to the precise point,—whether Martin knew that the bankers were presenting the notes as agents of the defendants,—which does not appear to have been left to them on the former trial.

For these reasons we think the rule should be made absolute for a new trial, and that the costs of the former trial should abide the event of the second.

Rule absolute accordingly.

BLYTH AND ANOTHER v. SMITH. Jan. 26, 1843.

[S. C. 6 Scott, N. R. 360 ; 12 L. J. C. P. 203 ; 7 Jur. 948. Referred to, *Clare v. Dobson*, [1911] 1 K. B. 41.]

In an action by A. against B., B. gave notice to C. against whom B. had a remedy over, to come in and defend the action. C. refused to do so, but did not prohibit B. from continuing the defence. B. suffered judgment by default, and watched the proceedings under the writ of inquiry, putting A. to the proof of his claim.—At the trial of the action over by B. against C. the jury included in their verdict the costs incurred by B. in the former action, no objection being then taken by C. to the right of B. to recover such costs. The court refused to disturb the verdict, being of opinion that there was evidence to go to the jury that C. had sanctioned the incurring of these costs.

Assumpsit. The declaration, after setting out a contract of charter, dated the 27th of April 1837, between the defendant as managing owner of the schooner "The Rapid" of the one part, and the plaintiffs and Thomas Blyth deceased, freighters of the said vessel of the other part, whereby that vessel was let on hire or freight to the said freighters, and stating mutual promises, alleged that afterwards and in the lifetime of Blyth, and whilst the said vessel so remained in their [406] said service, under and by virtue of the said charter, and on the terms thereof, to wit, on the 24th of November in the year aforesaid, the plaintiffs and Blyth caused to be shipped at Port Louis, in the island of Mauritius, on board the said vessel, a cargo of lawful goods and merchandize, to wit, 3348 bags of Mauritius sugar, in good order and well conditioned, of great value, to wit, of the value of 12,000L., belonging to W. Little, B. Roberts and J. T. Mitchell, and 283 bags of Mauritius sugar in good order, &c., &c. belonging to R. F. Gower, A. L. Gower, G. S. Walters and E. Gower, which goods and merchandize for certain freight and reward to be therefore paid to the plaintiffs and Blyth, were, for the said respective owners, to be taken care of, and safely and securely carried and conveyed by the plaintiffs and Blyth, in and on board the said vessel from Port Louis to London, and there to be safely and securely delivered in the like good order and well conditioned at London, the act of God, &c., excepted ; that afterwards, to wit, on, &c., the said vessel then remaining in the said service of the plaintiffs and Blyth, under and by virtue of the said charter, and on the terms thereof, sailed on her said voyage from Port Louis to London, laden with the said goods and merchandize ; that although the plaintiffs and Blyth had always observed and performed all things in the said charter mentioned on their part and behalf to be observed and performed, yet the defendant had disregarded his promise in this, to wit, that the said vessel, after the making of the said charter and before the time she so as aforesaid entered into the said service of the plaintiffs and Blyth was not made, nor was the said vessel when she so entered into the said service, or at any time afterwards, tight, staunch, or substantial, or in any respect fit or ready to receive on board a cargo of the plaintiffs and Blyth ; and in this, to wit, that during the continuance of the said [407] vessel in the said service of the plaintiffs and Blyth under the said charter party, the said vessel was not well or sufficiently tackled or appurtened, as was usual for vessels in the merchant service, or for the execution of the aforesaid voyages, nor was the said vessel nor were her stores, tackle, or appurtenances kept, as far as was practicable, in good or sufficient repair, although no act of God prevented the said vessel from being made or kept tight, staunch, or substantial, or fit and ready to receive the said freighters' cargo on board, or well and sufficiently tackled or appurtened, or prevented the said vessel, her stores, tackle, and appurtenances, or any of them, from being kept in good and sufficient repair as in the said charter agreed in that behalf as aforesaid ; whereby and by means of the premises and of the said vessel at the time she so as aforesaid entered into the said service of the plaintiffs and of Blyth, and from thence continually until and at the time of the said goods and merchandize, to wit, the aforesaid sugar being damaged and destroyed as thereafter mentioned, not having been made, nor being tight or staunch or substantial, and not by reason or means of any act of God, &c. large quantities of water, after the said vessel had sailed as aforesaid on her said voyage from Port Louis for London, and whilst she was on her said voyage with the said goods and merchandize

on board as aforesaid, and whilst the said vessel remained in the said service of the plaintiffs and Blyth, under and by virtue of the said charter, and on the terms thereof, to wit, on the 25th of November in the year aforesaid, penetrated through the sides and bottom of the said vessel and the seams thereof into the hold of the said vessel, and then and there destroyed a large quantity, to wit, 2000 bags of the said sugar, and then and there greatly damaged the residue thereof, and thereby the plaintiffs and Blyth then became and were wholly unable, safely or securely to [408] carry or to convey to London, or there safely or securely to deliver in such good order or well conditioned as aforesaid, the said goods or merchandize, or any part thereof, to the said respective owners thereof, and had lost and been deprived of the freight which they would have earned thereby, and they the plaintiffs and Blyth thereby became and were answerable to the said respective owners of the said goods and merchandize for the aforesaid destruction and damage thereof, and became and were liable to compensate them for the same; and by means of the premises, not only had the plaintiffs, since the death of Blyth, been compelled to pay, and had paid to the said respective owners of the said goods and merchandize, to wit, the said W. Little, &c., &c. large sums of money, amounting to a large sum, to wit, 5000l. as and for compensations to the said owners respectively for the said destruction and damage of the said goods and merchandize; but also the plaintiffs since the death of Blyth had been compelled to pay, and had paid, to the said owners respectively, divers large sums together amounting to a large sum, to wit, 1000l. as and for the costs of the said owners respectively in certain actions brought by those owners respectively in H. M.'s court of Queen's Bench at Westminster, against the plaintiffs and Blyth in respect of the said destruction and damage of the said goods and merchandize, and to recover from the plaintiffs and Blyth compensation for the same; and the plaintiffs by means of the premises had also necessarily incurred a great expense, to wit, an expense of 1000l. in and about their defence to the said actions, and in and about the investigating of the circumstances attending the said destruction and damage of the said goods and merchandize.

The declaration also contained the common indebitatus counts, and a count upon an account stated.

Pleas, *inter alia*—first, non assumpsit, except as to [409] 234l. 10s. which was paid into court; and seventhly that the plaintiffs had not been compelled, nor had they paid to the said respective owners of the said goods and merchandize, the said sum of 5000l., or any part thereof, as and for compensation to the said owners respectively, for the said destruction and damage of the said goods and merchandize, and the plaintiffs had not been compelled to pay, and had not paid, to the said owners respectively the said sum of 1000l., or any part thereof, as and for the costs of the said owners respectively in the said actions brought by those owners respectively, for the said purposes in the declaration mentioned, in manner and form as in the said declaration mentioned; concluding to the country. Issue thereon.

At the trial before Tindal C. J. at the sittings in London, after the last term, the following facts appeared:—"The Rapid" sailed from London under the charter set out in the declaration, in May 1837, and arrived at the Mauritius on the 5th of August. She then undertook an intermediate voyage to the Cape of Good Hope; after which, namely, in November, she was put up, by the plaintiffs' house at the Mauritius, as a general ship for London, and amongst other goods, received on board 3348 bags of sugar for Rickards, Little and Co., and 283 bags for A. A. Gower, Nephews and Co. On the 19th of December, the vessel sailed from the Mauritius, but in a few days she was compelled to return in a disabled state, and to unload. Part of the sugars, amounting to 979 bags, were found damaged and being unfit for re-shipment were sold. After being repaired at the Mauritius, she sailed for London on the 7th of February 1838 with the residue of her cargo, and arrived there on the 22d of May.

Rickards and Co. and Gower and Co. having commenced actions against the present plaintiffs to recover the value of the sugars so sold at the Mauritius, the [410] solicitors of the plaintiffs sent to the defendant the following notice:—

"January 24th, 1839.

"Ship 'Rapid.'

"Gentlemen,—We are instructed to give you notice that Messrs. Little and Co. (Rickards and Co.) have commenced an action against Messrs. Blyth, the charterers of the above ship, in H. M. court of Queen's Bench, to recover damages for the non-delivery

of certain goods and merchandize shipped by the plaintiffs on board the said ship at the Mauritius, to be carried and conveyed therein to London. The plaintiffs allege in and by their declaration in their said action, that the delivery of the said goods was not prevented by the perils of the seas, and indeed you are aware that the ground of the said action is the alleged unseaworthiness of the said ship. Under these circumstances, and as in case of the plaintiffs' recovery against the said charterers in the said action, the latter would have recourse to you as the owners of the said ship, for all such damages, we do hereby invite you to take upon yourselves the defence of the said action, and do give you notice that the defendants will hold you responsible at law for all damages, loss, costs, charges, and expenses to be by them sustained in or relating to the same."

Shortly afterwards the defendant was furnished with copies of the particulars of the claims respectively made by Messrs. Rickards, Little and Co. and Messrs Gower and Co. On the 19th of February 1839, the plaintiffs' solicitors wrote again to the defendant to inquire whether he intended to settle the foregoing claims, or to defend the actions. On the 22d they received from the defendant's attorney the following answer:—

"I am instructed by my client to say that he declines to take up the defence of Messrs. Blyth to the actions [411] brought against them by Messrs. Rickards and Co. and Messrs Gower and Co."

When it became necessary to plead, the defendant again received notice, and was required to furnish evidence in answer to the actions. The plaintiffs not obtaining the requisite assistance, and being advised that they had no defence to offer, suffered judgment to go by default, and upon the execution of writs of inquiry, put the parties to the proof of their respective claims. Messrs. Rickards and Co. recovered 1503l. and 58l. for costs, and Messrs. Gower and Co. 110l. 4s. and 27l. 18s. 4d. for costs; which sums the plaintiffs paid and now sought to recover, together with the costs incurred in resisting the two actions.

The jury having found for the plaintiffs, damages 1756l. 14s.,

Shee Serjt. on a former day in this term, obtained a rule nisi for a new trial, or to reduce the verdict to nominal damages (a), or, by the amount of the costs incurred by the plaintiffs in defending the two actions, which he contended the plaintiffs could not claim from the defendant.

Channell Serjt. (with whom was Bovill) now shewed cause. As to the objection that the plaintiffs cannot recover the costs incurred by them with respect to the two actions brought against them, this case is clearly distinguishable from the case of an accommodation acceptor. For as he is clearly liable to the holder for an ascertained amount, he is not justified in putting the drawer to any costs in recovering upon the bill. Here, the damages were unliquidated; and having suffered judgment by default, the plaintiffs were bound to appear at the execution of the writs of inquiry and put the parties to the proof of their claims. The course taken by the plaintiffs was a reasonable and proper one throughout. They gave the defendant notice of the actions, and offered to place the defence in his hands, and on his refusal, adopted the course which appeared to be most beneficial to the defendant.

Shee Serjt. (with whom was Cleasby) in support of the rule. It is submitted that the defendant is not liable to the costs of defending the actions; for such costs are not a necessary consequence of any breach of contract by the defendant. In *Short v. Kalloway* (11 A. & E. 28), it is said by Lord Denman, "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend. The circumstance relied on, that the damages were unliquidated, makes no difference." [Tindal C. J. You would have had just ground of complaint if the plaintiffs had proceeded to trial without giving you notice. But the course adopted was for your benefit, and the defendant had the opportunity at any time of coming forward, and undertaking the

(a) On the ground that by the terms of the charter party the contract of the shipper was with the owners, and not with the freighters; and, consequently, that having paid money which they were not legally liable to pay, they had paid it in their own wrong, and could not recover it from the defendant. On the argument, however, the court held, that this point was not open to the defendant, it not having been taken at the trial.

defence.] If the plaintiffs have incurred costs unnecessarily, the defendant cannot be held liable to repay them. [Erskine J. You must shew that the defence was unreasonable.] In *Penley v. Watts* (7 M. & W. 601), A. leased premises to B. from the 25th of March 1823, for sixteen [413] years wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C. from the 24th of June 1834, for four years and three quarters, wanting eleven days, and C. covenanted with B. to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages were assessed at 64l. 10s., being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previously to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of dilapidations to be 57l. 10s., and it was held (in effect overruling *Neale v. Wyllie* (3 B. & C. 533, 5 D. & R. 442)), that B. was not entitled to recover also the amount of the costs in the former action. And Parke B. said "The only true measure of damages here is what it would have cost the defendants to put the premises in repair. If the plaintiffs have expended more, that is their own fault, for which the defendants are not liable." That case shews, that however hard it may seem, if a man defends an action and incurs costs, he cannot recover them. [Tindal C. J. There, the plaintiffs themselves had broken the covenant into which they had entered to keep the premises in repair.] So in *Walker v. Hatton* (10 M. & W. 249), it was held that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of [414] the covenant to repair. These cases put an end to the distinction between ascertained and unliquidated damages. [Maule J. Was this point made at the trial? Channell Serjt. No. Tindal C. J. (referring to the correspondence), After the letters that passed between the parties, was it unreasonable for the plaintiffs to take the course they did?]

TINDAL C. J. The only question now before us is whether there was any evidence for the jury in case this point had been made at the trial, to shew that these costs were incurred with the sanction of the defendant. He receives notice of the actions, and is invited to undertake the defence; and although he refuses to do so, he does not at all prohibit the plaintiffs from defending. Under the circumstances of the case very slight evidence would have satisfied the minds of the jury that the defendant consented to the course adopted by the plaintiffs.

ERSKINE J. I think that the authorities which have been cited are by no means conclusive.

MAULE and CRESSWELL JJ. concurred.

Rule discharged.

[415] BEECH v. SIR JAMES EYRE, BART. Jan. 26, 1843.

[S. C. 6 Scott, N. R. 327.]

A private act passed to enable a manufacturing company to purchase certain patents, and to sue and be sued, enacted, that in all actions, &c. to be instituted or prosecuted against the company, "it should be sufficient to state the name of the secretary or some one of the directors, or where there shall be no secretary or director, then the name of some one of the shareholders, for the time being, of the company, as the nominal defendant representing the company in such proceedings," and provided for the reimbursement, &c. of shareholders who might be sued "in any other manner than under the powers and authorities thereinbefore given," and enacted, "that nothing therein contained should extend to incorporate the company or to relieve or discharge the company, or any of the shareholders thereof from any responsibility, duty, contract, or obligation whatever to which by law they then were or at any time thereafter might be subject or liable, either as between such company and other parties, or as between the company and any of the individual shareholders thereof and others, or as between themselves, or in any manner whatever."—Held, that the act was not imperative upon a creditor to sue in the manner pointed out, but

that he might exercise his common law right of proceeding against any individual shareholder.—The defendant was a party to a contract in February, for procuring the act which was obtained in June, and his name appeared in it as a subscriber to the undertaking, and in September, he executed a deed of settlement, which recited that the company was in operation. The goods in respect of which the action was brought were supplied in July. Held, that there was sufficient evidence from which the jury might infer that the defendant was a partner at the time the goods were furnished.

Assumpsit for goods sold and delivered. Plea, non assumpsit.

At the trial of the case before Tindal C. J. at the sittings in London after last Michaelmas term, it appeared that the defendant was an original subscriber and shareholder in a company established under the 4 & 5 Vict. c. lxxxix, being "An act to enable the Patent Rolling and Compressing Iron Company to purchase certain letters patent, and to sue and be sued." The patents were two in number, one, for "certain improvements in machinery for the making or manufacturing of pins, bolts, nails and rivets applicable to various useful purposes," and another "for improvements in rolling iron."

[416] The fifth section enacts "that in all actions, suits and other legal proceedings other than proceedings of a criminal nature, &c., to be thereafter instituted or prosecuted by or on behalf of the said company, either alone or jointly with any other necessary parties, it shall be sufficient to state and to proceed in the name of the secretary, or one of the directors for the time being of the company, as the nominal plaintiff representing the company in such proceedings; and that in all actions, suits and other legal proceedings to be thereafter instituted or prosecuted against the company, either alone or jointly with any other necessary parties, it shall be sufficient to state the name of the secretary or some one of the directors, or where there shall be no secretary or director, then the name of some one of the shareholders for the time being of the company, as the nominal defendant representing the company in such proceedings: Provided always, that any party suing the company may, if he think fit, join any shareholders of the company together with such nominal party, as defendants in equity, for the purpose of discovery, or in case of fraud."

By the twelfth section "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against all or any of the shareholders, for the time being, of the company; and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into upon which such action or suit shall have been instituted."

By the seventeenth section, it is provided "that in case any action, suit, or other proceeding, in respect of any [417] demand against the company, shall be instituted or prosecuted against any shareholder, or former shareholder, of the company, in any other manner than under the powers and authorities hereinbefore given, and in case such shareholder shall, by virtue of any judgment or decree in such action, suit, or other proceeding, or under any execution to be issued in respect thereof, or otherwise, pay any sum of money, damages, costs, or expenses, he shall, in respect of such last-mentioned payment, be entitled to all such indemnities, rights, powers, and remedies in all respects, for reimbursing himself or for enforcing contribution, according as the case may be, in respect of all moneys, damages, costs, or expenses so paid by him as aforesaid, as are hereinbefore given in cases where execution shall have issued upon any judgment or decree obtained in any action, suit, or other proceeding instituted or prosecuted under the powers given by this act."

By sect. 20 the company were required, within six months after the passing of the act, to cause to be inrolled in Chancery a memorial of the names, residences, and descriptions of the directors and secretary for the time being of the company, and of the shareholders thereof, &c.

By sect. 24 it is provided, "that until the first memorial shall have been duly inrolled in manner by this act directed, no action or other proceeding by or against the company shall be commenced or prosecuted under the authority of this act."

By sect. 31 nothing in the act contained shall extend to incorporate the company,

or to relieve them or any of the shareholders thereof from any responsibility, duty, contract, or obligation whatever to which by law they are, or at any time hereafter, may be subject or liable, either as between the company and other parties, or as between the company or any individual shareholders [418] thereof and others, or as between themselves, or in any other manner whatsoever.

The original deed of contract, dated the 9th of February 1841, for obtaining the act of parliament, was put in, executed by the defendant, who had subscribed his name for 100 shares of 25l. each, on which he had paid a deposit of 5l. a share. The deed contained a covenant by the subscribers to pay the residue of their subscriptions when they should be called upon to do so. In pursuance of this deed, the act of parliament, which received the royal assent on the 21st of June, was obtained. A deed of settlement, bearing date the 18th of September, was also given in evidence, executed by the defendant, which, after reciting the former deed, and that the act had been obtained, stated that the company had taken premises at Rotherhithe, for carrying on business, had erected machinery, and was in actual operation. It was proved that the defendant had attended several meetings of the company in March and April 1842.

There was no evidence that the company had purchased the patents mentioned in the act. Directors and a secretary had been appointed, but the memorial required by the act was not inrolled until the six months specified by the act had expired, and consequently was not received in evidence. The goods in respect of which the action was brought, consisting of tallow for the machinery, had been ordered by the secretary, and were supplied in July 1841.

For the defendant it was contended that inasmuch as no memorial had been inrolled within the six months as required by the twentieth section, the act became inoperative, and the company was an illegal body; but that supposing the company to be properly formed, still the only mode of suing the company was that prescribed by the fifth section.

[419] Under the direction of the Lord Chief Justice a verdict was found for the plaintiff for 28l. 0s. 9d., leave being reserved for the defendant to move to enter a nonsuit.

Bompas Serjt., on a former day of this term, moved accordingly; citing *Steward v. Greaves* (10 M. & W. 711); where it was held that the creditor of a banking copartnership established and carrying on business under the 7 G. 4, c. 46, cannot sue an individual member of the company for his debt, but must proceed against the public officer, pursuant to the ninth section of the act. A rule nisi having been granted,

Channell Serjt. (with whom was W. H. Watson). The only point on which the defendant had leave to move, was whether he could be sued as an individual shareholder. There is nothing in the fifth section of the act establishing the company, to render it imperative on third parties to sue the company in the name of the secretary, or of one of the directors. That section, for the sake of public convenience merely empowers the company, if they think proper, to sue for debts due to them in the manner pointed out, but without making it at all obligatory upon them to do so. While on the other hand, third parties are authorised to sue the company in the name of the secretary, &c., if they think fit to adopt that course. The words that in actions against the company, "it shall be sufficient to state the name of the secretary," &c. shew, that the clause was meant to be optional. In order to take away the common law right to sue any individual partner of the concern, distinct and precise language must be used. The subsequent clauses of the act all tend to the con-[420]-clusion that this right to sue individual members was not meant to be abrogated. The twelfth and seventeenth sections plainly contemplate the case of shareholders being sued otherwise than in the mode pointed out by the act. The twenty-fourth section, which provides that until the memorial is inrolled, no action shall be brought by or against the company, under the authority of the act, is relied on as shewing that the company is not legally constituted, no such memorial having been inrolled; but that clause does not render the company less a company, although it may suspend, or deprive them of, part of their intended privileges; and even supposing it rendered the partnership no longer a company, it has no effect upon the partnership itself, or upon the liabilities of the individual members. If it had, in what a situation would the public be placed, supposing the company, after having dealt with parties and obtained goods from them, were to choose not to inrol any memorial. If any doubt existed as

to the construction of the other clauses, the thirty-first section (which provides that nothing contained in the act shall relieve the company or any of the shareholders from any responsibility to which by law they are or at any time hereafter may be subject or liable) seems decisive upon the point. *Steward v. Greaves* (10 M. & W. 711) which was cited when this rule was obtained, is distinguishable from the present case. The words of the ninth section of the 7 G. 4, c. 46, upon which the former case was decided, are that "all actions against the copartnership shall, and lawfully may, be commenced, instituted and prosecuted against one or more of the public officers nominated as before mentioned as the nominal defendant," and Parke J. in delivering the judgment of the court said, "These words, according to the ordinary import, [421] are obligatory, and ought to have that construction, unless it would lead to some absurd or inconvenient consequence, or would be at variance with the intent of the legislature to be collected from other parts of the act." *Blewett v. Gordon* (1 Dowl. N. S. 815) is a distinct authority for the plaintiff. It was there held, upon the words of a private act of parliament establishing the Monmouthshire Iron and Coal Company, containing clauses nearly similar to the act under consideration, that it was not imperative upon a plaintiff to sue the secretary or one of the directors of the company, and that a plea raising the point was not an issuable plea.

It is now attempted to be said that if the defendant cannot be sued under the act, there is no evidence to fix him as a partner at all. It is submitted that this point cannot be raised by the defendant, as it was not taken at the trial; but that if it can, the evidence was abundantly sufficient. In the deed of contract of the 9th of February 1841, the defendant holds himself out as one of a number of persons associated together for trading purposes. And with respect to the deed of settlement, though entered into after the supplying of the goods, it contains recitals of past events, by which it appears that the company had taken premises at Rotherhithe, had erected machinery there (for the use of which the tallow was supplied), and was in operation. In addition to these documents, there is the fact of the defendant having subsequently attended several meetings. It is impossible to say, that there was no evidence for the jury, of the defendant being a member of the company; and there can be no doubt that if the point had been raised at the trial, the jury would have distinctly found the fact.

[422] Bompas Serjt., in support of the rule. It is submitted that there was no evidence to fix the defendant as a partner at the time these goods were supplied, if he cannot be held liable under the act of parliament, which, it is clear, he cannot. [Tindal C. J. I do not see why the act is not to be appealed to, notwithstanding the company had not put themselves in a situation to render its provisions available. Erskine J. You must go the length of contending that there was no evidence for the jury.] It is not denied that the defendant was a party to the obtaining of the act; and if it had been shewn that the company had carried on business under the patents it might have been evidence. But the act was procured for a particular purpose, namely, to buy the patents, and the defendant can only be held responsible for things done in pursuance of the act. It is clear, that if the directors had done something not warranted by the act, the defendant would not be liable. [Tindal C. J. Who do you say should have been sued for this tallow?] The party who ordered it. It is contended that at that time the defendant was not a partner at all. [Tindal C. J. The tallow was ordered for the machinery.] But the patents had not been purchased. [Maule J. Suppose they had not, do you contend that their purchase was a condition precedent to carrying on the company? You assume that till the patents are bought the company cannot be sued, but there is nothing to that effect in the act. The third section seems to contemplate that some time may elapse before the patents are purchased. Erskine J. Was not the deed of settlement, reciting that the company had taken premises, erected machinery, &c., coupled with the fact as shewn by the deed of contract that the defendant was a party to the obtaining of the act, evidence of his being a partner?] The deed of settlement, contains no recital that the patents had been purchased, [423] but only that a company had been formed to purchase them. [Cresswell J. That deed states that the company is in operation; which shews that the patents had then been purchased, or if not, it is an admission, under the hand and seal of the defendant, that the company might be in operation before they were bought.] If the order for the goods had been after the execution of the deed of settlement, it would be difficult to say that the defendant was not liable; but it is submitted that there is no evidence that the defendant was a partner at the time the goods were

ordered ; neither does the evidence that he attended several subsequent meetings of the company establish that fact.

Supposing the company to be legally in existence, then the plaintiff was bound to sue in the manner prescribed by the fifth section ; for it was proved that there were both a secretary and directors ; and an individual shareholder can only be sued as a defendant representing the company. The proviso to that section shews that the clause was meant to be imperative ; for if not, the insertion of such proviso would have been quite unnecessary. If the fifth section is held to be optional, one of the principal objects in obtaining the act, which was to protect the individual shareholders, by giving the public a convenient mode of proceeding against the company, would be defeated.

TINDAL C. J. This is an action brought against the defendant charging him, as a partner in a trading company, with certain goods supplied to that company. Two objections had been taken against the plaintiff's right to recover : first, that by the act of parliament establishing the company, the right of suing any individual shareholder is taken away, as all actions must be brought in the manner thereby prescribed ; and, secondly, that supposing the act not to apply, there was [424] no evidence to shew that the defendant was a partner in the undertaking. With respect to the first question it is incumbent on the defendant to make out that the common law right of suing is taken away in express terms. So far however, from that being the case, it seems to me, that the fair construction of the act is, not only that the right to sue is not taken away, but that it is distinctly reserved. The fifth section (ante, p. 416) does not state that in actions against the company parties shall sue, but only that "it shall be sufficient to state," &c., evidently shewing that the clause was merely meant to confer a power or privilege, but not to impose an obligation. By the twenty-fourth section, this power cannot be exercised unless a memorial has been inrolled pursuant to the provisions of the twentieth clause, which is an act to be done by the company. Supposing the company not to file any memorial, as indeed was the case, are the rights of third parties to be affected by a condition to be performed by the company with which they have not thought proper to comply ? On referring to the twelfth and seventeenth sections (ante, p. 416, 417), it clearly appears that the right of third parties to sue individual members of the company, is distinctly reserved ; for both of these clauses contemplate that the case may occur of actions being brought against individual shareholders. I think, therefore, that the first objection falls to the ground.

With respect to the second objection, I agree that in order to charge the defendant it must be shewn that he was a partner at the time when the goods were supplied. In the first place it has been contended that the company could not be legally constituted until the patents were purchased ; but it does not appear to me, that the act contains any words making the buying of the patents a condition precedent. But even if that had [425] been so, no objection was taken before me at the trial, that the patents had not been purchased. On the contrary, it seemed to be assumed that the company were carrying on business under the act. With respect to the evidence, it is sufficient to say, that there was some evidence to go to the jury, that the defendant was a partner when the goods were supplied. The act was passed on the 21st of June 1841, and we find that in the preceding February, the defendant enters into a contract to procure the act, and his name appears therein as a subscriber for shares in the capital of the company. We find him, afterwards, in March and April 1842, attending meetings of the company, having previously signed the deed of settlement which recites that the company is in operation. Is not all this evidence that he was a partner from the first commencement of the works ? There was clearly evidence from which the jury might infer that he was, from the first, a shareholder in the company.

ERSKINE J. This is an action for goods sold and delivered, in which the defendant by his plea simply denies his liability. It is sufficient therefore for the plaintiff to shew that the goods were supplied either to the defendant individually, or to some partnership of which he was a member. It appears that the goods were delivered at Rotherhithe upon the premises of a company calling itself "The Patent Rolling and Compressing Iron Company," and the question is, whether, at the time of the delivery of the goods, the premises were actually occupied by the company, and whether the defendant was then a member thereof. In order to make that out, a deed of settlement dated in September 1841, and executed by the defendant, was put in, which recites, among other things, that premises had been taken for the company, and

adapted for the purpose of carrying on business, that machinery had been erected, and [426] that the company was in operation. Then it appears that he had been in the preceding February a party to an agreement for obtaining the act; that in pursuance of such agreement, the act was procured; and his name appears in the act as a subscriber to and partner in the company. We are asked to say, that these facts afford no evidence from which a jury might infer that the defendant was a partner in the company in July, when the goods were furnished. It appears to me not only that there was evidence for the jury of the defendant being then a shareholder, but that if they had come to any other conclusion, their verdict would have been so unsatisfactory as to warrant the court in sending the cause down again.

The next question is, whether there is any thing in the act which deprives the plaintiff of his right to sue the defendant. It is said that the company was formed for the purpose of purchasing certain patents, and carrying on business under them; and that the sole object of the act was to authorise them to do so; and that unless the plaintiff could shew that the company had bought the patents, he had not proved the defendant a partner in a firm then carrying on business. It appears to me that there is nothing in the act making the purchase of the patents a condition precedent. Then, it is contended that the act prevents the plaintiff from suing the defendant in his individual capacity, for that by the fifth section all actions must be brought against the secretary or one of the directors of the company, &c., and it was proved that the company had both a secretary and directors. If this clause had said, that the company shall be sued in the name of the secretary, &c., and there had been nothing in the other sections to shew that the legislature had used the word "shall" in any other than its imperative sense, then the case would have fallen within the decision in *Steward* [427] v. *Greaves*. But here the words merely are that "it shall be sufficient;" leaving it therefore optional so to sue or not. It is contended that the proviso to the fifth section (ante, p. 416) shews that this is not the true construction of the clause; for the power thereby given of joining any shareholder shews that it was requisite on all occasions to sue either the secretary or one of the directors, as otherwise the proviso would be superfluous. It seems to me, however, that the object of that proviso merely is, to enable a plaintiff to join any of the shareholders with the nominal defendant, in cases where it may be necessary to bring them personally before a court of equity. If, therefore, the case had rested on the fifth section alone, I should have thought that there was nothing to take away the common law right of the plaintiff to sue the defendant. But by the seventeenth section, the legislature clearly contemplates the case of a party bringing an action against an individual shareholder in some "other manner" than under the authority of the act. Lastly, when we look at the thirty-first clause, we see that the legislature seems to have been curiously anxious not to take away the common law responsibility of the individual members of the company. It therefore appears to me, that the act leaves the case as it stood at common law, and that as the liability of the defendant as a partner was proved, this rule must be discharged.

MAULE and CRESSWELL Js. concurred.

Rule discharged.

[428] BIFFIN AND ANOTHER, Assignees of George Yorke, an Insolvent, r. JOSEPH YORKE. Jan. 25, 1843.

[S. C. 6 Scott, N. R. 222; 12 L. J. C. P. 162. Dictum adopted, *Wear River Commissioners v. Adamson*, 1877, 2 App. Cas. 776. Extended, *In re Smith*, 1888, 20 Q. B. D. 327.]

Money levied under a cognovit not filed, and upon which no judgment has been signed within twenty-one days, is void as against assignees of an insolvent, although the cognovit was given in a suit commenced adversely, and although the proceeds of the execution are paid over to the judgment creditor before the insolvency.

Debt, for money had and received, and upon an account stated. Plea: nunquam indebitatus. The action, commenced on the 6th of May 1842, was brought for the purpose of recovering 207l. 7s. 2d.

By an order of Maule J., the following case was stated for the opinion of the court:—

On the 21st of December 1840, an action was adversely commenced in the Exchequer, against the insolvent George Yorke, by the present defendant, upon G. Yorke's dishonoured promissory note given for money and goods. On the 1st of January 1841, and before the present defendant had declared in that action, George Yorke being then in insolvent circumstances (but which was not then known to the present defendant), gave to the present defendant a cognovit authorising him, in case default should be made by George Yorke in payment of the sum of 300l. (being the debt in that action), with interest thereon at 5 per cent., together with costs, on the 7th of January 1841, to enter up judgment for 300l. and interest and costs, and also the costs of entering up such judgment, and of suing out execution thereon, and thereupon forthwith to sue out execution for the same, together with officer's fees, sheriff's poundage, costs of levying, and all other incidental expenses. The cognovit was not, nor was any copy thereof, filled, (as required by the 3 G. 4, c. 39, and 1 & 2 Vict. c. 110) until the 1st of February 1841.

[429] Judgment was signed on the cognovit upon the 26th of January 1842, on which day a fieri facias issued, directed to the sheriff of Sussex, indorsed to levy 324l. 4s. 6d. and interest thereon at 4 per cent. from the 22d of January 1842 till paid, with 1l. 1s. for the writ. Under this writ the now defendant caused certain goods of G. Yorke to be seized and sold. The seizure was made on the 7th of February 1842, and the sale took place on that and the two following days. The gross proceeds of the sale amounted to 207l. 7s. 2d., which amount was applied in the following manner: 31l. 4s. 1d. was paid in discharge of assessed taxes; 35l. 4s. 6d. was retained for charges, and the remainder, 140l. 18s. 7d., was paid to the present defendant. After the sale Sherwood, one of the present plaintiffs, brought an action against George Yorke, in which judgment was suffered by default. On the 14th of April 1842, George Yorke was taken under a ca. sa. at the suit of Sherwood. On the 15th of the same month George Yorke went to Horsham gaol, and continued a prisoner for debt in such gaol until the 22d of July 1842, when he was discharged according to the provisions of the 1 & 2 Vict. c. 110.

George Yorke signed his petition under that statute on the 21st of April 1842, and filed it on the following day. The vesting order was dated the 23d of the same month, and on the 30th the plaintiffs were appointed assignees. George Yorke's schedule was filed on the 14th of May, and his petition was heard on the 22d of July 1842. The appointment of the plaintiffs as assignees, and all the other proceedings, were made and heard under the provisions of the 1 & 2 Vict. c. 110.

The character of the plaintiffs as assignees, as stated in the declaration, is admitted; and it is admitted that they became such assignees on the 30th of April 1842.

The question for the opinion of the court is, whether, [430] under the sixtieth section of the 1 & 2 Vict. c. 110, the plaintiffs are entitled to recover the 207l. 7s. 2d., or any part thereof, from the present defendant. If the court shall be of opinion that the plaintiffs are entitled to recover from the defendant the same or any part thereof, judgment is to be entered for the plaintiffs, by confession, for the whole or such part as the court shall think them entitled to recover; but if the court shall think that the plaintiffs are not entitled to recover any part of the said sum, judgment is to be entered for the present defendant by *nolle prosequi*.

Bompas Serjt. (with whom was Montague Chambers), for the plaintiff. By the 3 G. 4, c. 39, s. 2, every warrant of attorney, and the judgment execution thereon, are declared to be fraudulent, unless the warrant of attorney or a copy thereof has been filed within twenty-one days pursuant to the directions of sect. 1, or unless judgment has been signed or execution issued within the same period. By sect. 3, these provisions are extended to cognovits. The 1 & 2 Vict. c. 110, s. 60, places the assignees of insolvent debtors upon the same footing as the assignees of bankrupts with respect to both these species of securities. The only thing material in this case is, that the cognovit given by the insolvent was not filed, nor was any judgment entered up thereon within the twenty-one days. It does not appear that any case has yet arisen in which the property taken in execution under a judgment signed upon a warrant of attorney or a cognovit, had been converted into money; but the words of the statute are, "moneys levied or effects seized." In *Dillon v. Edwards* (2 M. & P. 550), it was held that an action of trover lay against the sheriff at the suit of the assignees of a bankrupt, where goods had been taken in [431] execution under a judgment signed upon a warrant of attorney not duly filed. It is true that, in *Wilson*

v. *Whitaker* (Mood. & Malk. 8), a doubt is thrown out by Abbott C. J., whether the 3 G. 4, c. 39, extends to cases where no act of bankruptcy has been committed at the time of the execution of the warrant of attorney. No question can however arise in the case of an insolvent debtor as to sums levied before an application to the court for his discharge. In *Hurst v. Jennings* (5 B. & C. 650, 8 D. & K. 424), the court on the application of the assignees of a bankrupt, ordered an execution to be withdrawn which had been issued on a judgment signed upon an instrument in the nature of a cognovit which had not been filed within the prescribed period. The case of *Everett v. Wells* (ante, vol. ii. p. 269, 2 Scott, N. R. 525) is in some respects stronger than the present. There, the petitioning creditor's debt had no existence either when the warrant of attorney was given or when the twenty-one days expired; and it was contended that it could not have been the intention of the legislature to protect persons who were not creditors at the time the security was given. But the court refused to recognise any such distinction. The cases shew that, as against assignees, warrants of attorney and cognovits not duly filed, and not followed by judgment within twenty-one days, are absolutely void. It has been suggested that the judgment of the court in *Dillon v. Edwards*, and that of Lord Tenterden in *Hunt v. Jennings*, shew that this is not so.

Channell Serjt. (with whom was Barstow), *contra*. However strong the language of the statutes may be, it is hoped that the court will pause before they extend their provisions to the case of a cognovit given in an [432] action commenced adversely where the plaintiff may have been totally ignorant of the insolvency of the party whom he is suing. Here, both these facts are expressly stated, and the money was paid over before the insolvent went to prison. The question is this, whether, when a party neglects to file a cognovit within twenty-one days, his execution may be defeated by a subsequent insolvency, however remote the period of that insolvency may be; and whether, in such a case, assignees may disturb by-gone transactions of the most bona fide character, unless they are protected by the lapse of six years under the statute of limitations. The only mode of avoiding the extreme inconvenience arising from such a construction appears to be, to hold that the statutes in question do not apply when the money is actually levied before the committing of the act of bankruptcy, or the filing of the petition under the insolvent debtors' act. Except in cases of voluntary conveyance, provided for by the fifty-ninth section of 1 & 2 Vict. c. 110, the assignees of an insolvent take the property from the time of the imprisonment. For the excepted cases there is an express provision; but that provision is for the excepted cases only, and does not entitle the assignees in other cases to go back to a period anterior to the imprisonment. No case has been decided upon the sixtieth section of the 1 & 2 Vict. c. 110. The cases cited on the other side arose upon the bankrupt laws. None of these decisions affect the point for which the defendant is contending otherwise than as containing dates which are in the defendant's favour. In *Dillon v. Edwards* it appeared clearly that the goods were in the disposition of the bankrupt at the time of the commission. The same observation applies to the case of *Hurst v. Jennings*. Either this is a cognovit or it is a device to avoid the statute. The same observation would apply to *Everett v. Wells*, which was the case of an unsatisfied [433] judgment, and not a lien, or a case of payment over of the proceeds of an execution. The opinion of Abbott C. J. in *Wilson v. Whitaker* is in favour of the defendant. That learned judge says: "If it were necessary to consider what might be the effect of such a warrant of attorney judgment and execution as the present when the execution had been executed before any act of bankruptcy, I should be very unwilling to decide that question here. Even such a case would satisfy the words of the statute 3 G. 4; but it is necessary to affix a reasonable construction to a statute; and the inconvenience consequent on extending it to cases where there had been no act of bankruptcy might be very great; since, in that case, a warrant of attorney might be given without the requisite formalities, and judgment signed and execution issued upon it even before the party was at all in trade, and all these proceedings would subsequently become void." The same point was argued, but not decided, in *Brook v. Mitchell* (6 New Ca. 349, 8 Scott, 332); *Everett v. Wells* is differently reported in Scott and in Mann. & Gran. According to the former report, Mr. J. Erskine appears to have pointed out a difference between a judgment executory and a judgment executed; but no such expression is to be found in Mann. & Gran.; and it would have been wholly unnecessary with reference to the question then before the court.

[Tindal C. J. The observation supposed to have been made would have been correct if limited to the matter then before the court. Erskine J. I had in view only the case then argued.] It is necessary to look at the state of the law. The 6 G. 4, c. 16, s. 81, contains a similar proviso to that in the 49 G. 3, c. 121. Formerly the title of assignees had, in all cases, relation to the act of bankruptcy, and an execution levied after an act of [434] bankruptcy would have been treated as a seizure of the property of the assignees. That was remedied in cases of bonâ fide dealings with the bankrupt. [Crosswell J. Is it meant to be contended that the provisions of the 3 G. 4, c. 39, do not apply to cases that are within the 49 G. 3, c. 121?] If, before the passing of the 3 G. 4, c. 39, the plaintiff had levied, he would have been protected by the 49 G. 3, c. 121. The court are asked to put a construction upon the second section of the 3 G. 4, c. 39, which would give rise to an inconvenience. [Tindal C. J. If any inconvenience arises to the plaintiff, it is one of his own seeking.] So far the case has been considered as if it were a case of bankruptcy. The provisions of the 1 & 2 Vict. c. 110, s. 60, with respect to insolvent debtors, are, however, much the same as those of the 3 & 4 G. 4, c. 39, ss. 2, 3, relating to bankrupts.

Bompas Serjt., in reply. *Brook v. Mitchell* was not referred to because it was not considered to be in point. The decision there turned upon the peculiar circumstances of the case. The concluding words of the Lord Chief Justice do not imply that an action could not have been brought. The question in that case was, whether the matters sought to be impugned, were really bonâ fide transactions. Tindal C. J. asks, "How can an execution against an act of parliament, be bonâ fide?" If "money levied" is to be recovered, it must be money levied before the imprisonment. The case of *Everett v. Wells* resolves the doubt expressed by Tindal C. J. in *Brook v. Mitchell*.

TINDAL C. J. It has now become necessary to decide a point brought before the court in *Brook v. Mitchell*, in which case an objection to the proceedings of the judgment-creditor upon another ground, was allowed to prevail. Though the case now before the court arises [435] under the insolvent debtors' act, of the 1 & 2 Vict. c. 110, the decision must turn upon the terms of the bankrupt act of 3 G. 4, c. 39; and the question is, whether money levied under an execution issued upon a judgment signed on a cognovit and actually paid over to the judgment-creditor before the imprisonment of the debtor, does or does not fall within the sixtieth section of the act of 1 & 2 Vict. c. 110, which incorporates the provisions of the 3 G. 4, c. 39. The last-mentioned act contemplates the case of a judgment recovered on a cognovit not filed within twenty-one days, and where no judgment has been signed within the same period. The words of the statute are extremely strong. By the second section, "If, at any time after the expiration of twenty-one days after the execution of such warrant of attorney (or cognovit, sect. 3), a commission of bankruptcy shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, that, from and after, &c., if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney a commission of bankruptcy shall be issued against the persons who shall have given such warrant of attorney (or cognovit) under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back, and receive, for the use of the creditors of such bankrupt at large, all and every the moneys levied, or effects seized, under and by virtue of such judgment and execution." Clearly [436] no distinction can be made between money, and goods remaining unsold in the hands of the sheriff. My brother Channell says that the statute must be construed with reference to the then existing state of the law, and that if money levied under an execution, by fraud even, could not have been recovered then, so neither can it now. He says truly that by the old bankrupt law, as it existed at the time of the passing of the 3 G. 4, c. 39, an execution upon a judgment signed on a warrant of attorney and on a cognovit which had been completed by seizure and sale two months before the issuing of the commission, would not have been defeated by a prior secret act of bankruptcy, the act of 49 G. 3, c. 121, having given validity to all bonâ fide transactions with the bankrupt before that period, provided the party

had no notice of an act of bankruptcy, insolvency, or stoppage of payment. It is contended that in this state of the law, a case where no act of bankruptcy had taken place at the time of the execution, could not have been contemplated by the 3 G. 4, c. 39. I see no such condition; and we are bound to read a statute according to the plain meaning of the language which the legislature has thought proper to use. The words here are, "the judgment and execution thereon shall be fraudulent and void," without any such condition as my brother Channell would engraft upon them. If, therefore, a party takes a cognovit without filing it or signing judgment on it within the prescribed number of days, he takes the risk upon himself. It is said that this construction will lead to very great inconvenience. I agree that it may do so. But no one can suffer inconvenience except the party who neglects to pursue the plain directions of an act of parliament. On the other hand, were we to adopt the construction contended for, we should be opening a door to considerable frauds. It is most convenient that securities of this description should not be held back till [437] the verge of insolvency but should be speedily enforced. In this very case it appears that the *fi. fa.* issued in February, and that in April the defendant was in prison. Without, however, regarding the inconvenience which may be sustained on the one side, or the probability of opening a door to fraud on the other, I think it safer to follow the words of the statute.

ERSKINE J. I think we ought to look to the words of the statute without regard to consequences. The latter part of each of these clauses gives to the assignees power to recover back money levied under an execution issued upon a warrant of attorney or cognovit, where the instrument has not been filed, and where no judgment has been signed, within twenty-one days. It seems to me that we should defeat the intention of the statute, if we were to add to it the qualification which has been suggested.

CRESSWELL J.(a). The words of the statute appear to me to be perfectly clear. (The learned judge then read the sixtieth section of 1 & 2 Vict. c. 110.) In this case the cognovit was not filed, nor was judgment signed, within the prescribed period; and we have a clear and express enactment making every such cognovit, and the judgment and execution thereon, fraudulent and void as against assignees. Before any question can arise as to the period at which the execution may issue, we find the execution, generally, declared to be fraudulent and void. The execution must therefore be void in every stage. The assignees are authorised to recover back not only the effects seized (upon which words if they had stood alone, an argument might have been raised), but "the moneys [438] levied and effects seized, under or by virtue of any such judgment or execution." It is contended by my brother Channell, that we must put a reasonable construction upon the language of the 3 G. 4, c. 39. To this I fully agree. But the most reasonable construction which judges can put upon acts of parliament is that which, according to the ordinary rules of reason and common sense, must have been the intention of the legislature in using the language which it has adopted. It is said that it would be a great hardship if a party could be called upon, after several years, to refund that which he has honestly recovered. He can, however, be only called upon to refund money which he has recovered under an execution which is pronounced by the legislature to be fraudulent. Looking to the convenience of the public, we should perceive that a cognovit given whilst the party is apparently in good circumstances that is best consulted by not allowing it to be kept secret until those circumstances are altered.

The creditors at large have no means of protecting themselves against frauds arising out of several cognovits; but the particular creditor can protect himself by filing his security or signing judgment. It is more reasonable that those should be protected by the law, who are not in a condition to protect themselves. No case appears to have occurred in which the point has been determined. In *Wymer v. Kemble* (6 B. & C. 479, 9 D. & R. 511), it was contended that it could not have been the intention of the legislature to interfere with the right of a *bonâ fide* creditor, who had issued an execution and recovered the sum levied before any insolvency on the part of the debtor. But upon that, Bayley J. observed, that the party might, by his own diligence, protect himself from the consequences of the 3 G. 4, c. 39. In that

case the difficulty was gotten rid of by holding that [439] a judgment creditor who had levied, was not a person "having security for his debt."

Judgment for the defendants.

Channell Serjt. submitted, that the plaintiffs were entitled to recover no more than 140l. 18s. 7d. that being the amount of the levy after deducting the taxes, poundage, and other charges.

CRESSWELL J. The defendants must be considered as receiving the whole, and paying certain sums thereout to an unauthorised agent.

The verdict was taken by the agreement of the parties, at 150l.

BRADBURN AND ANOTHER, Trustees, &c. of the Amicable Loan Society v.
WHITBREAD. 1843.

[S. C. 6 Scott, N. R. 283; 12 L. J. C. P. 218; 7 Jur. 629.]

A loan-society established pursuant to the provisions of the 5 & 6 W. 4, c. 23, becomes entitled to the benefit of those provisions, upon its rules and regulations being certified by the barrister appointed for that purpose, and before they are inrolled at the quarter sessions.—One of the rules of a loan-society directed that the repayment of loans should be secured by the joint promissory note of the borrower and his sureties, but gave a form of note which was joint and several. Held, that a joint and several note was a note made in pursuance of the rules of the society, so as to come within the exemption from stamp-duty created by the 5 & 6 W. 4, c. 23, s. 7.

Debt. The declaration stated, that before and at the time of the making of the promissory note thereafter mentioned, and from thence continually until the commencement of the action, certain persons had formed a certain loan-society, called the Amicable Loan Society, and established the same, and continued the same established for a loan fund for the industrious classes in England, and receiving back payment of the same by in-[440]-stalments, with the legal interest due thereon; that all the rules and regulations framed for the management of the said society had been and were duly certified, deposited, and inrolled, pursuant to the direction of the statute, and that by such rules and regulations it was provided amongst other things, that loans should be made in sums of not less than 5l. or more than 15l., for which interest at the rate of 5l. per cent. per annum should be paid at the time the loan was advanced, and security given for the repayment thereof by a joint promissory note of the borrower, and one or more approved sureties; to be made only to those persons whose character and circumstances afforded a reasonable guarantee that the money would be usefully employed in a proper object, so as to enable the borrower to meet the instalments regularly as they should become due, to be made in the following manner; to wit, on a loan of 5l., by instalments of 2s., and 2d. each week for rent of office, stationery, clerks' salary, and a guarantee fund to meet the losses from death and contingencies; on a loan of 10l., by instalments of 4s. each week, and 3d. per week for rent of office, stationery, clerks' salary, and a guarantee fund to meet losses from death and contingencies; and on a loan of 15l., by instalments of 6s. each week, and 4d. each week for rent of office, &c., as thereafter mentioned; that it was by the said rules and regulations further provided, that the repayments of the instalments should be made at the office of the said society, at No. 10 Upper St. Martin's Lane, every Wednesday evening between the hours of six and ten o'clock, when the office would be open and attendance given for that purpose; that every borrower must then produce his book, in which each repayment would be entered, and the receipt acknowledged by the signature of the officer in attendance; that one George Linford, before the making of the said promissory note, applied [441] to the said society for a loan of 15l., to be lent to him according to the said rules and regulations, and that the defendant and one George Priddle, at the request of Linford, consented to become, and did become, security for him to the said society, and for the repayment of the said loan according to the said rules and regulations; that Linford and the defendant had respectively full notice of all the said rules and regulations, and that afterwards, and after the said rules and regulations had been, and whilst they continued, certified, deposited, and enrolled as aforesaid, the said

society, according to and in pursuance of the said rules and regulations, and of the several powers and authorities otherwise enabling them in that behalf, on the 22d of August 1839, granted and lent to Linford a loan of the said sum of 15l. upon the security of himself and of the defendant and of Priddle, upon and by their making the promissory note thereafter mentioned; and thereupon afterwards, to wit, on, &c., and whilst the said rules and regulations continued so certified, deposited, and inrolled as aforesaid, Linford and the defendant and Priddle made their promissory note in writing, and thereby, on demand, and jointly and severally, promised to pay to the said Amicable Loan Society, at the office of the said society, at No. 10 Upper St. Martin's Lane, a certain sum of money, to wit, 15l. sterling, or so much thereof as should be unpaid at the time of any default in the punctual repayments of the instalments, or other violation of the conditions on which it was granted, together with such sums as by the inrolled rules and regulations of the said society were required to be paid on such loan; that Linford and the defendant and Priddle delivered such note to the said society; that before the commencement of this suit, the whole of the said principal sum so secured by the said promissory note, had become due and payable according to [442] the tenor and effect thereof; that before the commencement of this suit, divers, to wit, fifty weekly instalments of the amount, to wit, 4d. for each such instalment, and amounting in the whole to a large sum, to wit, 16s. 8d., became due and payable according to the tenor and effect of the said promissory note, for and on account of the said rent of office, &c. pursuant to the said rules and regulations; and that although upon the several and respective days when each of the said instalments so became due and payable, and at a certain time, to wit, between the hours of six and ten o'clock of the evening of such days respectively, the said promissory note was duly presented at the office of the said society, at No. 10 Upper St. Martin's Lane, for payment, the said several instalments were not then or at any other time paid, but on the contrary thereof, at the commencement of this suit, there was and still was due to the plaintiffs, as such trustees, a certain sum, to wit, 8l. 14s. in respect of the said several instalments on the said sum of 15l., together with the said sum of 16s. 8d. for the said several instalments of 4d. per week; that Linford, and also the defendant, before the commencement of this suit, had due notice of all the premises; and that by reason of the last-mentioned sums of 8l. 14s. and 16s. 8d. being unpaid, an action had accrued to the plaintiffs, suing as such trustees as aforesaid, to demand and have of the defendant the said sums of 8l. 14s. and 16s. 8d. above mentioned, making together the sum of 9l. 10s. 8d.

Second count, for money lent. Third count, upon an account stated.

To the first count the defendant pleaded, first, that the plaintiffs were not, nor are trustees of the said society, *modo et formâ*; secondly, that the rules and regulations in the first count mentioned, were not inrolled, *modo et formâ*; thirdly, that the said promissory note [443] was not made, *modo et formâ*. Plea, to the second and third counts, *nunquam indebitatus*.

At the trial in the sheriffs' court, London, in June 1842, the rules of the society were produced, which stated, as in the declaration, that loans should be secured by a joint promissory note of the borrower, and one or more approved sureties, but gave the form of a joint and several note. It was shewn that the rules had been duly certified by Mr. Pratt, the barrister appointed under the statute, on the 12th of August 1839, and that they had been deposited the next day with the clerk of the peace. They were not, however, inrolled until the 14th of October following. The note, which was unstamped, and which purported to be the joint and several note of Linford, the defendant and Priddle being produced, and the three signatures proved, it was objected that the note was not admissible in evidence, on the ground that it was not framed in pursuance of the rules and regulations of the society, which only authorised the grant of loans upon the joint note, and not upon the joint and several note, of the borrower and sureties. This objection being overruled, it was further objected, that as the rules and regulations of the society had not been inrolled until October, the note taken in August was void, inasmuch as the society was not then legally constituted. This objection was also overruled; and a verdict was found for the plaintiffs upon the first three issues with nominal damages (a), and for the defendant on the last.

(a) The jury had nothing to find as to the debt, the amount not being in issue.

Nov. 3.—In the following term, Sir Thomas Wilde Serjt. obtained a rule nisi for a new trial on the ground of misdirection.

[444] Talfourd Serjt. (with whom was Miller) now shewed cause. The first question is as to the title of the plaintiffs to sue as trustees. The second point made by the defendant is, that the promissory note was not, as the statute requires, in pursuance of and in accordance with the rules and regulations of the society; that the note should have been a joint note, and not joint and several. A third objection was, that the rules and regulations though certified by Mr. Pratt, the barrister appointed for the purpose, had not been inrolled. The words of the declaration are, "and all the rules and regulations framed for the management of the said society, have been and are duly certified, deposited and inrolled, pursuant to the directions of the statute in that behalf made and provided." There is a careful avoidance of any statement that this was done before the note was given. [Erskine J. Another objection was, that there was no stamp.] That objection was not taken at the trial. If it had been it is difficult to see how the defendant could have got over the seventh section of the 5 & 6 W. 4, c. 23, which enacts, "that no note, &c., which may be entered into for the repayment of any loan made under this act in manner hereinbefore provided, nor any receipt or entry in any book of receipt for money lent or paid, nor any draft or order, nor any appointment of any agent, nor any other instrument or document whatever, required to be given, issued, made, or provided, in pursuance of the rules and regulations of the society, shall be subject to, or chargeable with, any stamp-duty whatever." [Cresswell J. Although the defendant may not have put his argument properly before the court, yet the objection is substantially to the want of a stamp. Maule J. The allegation that the rules have been and are duly certified, deposited and inrolled, must be intended to mean, that they were certified, deposited and inrolled within the time necessary to make the note [445] valid. The allegation might be bad on special demurrer, but if traversed, the statement in the plea, that the rules, &c. were not inrolled, must be understood in the sense which would make the declaration good; not being specially demurred to, the allegation must be taken in the sense of being properly inrolled. Then the evidence does prove the issue.] If the defendant had merely pleaded that he was never indebted, there might have been some difficulty in supporting this objection. [Tindal C. J. The declaration states that Linford, before the making of the said promissory note, applied to the said society for a loan of 15l., to be lent to him according to the said rules and regulations. Does not this give sense and meaning to the preceding and more general allegation? Reading the whole declaration, it must be taken to imply, that the note was not given till the rules had been certified and inrolled. Cresswell J. The rules could not be inrolled until the next quarter sessions, or the adjournment of a former sessions.] Upon the rules being certified by the barrister, and deposited by the clerk of the peace, the society had done all that was incumbent on them to do; the inrolment is the act of the court. [Tindal C. J. At the end of the fourth section of the 4 & 5 W. 4, c. 40, all rules, alterations and amendments thereof, from the time when the same shall be certified by the barrister, shall be binding on the several members and officers of the said society, and all other persons having interest therein. No discretion is given except to the barrister.] The inrolment is merely a mode of enabling the parties to have the certificate of the barrister in the most authentic form. Supposing any neglect to have occurred in inrolling the proceedings at the court of sessions, the society ought not to be prejudiced by an omission of which they may be altogether ignorant. The plaintiffs shew an inrolment before action brought. The title of the society refers back to [446] the time of the certificate. [Maule J. The first section is not to be construed with great strictness. Taken literally, it hardly makes sense.] With respect to the objection that the note is joint and several, the form of note given by the rule explains the rule, and shews that the term joint note in the rule must be understood as applying to a joint and several note.

Channell Serjt., in support of the rule. The objection as to the stamp gives rise to two points—the first being, whether the exemption in the 5 & 6 W. 4, c. 23, s. 7, applies only to notes or securities made in the form prescribed by the rules. Here, the rules prescribe a joint note. It is true that a form is given of a joint and several note, but the allegation in the declaration which is put in issue, refers to the rules and not to the form. [Maule J. This is clearly a case for an amendment under the 3 & 4 W. 4, c. 42, s. 23, supposing an amendment to be necessary.] In the form in which

this note is given, a separate action may be supported on it against each of the makers. The plaintiffs are not entitled to sue as trustees, except upon a security taken in the way provided by the act. The second point is that, in order to entitle the plaintiffs to sue, it was incumbent on the trustees to shew that the rules had been inrolled before the commencement of the action. The first section of the 5 & 6 W. 4, c. 23, enacts "that if any number of persons who have formed or shall form any society for the purpose of establishing a society for a loan fund, and receiving back payment for the same by instalments with the legal interest due thereon, shall be desirous of having the benefit of that act, such persons shall cause the rules or regulations framed, or to be framed, for the management of such institutions, to be certified, deposited, and inrolled in manner thereafter directed, and thereupon shall be deemed and be entitled to, and shall have, the benefit [447] of the provisions contained in that act." Here, the plaintiffs profess to sue as trustees, by virtue of the act. On the other side it is said, that the provisions of the 5 & 6 W. 4, c. 23, may be explained by those of the 4 & 5 W. 4, c. 40. But the plaintiffs overlook the third section of the 5 & 6 W. 4, c. 23. By that section all rules and regulations from time to time made and in force for the management of any such society, and duly inrolled, shall be entered in a book or books to be kept by an officer of such institution to be appointed for that purpose, and which book or books shall be open at all seasonable times for the inspection of persons receiving assistance from such institution, and shall be binding on the several members and officers of such society, and the several persons receiving assistance from the same, and their representatives, as well as those parties who may become the sureties for the repayment of any loan, all of whom shall be deemed and taken to have full notice thereof by such entry and deposit with the clerk of the peace or town-clerk; and the entry of such rules and regulations in such book or books as aforesaid, or the transcript thereof deposited with the clerk of the peace or town-clerk, or a true copy of such transcript examined with the original and proved to be a true copy, shall be received as evidence of such rules and regulations respectively in all cases. The first section makes inrolment a condition precedent to the right of the plaintiffs to sue under the act. The second section introduces a difficulty. That section enacts that all the rules and regulations of any society to be entitled to the benefit of this act, shall be certified, deposited, and inrolled in the same manner as the rules and regulations of any friendly society are required to be certified, deposited and inrolled, pursuant to the provisions of the 4 & 5 W. 4, c. 40; and that all the provisions of the said act, as well as those of the 10 G. 4, c. 56, to con-[448]-solidate and amend the laws relating to friendly societies so far as the same relate to the framing, certifying, inrolling and altering rules of friendly societies shall be applicable to the framing, certifying, inrolling and altering the rules and regulations of any society to be established under the provisions of this act. [Tindal C. J. Does not that section answer the objection raised on the first?] At all events no such construction can be put upon the third section. To adopt the construction contended for on the other side would be, in effect, to repeal the statute. [Maule J. The third section does not restrain the operation of the second section, but extends it. The effect of that section is not to narrow the right of the parties, but to enlarge them by making the entries in the book binding. Erskine J. You have no plea denying that the defendant had notice of the rules and regulations of the society. Maule J. If the argument urged on the part of the defendant is correct even inrolment would not be sufficient.]

Another point is the necessity of inrolment generally. Assuming that the declaration must be understood as containing an allegation that the inrolment took place before the note was given, then the truth of that allegation is put in issue by one or other of the pleas to the first count. The traverse of the allegation that the note was made *modo et forma*, is a denial that the note was made by the defendant and Linford and Priddle, after the rules had been inrolled.

TINDAL C. J. It appears to me that in this case there is, in effect, only one point which requires consideration; and that is, at what period this loan-society became entitled to the benefit of the provisions of the 5 & 6 W. 4, c. 23. In that act the 4 & 5 W. 4, c. 40, is expressly referred to; and, if this had not been the case, I should still think that those statutes, being in *pari* [449] *materia*, ought to be construed together (a). Looking at the provisions of both of these acts, it appears to me that

(a) The title of the act is "An act for the establishment of loan-societies in England

this loan society became entitled to the privileges of the 5 & 6 W. 4, c. 23, from the time at which its rules and regulations were certified by the barrister. The second section of the 5 & 6 W. 4, c. 23, directs "that all the rules and regulations of any society to be entitled to the benefit of this act shall be certified, deposited, and inrolled in the same manner as the rules and regulations of any friendly society are required to be certified, deposited, and inrolled, pursuant to the provisions of the 4 & 5 W. 4, c. 40." It goes on to say, "that all the provisions of the said act, as well as (those of) the 10 G. 4, c. 56, to consolidate and amend the laws relating to friendly societies, as far as the same relate to the framing, certifying, inrolling and altering rules of friendly societies, shall be applicable to the framing, certifying, inrolling and altering the rules and regulations of any society to be established under the provisions of this act." We must therefore look back to the 4 & 5 W. 4, c. 40, and see what directions are there given as to the mode of certifying the rules, and as to their effect when certified. The fourth section directs that all rules, (and) alterations and amendments thereof, from the time when the same shall be certified by the barrister, shall be binding on the members and officers of the society and all other persons having interest therein, that is, amongst others, binding upon persons to whom loans are made (b). The directions are very express. It has been contended that in the 5 & 6 W. 4, c. 23, the legislature referred to the 4 & 5 W. 4, c. 40, merely for the purpose of shewing in [450] what manner the rules were to be certified, and that it was not intended by such reference, to fix the time at which the provisions of the act were to take effect. I think that this would be a strange construction to put upon the act, and one by which parties would be very likely to be misled. It seems to me therefore that the plea, in traversing the time of the inrolment, raises an immaterial issue. The objection as to the stamp is answered by what has been already said.

ERSKINE J. I am of the same opinion. The first objection raised in this case is, that the note, not being stamped, was not receivable in evidence. In answer to that objection the plaintiff relies upon the seventh section of the 5 & 6 W. 4, c. 23, which exempts from stamp duty notes entered into for the repayment of any loan made under that act. It is material, therefore, to see whether the note in question was given under the act. Referring to the first section we find it provided that persons desirous of having the benefit of the act, shall cause the rules and regulations framed for their management to be certified, deposited and inrolled in manner thereafter directed, and thereupon shall be deemed, and be entitled to, and shall have the benefit of, the provisions contained in the act; and it was argued on the part of the defendant that by this clause the certifying, depositing and inrolling were made conditions precedent to the privileges and exemptions conferred by the act. But in the second section we find an express reference to the former statute of 4 & 5 W. 4, c. 40, the provisions of which, as to the certificate and the inrolment, it adopts. By the fourth section of that statute the rules are not to take effect from the inrolment, but are to have reference back to the time at which the rules are certified.

Then it is said that the jury were misdirected, and that, [451] upon the second issue, they should have been directed to find that the rules were not duly inrolled. But the form of the issue taken upon the second plea does not involve the question whether the rules were inrolled before the loan was granted or before the note was given. The allegation traversed by the plea is, "that all the rules and regulations framed for the management of the said society, have been and are duly certified, deposited and inrolled, pursuant to the directions of the statute." The terms of the issue were therefore satisfied by inrolment before action brought. But it is said that this allegation must be understood to imply that the rules and regulations were certified and inrolled before the date of the note. If, however, it was not necessary that the rules should be inrolled before the privileges of the statute would attach, no such implication can arise. I therefore think that the allegation, as traversed by the second plea, is made out.

The defendant relies upon the third section of the 5 & 6 W. 4, c. 23, as shewing that the fourth section of the 4 & 5 W. 4, c. 40, was not intended to be incorporated in the subsequent act, except so far as it relates to the manner in which the rules and

and Wales; and to extend the provision of the friendly societies' acts to the islands of Guernsey, Jersey, and Man.

(b) Vide post, 454*(b).

regulations were to be certified, deposited and inrolled. It appears to me, however, that the effect of the third section of the 5 & 6 W. 4, c. 23, is, not to alter the effect of the reference to the former statute, but merely to superadd a provision for facilitating proof.

MAULE J. I am of the same opinion. In this case, one question of substance is raised, and two of form. The question of substance is, whether the society can maintain an action upon a note given after the rules are certified by the barrister, but before they are inrolled. The 5 & 6 W. 4, c. 23, was apparently intended to enlarge the 4 & 5 W. 4, c. 40, and to extend its provisions to loan [452] societies. It is certainly not drawn with much care. The first section provides, that societies desirous of having the benefit of the act, shall cause the rules and regulations framed for their management, to be certified, deposited and inrolled in manner thereafter directed, and shall thereupon be deemed, and be entitled to, and shall have, the benefit of the provisions contained in the act (a). This was meant to apply to any person who should borrow money from the society. The second section directs, that "all the provisions of the 4 & 5 W. 4, c. 40, and 10 G. 4, c. 56, to consolidate and amend the laws relating to friendly societies, as far as the same relate to the framing, certifying, inrolling and altering rules of friendly societies, shall be applicable to the framing, certifying, inrolling and altering the rules and regulations of any society to be established under the provisions of this act." It is only by reason of the reference to the 4 & 5 W. 4, c. 40, that the necessity arises that the rules and regulations of loan-societies should be certified. The provisions of the fourth section of that act must therefore be read as incorporated in the subsequent act; and that section expressly provides that all rules, from the time when the same shall be certified by the barrister, shall be binding on the several members and officers of the society, and all other persons having interest therein. It is admitted [453] that this would be the effect of the reference to the former statute, but for the language of the first and third sections of the subsequent statute. The first section of the 5 & 6 W. 4, c. 23, does nothing more than refer to the second; and the third section is very far from restraining the enactments of the former statute; on the contrary, it enlarges them. It leaves these societies all the powers which they would otherwise have, and, in addition, it empowers them to make entries in a book which shall be admissible in evidence.

Assuming that inrolment is generally not necessary, the question arises, whether the terms of the second issue make it requisite to shew an inrolment in this particular case. I think it very clear that they do not. The question is, whether the time at which the inrolment took place, is put in issue by the traverse taken by the second plea. If the time be in issue, it is so only so far as an allegation of time is material. An allegation of time would have been material if the legislature had required that the rules should be inrolled before the provisions of the statute were to attach to the proceedings of a loan-society. I am of opinion, however, that this is not required, and that the allegation of time, therefore, is not material.

CRESSWELL J. The two questions raised in the case are substantially the same. I entertained some doubt during the argument, whether the plaintiffs had shewn that this was a case of exemption from stamp-duty, but I now think that the note was admissible in evidence without a stamp. The statute requires the rules to be deposited and inrolled; and it directs that they shall be certified, deposited and inrolled, in the same manner as the rules and regulations of any friendly society. The second section incorporates the provisions of the 4 & 5 W. 4, c. 40, so far as the same relate to the [454] framing, certifying, inrolling and altering the rules of preceding societies. Considering the fourth section of the 4 & 5 W. 4, c. 40, as embodied in the 5 & 6

(a) So, in the 3 & 4 Vict. c. 110, s. 3, the words are "that if any number of persons who have formed, or shall form, any society in England, for establishing a fund for making loans to the industrious classes, and taking payment of the same by instalments with interest thereon, shall be desirous of having the benefit of this act, such persons shall cause the rules framed for the management of such society to be certified, deposited, and inrolled, in manner hereinafter directed, and thereupon shall have the benefit of the provisions contained in this act."

This act, however, contains (sect. 4) the same provision with respect to the effect of the certificate of the barrister, as is found in the 4 & 5 W. 4, c. 40, s. 4. Vide post, 454 (a). See also ante, 417.

W. 4, c. 23, I think it amounts to this, that the rules of a loan-society, when certified by the barrister, shall be binding upon the society and other persons interested therein. A person who becomes surety to the society for a loan made by them, is certainly a person interested in the society (a). The note having been given under the rules of the society, is expressly exempted from stamp-duty by the seventh section of the 5 & 6 W. 4, c. 23. I think, therefore, that nothing is involved in the third issue beyond the question of the signature or non-signature of the note by the borrower and his two sureties.

Rule discharged (b).

End of Hilary Term.

[455] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY VACATION, IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this vacation were, Tindal C. J., Erskine J., Maule J., Coltman J.

TURPIN v. BILTON. Feb. 8, 1843.

[S. C. 6 Scott, N. R. 447; 12 L. J. C. P. 167; 7 Jur. 950. Referred to, *Xenos v. Wickham*, 1867, L. R. 2 H. L. 314; *Great Western Insurance Company v. Cunliffe*, 1874, L. R. 9 Ch. 532 (n).]

In case against an insurance broker, for not effecting an insurance pursuant to his retainer, the declaration stated that the defendant was retained and employed to cause an insurance to be made on the plaintiff's ship, tackle, &c. against the perils of the sea, &c., and that he accepted such retainer and employment; and alleged for breach, that, although a reasonable time had long before elapsed, and before the loss of the ship, yet the defendant did not, nor would, within such reasonable time, cause to be made, insurance upon the said ship, tackle, &c., and did not, nor would, cause the same to be insured, or cause a policy of insurance to be made thereon from and against the perils of the sea, &c., nor did nor would cause the plaintiff to be insured in respect of the said ship, tackle, &c. from and against such perils, nor did nor would cause to be made thereon any insurance or policy of insurance, subscribed or underwritten, but the defendant so to do had wrongfully and, in breach of his duty and retainer, wholly neglected and refused; whereby, the vessel being lost, the plaintiff was without the benefit of insurance.—Upon an issue upon a plea of not guilty, it was shewn that the defendant had contracted with an insurance company for an insurance on the plaintiff's ship, tackle, &c., and shortly after—

(a) The language of the act of 3 & 4 Vict. c. 110, s. 4, is "that all rules and amendments thereof from the time when the same shall be certified by the said barrister, shall be binding on the several members and officers of the said society, and the borrower and sureties, and all other persons having interest therein."

(b) Loan-societies, which have become very numerous, are now regulated by the 3 & 4 Vict. c. 110 (continued by 5 & 6 Vict. c. 4, 6 & 7 Vict. c. 41, and 7 & 8 Vict. c. 54), with a proviso (sect. 1) that the provisions of the 5 & 6 W. 4, c. 23, and all rules theretofore certified by the barrister appointed to certify the rules of savings' banks, and inrolled, for the management of societies established under the said act, shall continue and be in force, and applicable, for the recovery of all sums of money which have been lent by any such society before the passing of this act, and may be due and owing, or become due in respect of any loan made by any such society previously to the passing of the act of 3 & 4 Vict. c. 110, according to the rules of such society, except when the same shall be contrary to the provisions contained in the latter act.

The right of the plaintiffs to sue in the character of trustees, was assumed, not only in the declaration, but also by the defendant in his first plea.

As to this point, see *Timms v. Williams*, 3 Queen's Bench Rep. 413, 2 Gale & Dav. 621; *Albon v. Pike*, ante, vol. iv. p. 421, 5 Scott, N. R. 241.

wards obtained from the secretary of the company what purported to be a copy of the policy. A stamped policy was afterwards subscribed, but was not given out, the practice of the company being to retain possession of policies until they were wanted in consequence of a loss. There was no evidence to shew the precise time when the stamped policy was actually executed; but it was proved that it was usual to execute policies very shortly after the receipt of orders. A demand of the policy was made on the part of the plaintiff after the loss of the vessel, to which the defendant gave an evasive answer. The judge left it to the jury to say whether or not the defendant had procured the policy to be executed within a reasonable time. The jury having found for the plaintiff, and the judge being satisfied with the verdict, the court refused to grant a new trial.—Held also, on motion in arrest of judgment, that the action was founded on an express contract, and that the declaration was sufficient, the terms of the breach not being larger than the terms of the contract.

Case. The first count of the declaration stated that before the committing of the grievances by the defendant thereafter next mentioned, the plaintiff was the [456] owner and possessed of a certain ship of great value, to wit, of, &c., and of certain tackle and other furniture and appurtenances thereof, of great value, to wit, of, &c., and of certain foreign coin and specie of great value, to wit, of, &c., which ship he the plaintiff then proposed and intended should, and the same then was about to, sail and depart on a certain voyage from a certain place, to wit Newcastle, to parts beyond the seas, to wit Rio de Janeiro, with divers goods of great value shipped and loaded in and on board of the said ship, to be carried and conveyed on freight on board the said ship on the said voyage, whereby freight and gains and profits therefrom of great value, to wit 500*l.*, might and could and would have accrued to the plaintiff; that thereupon theretofore, to wit on the 23rd of August, 1841, the plaintiff, at the special instance and request of the defendant, retained and employed the defendant to cause to be made, according to the custom of merchants, insurance upon the said ship, tackle, furniture, and appurtenances, and the said coin and the said freight, and to cause the same to be insured, and to [457] cause a policy or policies of insurance to be made, subscribed, and under written thereon, in and as to the said voyage so intended as aforesaid, from and against perils of the seas and other risks usually borne and taken upon themselves, in marine policies of insurance, by underwriters and insurers, and upon the usual terms and conditions of marine insurance, and to cause the plaintiff to be insured in respect of the said ship, tackle, furniture, and appurtenances, coins, and freight, in and as to the said intended voyage, from and against such perils and other risks so usually borne and undertaken as aforesaid, to wit, in certain amounts respectively; (that is to say,) as to the said ship or vessel in 1000*l.*, the said tackle, furniture, and appurtenances in 250*l.*, the said coins in 500*l.*, and the said freight in 100*l.*, for reasonable hire and reward to the defendant in that behalf; and the defendant then accepted, and entered upon, such retainer and employment: that the plaintiff then and from thence continually afterwards, until and at the time of the loss therein mentioned, was possessed of, and interested in, the said ship, tackle, furniture, and appurtenances, and coins and freight respectively as aforesaid, to large amounts and values respectively, to wit, to the said several amounts and values of 1000*l.*, 250*l.*, 500*l.*, and 100*l.* respectively, wherein the same were so to be respectively insured as aforesaid; and although a reasonable time in that behalf had long before the commencement of the suit elapsed, and before the loss of the said ship, tackle, furniture, and appurtenances, and coins and freight thereafter mentioned, to wit, on the 29th of August, 1841, whereof the defendant then had notice; yet the defendant, not regarding his duty in that behalf, but contriving and intending to injure the plaintiff, did not, nor would, within such reasonable time as aforesaid, cause to be made, according to the custom of merchants, insurance upon the said ship, tackle, furniture, and ap[458] purtenances, and the said coins and the said freight, or any or either of them, and did not nor would cause the same, or any part thereof, to be insured, or cause a policy or policies of insurance to be made, subscribed, and underwritten thereon, or on any part thereof, in and as to the said voyage so intended as aforesaid from and against perils of the seas and other risks usually borne and taken upon themselves in marine policies of insurance by underwriters and insurers, and upon the usual terms and conditions of marine insurance, nor did nor would cause the plaintiff to be

insured in respect of the said ship, tackle, furniture, and appurtenances, coins and freight, or any part thereof, in and as to the said intended voyage, from and against such perils and other risks so usually borne and undertaken as aforesaid, in such amounts as aforesaid, and did not, nor would, cause to be made thereon any insurance or policy of insurance subscribed or underwritten, although the plaintiff then was ready and willing to pay to the defendant such hire and reward as aforesaid; but the defendant so to do then and thitherto wrongfully and in breach of his duty and retainer and acceptance thereof, wholly neglected and refused, and still did neglect and refuse: that he, the plaintiff, confiding in the said retainer and employment so given to, and accepted by, the defendant as aforesaid, theretofore, to wit, on the 26th of August, 1841, suffered and permitted the said ship to, and the same did, to wit, on the day and year last aforesaid, with the said tackle, furniture, and appurtenances, and with the said coin on board, set sail from Newcastle aforesaid on her said voyage towards Rio de Janeiro aforesaid, with the said goods so shipped and loaded on board thereof as aforesaid, to be carried and conveyed on freight as aforesaid; and afterwards, and after the breach of duty by the defendant aforesaid, and whilst the said ship was proceeding on her said voyage, and [459] before her arrival at Rio de Janeiro aforesaid, to wit, on the 1st of August, 1841, the said ship, with the said tackle, furniture, and appurtenances, and coins, on board as aforesaid, and with the said goods so shipped and loaded on board as aforesaid, to be carried and conveyed on freight as aforesaid, by the perils and dangers of the seas on the high seas was rent and broken to pieces and sunk, and the same were then on the high seas, by the perils and dangers of the seas, wholly lost to the plaintiff, and never did arrive at Rio de Janeiro aforesaid; and the plaintiff thereby then also lost, and was deprived of, the said freight of the said goods loaded in and on board the said ship or vessel to the amount, to wit, of the sum of 100l. so to have been insured in respect thereof as aforesaid, the said loss being by and through one of the perils, to cause to be made insurance, and cause a policy or policies of insurance to be made, subscribed, and underwritten, against which, the plaintiff had retained and employed the defendant as aforesaid, and in respect whereof the plaintiff could and might have recovered from and against the insurers and underwriters the full amount of the said several amounts and sums respectively, if the defendant had regarded his duty in that behalf, and had caused such insurance to be made, and had caused such policy or policies of insurance to be made, subscribed, and underwritten, as he had as aforesaid been retained and employed to do; whereby, and by reason of the neglect, improper conduct, and breach of duty by the defendant, the plaintiff had wholly lost and been deprived of such insurance, and policy, or policies of insurance, and the moneys and indemnity he might and would have procured and recovered thereby.

There was a second count, in trover, for "certain instruments in writing called policies of insurance, to wit, four policies of insurance; one of the said policies purporting to be in and for the sum of 1000l. on a certain [460] ship called the 'Thérèse,' one other thereof in and for the sum of 250l. on the tackle and other furniture and appurtenances of the said last-mentioned ship or vessel, one other thereof in and for the sum of 500l. on certain foreign coins and specie to be shipped and carried on board the said last-mentioned ship or vessel, and one other thereof in and for the sum of 100l. on freight to be made and earned by the said last-mentioned ship or vessel."

The defendant pleaded, first, not guilty; secondly, to the first count, that the plaintiff did not retain or employ the defendant to cause to be made, according to the custom of merchants, insurance upon the said ship, &c., or to cause the same to be insured, or to cause a policy or policies of insurance to be made, subscribed, and underwritten thereon, or to cause the plaintiff to be insured in respect of the said ship, &c., modo et formâ; thirdly, to the second count, that the plaintiff was not lawfully possessed of the said policies of insurance in the said second count mentioned, or of any or either of them, as of his own property.

The replication joined issue on these pleas.

At the trial of the cause before Maule J. at the last assizes for Newcastle-upon-Tyne, it appeared that, in August 1841, the defendant, who is an insurance broker in that town, was employed by the plaintiff to effect insurances as well upon the ship "Thérèse," of which the plaintiff was owner and master, as also upon the furniture and freight. Accordingly, on the 23rd of that month, the defendant effected the following insurances

with the Newcastle Commercial Insurance Company: on the ship, &c., 500l.; on the specie, 200l.; on the furniture, 250l.; and with the Newcastle Marine Insurance Company, on the ship, 500l.; on the specie, 500l.; and on the freight, 100l. The vessel sailed for Rio de Janeiro on the 26th of August, and on the 31st she foundered at sea. The defendant had notice of the loss. [461] On the 8th of December 1841, the solicitor of the plaintiff wrote him the following letter:—

“December 7th, 1841.

“‘Thérèse’ of Hamburg; John Turpin, Master.

“Mr. Turpin not being able to obtain from the Marine and Commercial Insurance Companies in your town, payment of the amount of insurance effected by you in August last, has placed the matter in my hands for the purpose of enforcing the payment by legal proceedings. I will therefore thank you to give me all the information you can, relative to the mode by which the insurance was effected, and also the names of the gentlemen who underwrote the policies; for I presume the companies are not incorporated, and that the members underwrite as at Lloyd’s. You will also be pleased to send me such of the policies as are in your possession, and to inform me in whose possession the others are, and why they are not given up.”

The defendant’s reply was at follows:—

“Newcastle-upon-Tyne, 13th December 1841.

“We duly received your letter of the 7th instant, and in reply beg to say, that if Captain Turpin will pay 41l. 15s. 3d., the amount due to us from him, into the hands of Messrs. Barclay, Bevan, & Co., bankers, we shall be glad to forward to his order copies of the policies referred to in your letter, signed by the secretaries of the respective companies with whom the insurances were effected.”

On the 20th of December 1841, the plaintiff’s solicitors wrote again in these terms:—

“Mr. John Turpin, late master of the ship ‘Thérèse,’ has placed in our hands your letter to his late solicitor, Mr. P., wherein you state that if Captain Turpin will pay 41l. 15s. 3d., the amount due to you, into the hands of Messrs. Barclay & Co., bankers of this place, [462] you will forward to his order copies of the policies referred to in Mr. P.’s letter. We understand that you omitted to obtain from the insurance companies the original policies when they were effected, and that the companies now refuse to deliver them out, by which Captain Turpin is prevented from adopting measures to recover the amount of such policies. We shall be glad to be informed by return of post whether you have the original policies, and, if not, whether you can obtain them, and we will consult Captain Turpin as to the payment of your demand.”

Again, on the 28th, the plaintiff’s solicitors wrote—“We wish particularly to ascertain whether these copies (referring to the copies mentioned in the defendant’s letter of the 13th) are what the companies delivered to you as the policies, or whether the companies have the policies now in their possession.”

Some further correspondence took place between the parties, but without leading to any result.

It was not distinctly shewn when the policies were actually executed; but the secretary and one of the directors of the Newcastle Commercial Insurance Company, who were called as witnesses, stated that the practice of the office was to execute a policy on stamped paper very shortly after the receipt of the order; and that the defendant had applied to the company for the policies before the commencement of the action, but that they had refused to give them out to him on the ground that the loss was suspected to have been fraudulent. A formal demand of the policies was made on the 15th of April 1842; but they were not delivered up (a).

For the defendant it was submitted that the correspondence amounted to an admission on the part of the plaintiff, that the policies had been effected shortly after [463] the order was given, and that the evidence with respect to the usage of the company shewed that there had been no breach of duty by the defendant.

For the plaintiff it was contended that it was to be inferred from the correspondence that the policies had never been effected.

(a) The policies were given up after action brought.

The learned judge left it to the jury to say whether or not the defendant had procured the policies to be executed within a reasonable time.

The jury having found a verdict for the plaintiff on the first count, damages 30l., and for the defendant on the second count,

Sir Thomas Wilde Serjt., in Michaelmas term last, moved for a rule nisi, for a new trial on the ground that the verdict was against the evidence, or to arrest the judgment. On the latter point he submitted that the action, though in form an action of tort, was substantially an action of contract, and consequently the contract ought to be correctly alleged; that the retainer averred, absolutely to insure the ship, was larger than was warranted by law; that it was no where alleged that the defendants could have effected the insurance. The averment was that he had engaged to insure her upon the usual terms, which means on the usual premium; consequently it ought distinctly to have appeared that the vessel was one that might have been so insured. Again, the declaration contained no allegation that the plaintiff was ready and willing to pay the premiums. The learned serjeant also contended that case was not maintainable, where, as here, the supposed cause of action arose wholly out of a breach of contract unaccompanied by any wrongful act; but he abandoned this point when the rule came on for argument.

A rule nisi having been granted,

[464] Channell Serjt. (with whom were Hoggins and Bramwell) shewed cause. With respect to the first point, there was abundant evidence to warrant the jury in concluding that the defendant never effected the policies of insurance. Assuming that the defendant gave orders to the offices for the insurances, and that the policies were executed by the directors, and that copies were given to the defendant, it still cannot be said that the defendant had done what he was bound to do. It cannot be contended that he caused the insurance to be made according to the contract alleged, until he obtained from the offices the policies themselves, so that he might either deliver them to the plaintiff or hold them as his agent. Until he had placed the plaintiff in a situation to enforce the policies, every thing he had done might be considered nugatory; for the words "effecting an insurance" can only mean that the insurance is to be completed. It appears, however, that he never applied for the policies until after the loss of the ship. There was no evidence that the policies ever had been actually issued before that time. There was no identification of the copies given out with any particular policies; and, in truth, the papers given out were mere copies of the contract to insure. [Tindal C. J. Supposing the plaintiff had brought an action against either of the companies, and had given notice to produce the original, would not the copy, in case the original had not been produced, have been sufficient evidence of the policy?] That might be so if the company had delivered the copy as a copy of a policy executed by them; but no proof was given at the trial that any policy had then been signed; and, unless it could be clearly shewn that the original was then in existence, the copy would not be admitted in evidence. [Maule J. The proof was rather the other way as to the policies being then executed; for, according to the practice, a copy is first made in the company's [465] book, and the copy for the party is made from that, and the policy is made out afterwards.] According to that it is clear that the copies given to the defendant were not made from the policies themselves, but were merely copies of so many executory contracts to insure: and it is immaterial whether the policies were completed on the next day or a year afterwards. In case the policies were signed shortly after the order, it was a clear breach of duty in the defendant not to get them from the office in a reasonable time, so as to give the plaintiff, in case of a loss, the means of suing thereon. Supposing, on the other hand, that a considerable period elapsed before the policies were executed, there was a still stronger breach of duty in not obtaining them so as to give the plaintiff a complete, instead of an imperfect, security. It might have been different if the companies had given notice of the policies having been made out, in such a way as to identify them; but as the case stands there was no appropriation of any particular policies to the plaintiff. It is submitted, therefore, that there is no pretence for saying that the verdict was against the evidence.

The other point is, whether, assuming the declaration to have been proved to the extent disputed by the plea, it is good in point of law. One objection is, that the duty of the defendant is laid too largely. Though this in form is an action on the case, it is founded on an express contract; and no duty, stated as it results from

the contract, can be said to be laid too largely. The declaration does not allege that the plaintiff employed the defendant as an insurance-broker,—leaving it for the law to ascertain what his duty was,—but it expressly avers that the plaintiff retained the defendant to cause to be made insurance upon the ship, and to cause the plaintiff to be insured in respect thereof, and that “the defendant then accepted, and entered upon, such retainer and employment;” and the breach of duty [466] is laid precisely in the same language as the retainer and employment. Suppose the declaration had stated that the plaintiff had retained the defendant to do certain acts, and that the defendant undertook “to do his duty in the premises,” it could not be said that the duty was laid too largely. With respect to another objection, the undertaking of the defendant is, to effect an insurance for hire, and not to effect an insurance the plaintiff providing the premium; and there is an allegation that the plaintiff was ready and willing to pay the defendant his hire and reward. If the payment of the premium be necessary in order to effect the insurance, the question is, whether the defendant, by undertaking to effect it, does not engage to pay the premium and stipulate to receive certain remuneration, such remuneration including both the premium and his own charges. The defendant does not enter into a qualified undertaking, provided funds are furnished to him; but his obligation is to effect the insurance at all events. As to the other point, that it is not alleged that he could effect the insurance, it is averred that, although a reasonable time had elapsed for the purpose, he had not caused the insurance to be made. After verdict that is a sufficient allegation that it was in the defendant's power to effect the insurance; for his undertaking is absolute, or only qualified, if at all, by the allowance of a reasonable time for the purpose; which, it is averred, he had had.

Sir T. Wilde Serjt. (with whom were Knowles and W. H. Watson), in support of the rule. When the whole evidence is looked at, it is clear that the policies were effected shortly after the order had been given for them by the defendants. The delivery of the copies was a distinct intimation that the policies had then been made out. The defendant is not answerable for the conduct of the companies in withholding the policies on the [467] ground that they believed the loss of the vessel to have been fraudulent. The defendant discharged his duty, according to the usual course of business at Newcastle, by giving orders for the insurances, and by procuring copies of the policies, and handing them over to the plaintiff. There is no reason to think that, in this instance, the companies did not cause the policies to be made out within a day or two, according to their ordinary practice. It is said that it is not sufficient to effect the policies, but that they must be actually obtained from the companies. The procuring of the policies themselves must be regulated by the course of business in the town. The breach is however alleged not in obtaining the policies from the offices, but in not effecting them. If the defendant had been charged with not procuring the policies from the companies after they had been effected, the defence would have been of a totally different kind. So, the question for the jury was, whether the defendant had neglected, not to obtain the policies, but to effect them; and the other side are seeking to support the verdict on one ground by evidence of a distinct breach of duty. There can be no doubt that the policies were effected shortly after the order was given; and the verdict is clearly against the evidence.

With respect to the declaration, the allegations it contains are applicable only to the employment of the defendant as an insurance-broker to perform his ordinary duty, that is, to use ordinary diligence in the discharge of his duties. His undertaking is not stated as a contract. He is to insure “upon the usual terms;” and it was necessary, in order to make him liable, to allege, that he could have insured the vessel “upon the usual terms.” For, by his retainer, he is precluded from giving more than the customary premium; and if he could not insure upon paying such premium, he was not warranted in insuring at all. Although it is averred [468] that the plaintiff was ready and willing to pay the defendant his hire, it is not stated that the defendant had notice thereof.

TINDAL C. J. now delivered the judgment of the court.

In this case a rule nisi was obtained for setting aside the verdict which had been obtained by the plaintiff, and granting a new trial, or, in case that was refused, for arresting the judgment. It was an action by a ship-owner against an insurance-broker. In the first count of the declaration (on which alone the question arises) the plaintiff,—after setting out that he had retained and employed the defendant to cause an

insurance to be made on his ship, tackle, &c., and that the defendant had accepted, and entered upon, such retainer and employment,—alleged, by way of breach, that although a reasonable time had elapsed long before the commencement of the suit and before the loss of the ship, yet the defendant did not, nor would, within such reasonable time, cause to be made, according to the custom of merchants, insurance upon the said ship, tackle, &c., and did not, nor would, cause the same to be insured, or cause a policy of insurance to be made, subscribed and underwritten thereon, from and against the perils of the sea, and other risks usually borne by underwriters, nor did, nor would, cause the plaintiff to be insured in respect of the said ship, tackle, &c. from and against such perils, nor did, nor would, cause to be made thereon any insurance or policy of insurance subscribed or underwritten; but the defendant, so to do, had wrongfully, and in breach of his duty and retainer and acceptance thereof, wholly neglected and refused, and still did neglect and refuse. The second count was in trover for the policies of insurance. To the first count the defendant pleaded the general issue, and also a plea traversing [469] the retainer; but the first plea alone is now material. On the general issue the question arose whether the breach of duty, as alleged in the first count, was proved. It appeared in evidence that the defendant, an insurance-broker employed by the plaintiff, had contracted with the Newcastle Commercial Insurance Company, for an insurance on the plaintiff's ship, tackle, &c. immediately after he had been employed to do so; and that shortly afterwards papers were given out by the company to the defendant, as being copies (a)¹ of the policies. Stamped policies, in the same terms with the copies given out, were afterwards subscribed, although the exact time when the policies were subscribed did not distinctly appear; and the question agitated at the trial, and submitted to the jury, was, whether the defendant had procured the policies to be executed within a reasonable time. There was no precise evidence as to the time at which the policies were actually executed and completed. The defendant contended that the correspondence, which was put in evidence on the part of the plaintiff, amounted to an admission, on his part, that the policies had been effected shortly after they were ordered; and, further, that the evidence given by the secretary and the director, proved the usage to be, that the company executed them on stamped paper very shortly after the order, and kept them in a locked-up drawer, not to be delivered to the assured until wanted in consequence of a loss. The plaintiff, on the contrary, relied on a distinct request made by him to the defendant, that he would produce the policies; from which the defendant excused himself upon a ground which the plaintiff contended was an evasion only, and furnished the necessary inference that they were not in existence. These two conflicting views were placed before the jury, who, it would appear, drew their conclusion [470] in favour of the plaintiff; and my brother Maule, who tried the cause, appears satisfied with their finding.

A second prayer of the motion was, that the judgment should be arrested. And the objection taken in arrest of judgment is, that the duty cast upon the defendant by the contract into which he entered, was not an absolute duty, as alleged in the declaration, to effect an insurance, at all events, as in the nature of a warranty, but that it was a mandatum only, and that the defendant was bound only to use a proper degree of care and diligence to perform what he had undertaken. But to this we think the proper answer has been given at the bar,—viz. that the action is founded on an express contract; and that the breach is not larger than the terms of the contract, but is framed in the same precise terms; and that the allegation in the declaration, that the defendant to perform his promise “wrongfully, and in breach of his duty and retainer and acceptance thereof, wrongfully neglected and refused,” is a legal charge, sufficient to call for an answer, leaving it to the defendant, if he sought to excuse himself on the ground of impossibility of finding persons ready or willing to underwrite the particular risk, or on any other justifiable ground, either to shew it in evidence at the trial as an answer to the breach, or to plead it by way of excuse, as he should be advised (a)².

(a)¹ These papers would appear to have been copies of drafts of policies. Vide supra, p. 464, 465.

(a)² The stipulation of “hire and reward,” ante, 458, 466, would also appear to be an answer to the objection taken. An agreement for reward or benefit would not

We therefore think that there is no ground for arresting the judgment, but that our judgment should be given for the plaintiff.

Rule discharged.

[471] GARRARD v. HARDEY. Feb. 8, 1843.

[S. C. 6 Scott, N. R. 459; 12 L. J. C. P. 205; 7 Jur. 200.]

Raising and transferring stock is not a nuisance at common law.—Held, therefore, that a plea to a count in assumpsit for money lent, stating that the plaintiff and defendant, and other persons, did illegally associate in a certain illegal undertaking, tending to the common nuisance of the subjects; that is to say, that the plaintiff, defendant, and the other persons, did act as a corporate body, and pretend to be a trading corporation, under the name, &c., and did pretend to raise and transfer stock in the said company, and that the said stock consisted of, &c., and did pretend to transfer and assign shares in such stock, without legal authority by act of parliament, charter, or letters patent, &c., and that the money was lent for the purpose of furthering such illegal undertaking, was bad, as not describing such an illegal association as would constitute a nuisance at common law.—Held, also, that a plea to such a count, stating that the money was lent for the purpose of carrying on a trading copartnership, and that the plaintiff afterwards became a member thereof, and that complicated accounts arose between the plaintiff and the defendant in respect of such copartnership, which included the sum lent, was no answer to the action.

Assumpsit, for money lent, interest, and money due upon an account stated.

The defendant pleaded—to the whole declaration,—secondly, as to the sum of 500l., parcel, &c., that on the 10th of October 1839, from thence until the 6th of June 1840, the plaintiff, the defendant and other persons did illegally associate together in a certain illegal undertaking, project, and attempt, tending to the common grievance, prejudice, and inconvenience of the subjects of our Lady the Queen, in general, and great numbers of them, in their trade and commerce; that is to say, that the plaintiff, the defendant and the said other persons did, during the time aforesaid, act as a corporate body, and pretend to be a trading corporation, by and under the name and style of “The Limerick Marble and Stone Company,” and did then also pretend to raise and transfer stock in the said company, and that the said stock consisted of 50,000l., divided into five hundred shares of 100l., and did then also pretend to transfer and assign shares in such stock without legal authority, either by act of parliament, or by charter from the crown, or by letters patent under the great seal, or by any other lawful [472] authority whatsoever, to warrant such acting as a corporate body, or the raising of transferable stock, or the transferring of shares therein; whereof the plaintiff then had notice: that the plaintiff, well knowing the premises, for the furthering, countenancing, and promoting of such illegal undertaking and project, to wit, on the 10th of October 1839 aforesaid, lent and advanced to the defendant a certain sum of money, to wit, 500l., and he the defendant then received the same, for the purpose aforesaid, and then with the knowledge, privity and assent of the plaintiff, paid, laid out, and expended the same upon and for the furthering, aiding, and promoting of the said illegal undertaking and project: and that the last mentioned sum of 500l. so lent and advanced as aforesaid was the same cause of action in the introductory part of this plea mentioned, and whereof the plaintiff had above in his said first count complained against the defendant.—Verification.

Thirdly, that the said sum of 500l., parcel, &c., was lent by the plaintiff to the defendant for the purpose of carrying on a certain trading copartnership before then entered into between the defendant and certain other persons, under the name and style of “The Limerick Marble and Stone Company,” and the same was then expended by the defendant in and about the said copartnership, and the carrying on thereof: that, after the last-mentioned sum had been so lent and expended as aforesaid, to wit, on, &c. the plaintiff became and was a member of the said copartnership, and so

constitute the agent a mandatory, but would impose on him the more extensive liability of a locator operis faciendi.

remained and continued from thence until, &c. : that the plaintiff on divers days and times, whilst he was such member of the said copartnership as aforesaid, and before the commencement of this suit, received divers sums of money, in the whole amounting to a large sum of money, to wit, 1000l., on the account and for the use of the said copartnership, and that divers compli-[473]-cated accounts then arose between the plaintiff and defendant in respect of and relating to the said copartnership, which accounts included, amongst others, the said sum of 500l., parcel, &c. in the introductory part of this plea mentioned : and that no settlement or adjustment of the said partnership accounts had been at the time of the commencement of this suit nor hath yet been made, but that the same were at the commencement of the suit and still were open, depending, and unliquidated.—Verification.

The fourth and fifth pleas, pleaded to the second count only, were, respectively, similar to the second and third pleas pleaded to the interdiction.

Replication to the second plea ; that the plaintiff, the defendant, and the other persons did not associate together in the undertaking, project, and attempt in the said plea mentioned, and did not act or pretend in manner and form as therein mentioned ; and that the sum of 500l., in the said second plea mentioned, was not lent and advanced to the defendant, nor was the same received by the defendant for the purpose in the said plea mentioned ; nor was the same with the knowledge, privity, and assent of the plaintiff paid, laid out, and expended, in manner and form as the defendant hath in the said plea in that behalf alleged ; conclusion to the country. (There was a similar replication to the fourth plea.)

To the third and fifth pleas, the plaintiff replied *de injuriâ*.

Special demurrer to the replication to the second plea, assigning for causes, that the said replication was multifarious and double, and that the plaintiff had thereby attempted to put in issue several distinct matters, namely, whether the plaintiff, the defendant, and other persons associated together in the undertaking, [474] project, and attempt in the plea mentioned, and also whether they acted or pretended in manner and form as therein mentioned ; and also whether the said sum of 500l. in the said plea mentioned was lent and advanced to the defendant, and received by him for the purpose in the said plea mentioned ; and also whether the said sum was, with the knowledge, privity, and assent of the plaintiff, paid, laid out, and expended, in manner and form as the defendant had in the said plea alleged : that the replication was an informal mode of pleading the general replication *de injuriâ*, which last-mentioned replication could not, by the rules of law, be pleaded to the said second plea : that the plaintiff had in and by his said replication attempted to raise certain immaterial, superfluous, and complex issues, that is to say, he had traversed the allegation that the plaintiff and defendant acted and pretended as in the said plea mentioned, which fact was involved in, and arose out of, the question—whether or not the plaintiff and defendant associated together in such undertaking, &c., as is in the said plea mentioned : that the plaintiff had traversed, and attempted to put in issue, the purpose for which the said sum of 500l. was lent by the plaintiff to the defendant ; whereas if the said sum was, with the knowledge, &c. of the plaintiff, paid, &c. by the defendant in the said illegal undertaking, &c., the fact of the said sum not having been lent and advanced to the defendant, or received by him, for the purpose in the said second plea mentioned, was wholly immaterial : that the traverse taken by the replication was too large, in this, to wit, that it attempted to put in issue the fact—whether or not other persons were associated with the plaintiff and defendant in the said undertaking, &c., which fact was wholly immaterial to the defence set up : that the replication was uncertain, inasmuch as the defendant could not thereby know whether the [475] plaintiff meant to deny that he associated with the defendant, or that he associated with other persons, or that he associated with the defendant and other persons, in the said undertaking, &c.

(There was a demurrer to the replication to the fourth plea, upon which the defendant assigned the same causes of demurrer as upon the demurrer to the replication to the second plea.)

Special demurrer to the replication to the third plea, assigning for causes, that the third plea did not consist of matter of excuse, so as to entitle the plaintiff to adopt such general form of replication : that the defendant by his said plea claimed a title and interest in the said sum of 500l. therein mentioned, and set up a right to retain the same : that in the same plea authority was alleged to have been derived from the

plaintiff: and that the plea was double and multifarious. (There was a similar demurrer to the replication to the fifth plea.)

Joinder in demurrer (*a*).

The case was argued in Hilary term last.

Talfourd Serjt. (with whom was Hurlstone), in support of the demurrers (*b*). The replications to the [476] second and fourth pleas put in issue at least two things which are immaterial,—first, the fact that the plaintiff and defendant did associate with other persons; and, secondly, not only the purpose for which the money was lent, but also that for which it was applied. [Cresswell J. Is it open to the defendant to say that these allegations are immaterial, when he himself has put them on the record?] A plea is not made bad by the introduction of immaterial circumstances; nor can the plaintiff make such matter material by traversing it; *Regil v. Green* (1 M. & W. 328), *Moore v. Boulcott* (1 New Ca. 323, 1 Scott, 122). [Cresswell J. In the last-cited case the defendant pleaded to an action on an attorney's bill, that the bill was for work at law and in equity, and was not delivered a month before action brought. The replication, that the bill was not for work at law and in equity, was held bad, not because it contained two answers to the plea, but because it contained none.] That case shews it is not enough merely to traverse an allegation in the very terms of the plea.

As to the replications to the third and fifth pleas, it is now settled that *de injuria* is admissible in *assumpsit*; *Isaac v. Farrar* (1 M. & W. 65; Tyrwh. & G. 281; 4 Dowl. P. C. 750), *Griffin v. Yates* (2 New Ca. 579, 2 Scott, 845), *Purchell v. [477] Saller* (1 Q. B. 197, 209; 1 G. & D. 682, 693), but subject to the rule in *Croguet's case* (8 Co. Rep. 66), that such general form is only allowable where the plea sets up matter of excuse, and not of discharge. An excuse must arise before, or at the time, the contract is broken, but a discharge must be afterwards.

The third plea in this case does not consist of matter of excuse; it admits the cause of action, namely, the loan; and it does not insist on the illegality of the contract. [Tindal C. J. The question is, whether that plea contains any answer to the action. It admits the loan, and then states a subsequent partnership with the plaintiff, and that the money previously lent by the plaintiff was mixed up with the partnership accounts. That does not appear to be any answer to an action to recover the loan. Erskine J. At present, I believe, we all think that the plea is bad.] Perhaps it may amount to a special set-off. [Cresswell J. In what manner? The defendant does not say which way the balance of the account would be. Tindal C. J. A set-off can only be maintained on an ascertained debt. But here the defendant expressly says that the debt is not ascertained.]

(*a*) The following points were marked for argument on the part of the plaintiff:—

“That the several replications demurred to are good, and that none of the grounds of demurrer specially assigned are valid.

“It will also be argued that the pleas of the defendant by him secondly, thirdly, fourthly, and lastly above pleaded, are all bad; that the second and third pleas are bad for this, amongst other reasons, namely, that there is nothing illegal, either by common or statute law, in the said company called ‘The Limerick Marble and Stone Company,’ acting in the manner stated in the said second and third pleas; and that the third and last pleas are bad, inasmuch as the matters therein contained, namely, the existence of complicated partnership accounts between the plaintiff and defendant, is no answer to the demand of debts which became due previously to the existence of the partnership.”

(*b*) When the case was called on, the learned serjeant confined his argument to attacking the replications; and upon his attention being called by the court to the above objections to the pleas, which had been delivered on the part of the plaintiff to the judges, he stated that he was not aware of them, and that he had been taken by surprise. Cresswell J. observed that was the fault of his client, whose duty it was to have made inquiry at chambers. Tindal C. J., however, added that perhaps the defendant could not have gained any information by inquiry at chambers, as the points were only inserted in the paper-books, which were delivered to the judges. Channell Serjt., for the plaintiff, referred to *Scott v. Chappelow*, ante, vol. iv. p. 336; 2 Dowl. N. S. 83.

As the court ultimately decided the case upon the validity of the pleas, the argument as to the replications is very briefly reported.

The learned serjeant then admitted he could not support the third and fifth pleas. Channell Serjt. for the plaintiff. Assuming that the second and fourth pleas are good, the replications to them are sufficient, as they put in issue all the facts which those pleas set up as constituting one defence. If an alleged immaterial fact is so mixed up in a plea with others which are material that together they form part of the whole defence, the plaintiff has a right to traverse the plea in its terms. (Upon this branch of the argument he cited *Clugas v. Penaluna* (4 T. R. 466), *Biggs v.* [478] *Lawrence* (3 T. R. 454), *Waymell v. Reed* (5 T. R. 599), *Benison v. Thelwell* (7 M. & W. 512; 9 Dowl. P. C. 739), *Webb v. Weatherby* (1 N. C. 502; 1 Scott, 477), *Bell v. Tuckett* (ante, vol. iii. 785; 4 Scott, N. R. 402), and *Duvergier v. Fellows* (5 Bingh. 248; 2 M. & P. 384; affirmed in K. B. 10 B. & C. 826; in Dom. Proc. 1 Cl. & Fin. 39).) [Tindal C. J. The pleas in question comprise three separate allegations: first, that the plaintiff had entered into an illegal company; secondly, that the money lent was part of the stock of such company; and thirdly, that the money was applied to illegal purposes with the privity of the plaintiff. Of these three allegations two at least contain each a distinct answer to the action. If the illegal company was not formed, the plea falls to the ground. If the money was not lent for an illegal purpose, the same result would follow. These are separate and distinct allegations which the plaintiff has included in his replication; and as at present advised, I should say it would be better to see whether the pleas are good.]

The pleas cannot be supported. The facts which they set out as constituting the illegality of the association are, in terms, the same as those mentioned in the bubble act (6 G. 1, c. 18, s. 18). But that act was repealed by the 6 G. 4, c. 91. The demurrer admits, not the illegality of the company, but merely the facts from which the court will decide whether or not it was illegal. But the facts stated do not shew any such illegality. They merely disclose a method of forming and dissolving a joint stock partnership by transferring stock. It is not stated that the company acted as a corporation in any illegal way, or that they affected to use a corporate seal. There is nothing to shew the company was illegal at common law; *R. v. Webb* (14 East, 406). [479] The pleas, in substance, only state that certain persons formed an association for the purpose of trading in marble, and raised a capital by shares; but this is no offence at common law.

Talfourd Serjt. in reply. The second and fourth pleas disclose a sufficiently good ground of defence upon general demurrer. The grounds upon which the judgment of this court proceeded in *Duvergier v. Fellows* are in favour of the defendant. It was there held that the pretending to be possessed of transferable stock was pretending to act as a corporation. In this case the pleas shew that the parties not only pretended to act, but did in fact act, as a corporation. [Cresswell J. *Duvergier v. Fellows* was affirmed by the King's Bench upon error (10 B. & C. 826). But it is not quite clear that the judgment of this court was adopted to the full extent. Channell Serjt. The judgment was indeed also supported in the House of Lords (1 Cl. & Fin. 39); but upon quite different grounds.] In *R. v. Webb* the particular association was held legal; at least the parties were held not to be liable to an indictment. But that was under peculiar circumstances. And the authority of *R. v. Webb* was doubted in *Kinder v. Taylor* (George on Joint-Stock Companies, p. 46). A question arose in that case as to the legality of a company calling themselves the Real del Monte Mining Company; and Lord Eldon C. is reported to have said, "The question as to what was assuming to act as a corporate body, was rendered still more important to be decided, because it was impossible to read the 6 G. 1, and the clauses of exceptions contained in it, without seeing that the legislature thought itself bound to except even some legally chartered companies. The case of *R. v. Webb* was scanty in argument, [480] and the common law was not considered in it, because that was an indictment upon the statute. He spoke with all respect for Lord Ellenborough, who had decided the case, and whose memory he venerated as a law-giver; but he should have been glad if his lordship had taken the trouble to state what was assuming to act as a corporation." [Cresswell J. Here the defendant has not taken the trouble to state what he means by acting as a corporation.] It is submitted that he has in terms stated sufficient to bring the case within the principle of *Duvergier v. Taylor*. Lord Eldon added, in *Kinder v. Fellows*, "For many considerations it would have been very fortunate if the court had then looked at this as a distinct question, and had been good enough to declare, 'this is not acting as a corporation, because, to act as a corporation, you must act so and so.'"

It now, however, became necessary to decide, either by legal judgment or by a declaratory act of parliament, what is the meaning of presuming to act as a corporation; and by whomsoever it was declared, not only what was doing, but what had been done, must be attentively regarded. It was for this reason he thought the case of *R. v. Webb* called for further explanation." And his lordship, after commenting upon the 6 G. 1, stated, that "he was of opinion,—and he had taken some trouble to consider the question,—that if it could satisfactorily be made out to a jury that a party was opening books, raising a premium upon the shares, and then took care to get himself out of the scrape, that was an indictable offence." *Josephs v. Pebrer* (3 B. & C. 639; 3 D. & R. 542), and *Pratt v. Hutchinson* (15 East, 511), are authorities to shew that a company which professes to raise and transfer stock is illegal. [Tindal C. J. When those cases were decided the 6 G. 1 was in full force.]

[481] The learned serjeant then proceeded to argue that the replications to the second and fourth pleas were bad for multifariousness, and as involving an immaterial issue. It was immaterial whether other persons were associated with the plaintiff and defendant, as there might be a fraudulent company consisting of two parties only. [Tindal C. J. It is not very likely. The 6 G. 1 seems to point to associations formed by great numbers of persons. Erskine J. In order to render a proposition objectionable, it is sufficient that it is immaterial? Must it not also tend to embarrass the opposite party? That seems to be the ground upon which *Regil v. Green* was decided.] If the contract was unlawful in its origin, the subsequent application of the money would make no difference; *Thurman v. Wild* (11 A. & E. 453; 3 P. & D. 289). [Cresswell J. Suppose the money had been originally lent for an unlawful purpose, and the plaintiff had repented and demanded back the money, but had afterwards sanctioned its improper application.] If the contract was originally unlawful he could not recover the money. This is an action for money lent. It is a sufficient answer that it was lent in furtherance of an illegal contract. The subsequent application of the money is quite immaterial.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The questions before us in this case arise on the replications put in by the plaintiff to the second, third, fourth, and last pleas of the defendant. But as the third and last pleas were abandoned by the defendant upon the argument, and as we think the second and fourth pleas are also bad in point of law, it will be unnecessary to say any thing as to the replications: and the second [482] and fourth pleas being pleaded in the same form, the one to the action generally, the other to the second count, it will be necessary to consider the first only of those pleas.

That plea is framed upon the very words of the statute 6 Geo. 1, c. 18, s. 19. It states that the plaintiff, and the defendant, and others, did illegally associate themselves together in an illegal undertaking, project, and attempt, tending to the common nuisance, prejudice, and inconvenience of the subjects of our lady the Queen in general, and great numbers of them in their trade and commerce. It is obvious, that, if the plea had stopped here, such a general allegation of an illegal association would not have been sufficient, even if the statute above referred to had been still in force and unrepealed: and consequently the plea proceeds to describe the particular illegal association intended, and alleges it to consist in this, that the plaintiff, the defendant, and those other persons, did act as a corporate body, and pretend to be a trading corporation, under the name of "The Limerick Marble and Stone Company," and did also then pretend to raise and transfer stock in the said company, and that the said stock consisted of 50,000l. divided into 500 shares of 100l., and did pretend to transfer and assign shares in such stock, without legal authority by act of parliament, charter from the crown, or letters patent under the great seal, or by any lawful authority whatever, to warrant such acting as a corporate body, or the raising of transferable stock, or the transferring shares therein. Now assuming, for the sake of argument, that this description would have been sufficient to bring the case within the statute, yet, as that clause of the statute has been expressly repealed by the 6 Geo. 4, c. 91, the question becomes this, whether such an illegal association is described on the face of this plea as to constitute, at common law, a nuisance, and to [483] be indictable as such. The raising and transferring of stock in a company cannot be held, in itself, an offence at common law: such species of property was altogether unknown to the law in ancient times; nor indeed was it in usage and

practice until a short period antecedent to the passing of the statute; as is evident from the preamble to the 18th section, which recites that it is notorious that these projects and undertakings, which it is the object of the clause to put down, had been contrived and practised within the kingdom since the 24th of June, 1718; evidently shewing that the act was looking to some grievance of late introduction. And as that clause has been repealed, we find no authority for holding that an allegation that the parties raised and transferred stock is simply, and per se, without any statement of the mode by which it injures or defrauds the public, an indictable offence at common law. And, laying that allegation out of the way, the plea really states no more, in substance, than that the plaintiff and the defendant "and other persons" (which allegation would be satisfied if there were two only in addition to themselves), pretended to act as a trading corporation, under the name and style of "The Limerick Marble and Stone Company." The plea states no illegal mode or means by which they pretended to act as a company, as, by usurping a common seal, or the like; nothing more is stated than their assuming the style and firm of a company. It is not even alleged that this took place and was carried on in England, or within the Queen's dominions, which would seem from the preamble to the 18th section of the statute to have been necessary, at least, to constitute an offence under that statute.

The case of *Duvergier v. Fellows* (5 Bingh. 248; 5 M. & P. 403) has been cited, and relied on as an authority in point that the mere [484] presuming to act as a corporation is of itself alone an illegal act, and indictable. It should be observed, however, that the plea in that case did not state simply the fact of the formation of a pretended corporate body, but the formation of it for a purpose confessedly illegal, namely, the purpose of enjoying the benefit of certain letters patent, by the condition annexed whereto the letters patent were to become void if assigned to more than five persons. And this is the precise ground upon which the judgment was affirmed both in the court of King's Bench and in the House of Lords, where the case was removed by writ of error; not to mention also, that, in the plea of the defendant in that case, so much of the detail and management of the pretended company was stated as might perhaps be sufficient to shew a project which would necessarily operate to the fraud and deceit of the subjects of this kingdom.

It is enough, however, to say, on the present occasion, that there is an absence in this plea of any statement of facts from which an illegality at common law is necessarily to be inferred; and, unless such common law offence appear sufficiently stated on the plea itself, we are not to infer it.

We think, therefore, the second and fourth pleas are also bad, and that judgment on the four special pleas must be given for the plaintiff.

Judgment for the plaintiff.

[485] SIR WILLIAM HENRY RICHARDSON, KNIGHT, v. HENRY KENSIT
THE YOUNGER. Feb. 8, 1843.

[S. C. 6 Scott, N. R. 419; 12 L. J. C. P. 154; 7 Jur. 856. For subsequent proceedings see 6 Man. & G. 712.]

By the custom of a manor a fine was due on the admittance of a remainder-man, whether admitted at the same time as the tenant of the particular estate, or during the continuance of such estate. A., a copyholder in fee of the manor, devised certain copyhold premises to B. for life, remainder to C., and D., his wife, for life, with benefit of survivorship, remainder to E. for life, remainder to F. in fee. B. was admitted, paying a fine of full two years' value, and died. The custom gave to the lord, upon the admittance of C. and D., three years' value, for a fine and a half (treating the wife, D., as the party next in remainder), half a fine, being one year's value, from E., and a quarter of a fine, being half a year's value, from F.: Held, that the mode of assessing the fine was reasonable; but—Held, also, that the fine, having been calculated without making a deduction for repairs, was unreasonable.

Assumpsit brought by the lord of the manor of Chipping-Barnet and East-Barnet, for certain reasonable fines, alleged to have been duly assessed, and to be due and payable from the defendant to the plaintiff, for and upon the admittance of the defen-

dant, according to the usage and custom of the said manor, into divers copyhold tenements, with the appurtenances, within and parcel of the said manor, into which the defendant had, by the plaintiff, before then, and whilst the plaintiff was lord of the said manor, been admitted, according to the usage and custom of the said manor, to hold the same, with the appurtenances, to the defendant as tenant in remainder, in fee, by copy of court-roll, at the will of the lord of the said manor, according to the custom of the said manor.

The defendant pleaded non assumpsit; whereupon issue was joined.

The cause came on to be tried before Tindal C. J., at the sittings for Middlesex. after Michaelmas term, 1841, when a verdict was found for the plaintiff for the damages laid in the declaration, subject to the opinion of the court on the following case, with liberty for the court to draw such inferences as a jury might draw; and it was referred to J. A., Esq., barrister at law, to ascertain and [486] state the amount of the annual value of the copyhold premises mentioned in the pleadings, and all questions touching the same, and any deductions or deduction claimed by the defendant as proper to be made in respect of such premises: and it was ordered that the arbitrator, if required by either party, should state, upon the face of his award, the finding as well as the principle of such finding, and that such award should be introduced into the special case:—

CASE.

Before and at the time of the admittance of the defendant and others as tenants, as hereinafter mentioned, the plaintiff was the lord of the manor of Chipping-Barnet-and-East-Barnet, in the county of Herts, and still is lord of the said manor.

Thomas Balshaw, being tenant in fee, according to the custom of the said manor, of three houses, and a close of land, within and parcel of the said manor, by his will, duly executed on the 25th of February 1830, devised the same to Amy Lincoln for her life, with remainder to Henry Kensit, and Sarah Kensit, his wife, during their lives, or to the survivor of them, and, at their decease, to Susannah Sophia (in the will called Susannah) Kensit, their daughter, during her life, and, at her decease, to the defendant in fee.

T. Balshaw, being such tenant as aforesaid, died on the 15th of March 1830, without having altered or revoked his said will; and at a court held on the 13th of April 1830, his death and his said will were presented, and the said A. Lincoln was admitted tenant to the said premises, and paid for a fine 40l., as for two years' value thereof at that time.

A. Lincoln died on the 11th of April 1834.

At a court held the 17th of April 1838, the said H. K. the elder, and Sarah his wife, Susannah Sophia their [487] daughter, and the defendant, were admitted tenants, according to their estates and interests, under the said will. The entry on the court-roll of the admittance, after reciting the will of T. Balshaw, his death, and the admittance and death of A. Lincoln, proceeds as follows: "Now to this court come the said H. Kensit the elder, in his own person, and the said S. Kensit, his wife, and Susannah Sophia (in the said will called Susannah) Kensit, spinster, by the said H. Kensit the elder, their attorney, and the said H. Kensit the younger, in his own person, and humbly pray of the lord of the said manor, severally and respectively, to be admitted tenants to the premises whereof the said T. Balshaw died seised as aforesaid, according to their several and respective estates and interests therein, under and by virtue of the said will of the said T. Balshaw deceased. To whom the lord of the said manor, by his said steward, doth grant the same and deliver them, severally and respectively, seisin thereof, by the rod,—to the said H. Kensit the elder and H. Kensit the younger, in their own persons, and the said S. Kensit and Susannah S. Kensit, by the said H. Kensit the elder, their attorney,—to have and to hold the premises, unto the said H. Kensit the elder and Sarah his wife, for and during the term of their lives, and the life of the survivor of them, and, from and after the decease of the survivor of them, unto the said Susannah S. Kensit for and during the term of her life, and, from and after the decease of her the said Susannah S. Kensit, unto the said H. Kensit the younger (the defendant), his heirs and assigns for ever, by the rod, at the will of the lord, and according to the custom of the said manor, by the yearly rent of 10d., fealty, suit of court, customs, and other services due, and of right accustomed. And the homage aforesaid, on their oaths, present that the premises aforesaid are of the annual

value of 20l. And the fines payable to the lord were thereupon assessed [488] in manner following, that is to say, the sum of 60l. for the estate and interest of the said H. Kensit the elder and Sarah his wife, the sum of 10l., the fine for the estate and interest of the said Susannah S. Kensit, and the sum of 5l., the fine for the estate and interest of the said H. Kensit the younger (the defendant); and the said parties were accordingly, in manner and form aforesaid, admitted tenants to the said hereditaments and premises; but their fealty was respited until," &c.

The case then set out numerous extracts from the court-rolls, which were relied upon on the part of the plaintiff, as shewing that, by the custom of the manor, a fine was payable on the admittance of a remainder-man, and also as shewing that the mode and principle upon which the fines had been assessed upon each successive remainder-man in this particular case, were reasonable. The instances given are fully commented upon in the argument and in the judgment.

The arbitrator made the following award, under the order of reference before mentioned:—

"I find, award, and state, that the improved annual value of the said copyhold premises, on the 17th day of April, 1838, was 16l. 8s. 1d. And, at the request of the plaintiff, I further state, that in ascertaining the said annual value, I have made the following deductions and no other, that is to say, 1s. 11d., which I find, and state, to be a quit-rent payable to the lord for and in respect of the said premises, and also 4l. 10s., which I find, award, and state to have been at that time, and still to be, the amount of the annual costs and expenses of repairs necessary to be done to the said cottages annually, in order to keep them in tenantable repair."

It is agreed that the court shall be at liberty to draw any such conclusions of fact, as to the existence or non-existence of any special custom within the [489] manor, as they may think the jury ought to have drawn.

The question for the opinion of the court is, whether the plaintiff is entitled to recover in this action the said sum of 5l. If the court shall be of opinion that the plaintiff is so entitled, then the verdict is to be entered for the plaintiff, with 5l. damages, and costs of suit: but if the court shall be of a contrary opinion, then a non-suit is to be entered (a).

(a) The points marked for argument were as follows:—

For the plaintiff. First—Whether the extracts from the court-rolls set out in the case are sufficient evidence of the existence, in the manor of Chipping-Barnet-and-East-Barnet, of a custom for the payment of a fine by a remainder-man on his admittance to a copyhold.

Secondly—Whether the fine assessed by the lord, as stated in the case, was a reasonable fine.

For the defendant. That no fine is due from him to the lord of the manor, and that the assessment is bad. The admittance of Amy Lincoln, the tenant for life, operated as an admittance of those in remainder.

The defendant's admittance, whether necessary or not, would not of itself create a right to a fine not otherwise due (*Barnes v. Cock*, 3 Lev. 308). He was admitted only in respect of a remote remainder, and is not in any view liable to a present fine. A full fine having been received on the admittance of Amy Lincoln, as tenant for the particular estate, no fine can properly be claimed on the admittance of the remainder-man. If any fine can, on the admittance of such remainder-man, be demanded, a full fine cannot be demanded from him, or from those in remainder, nor can fines be claimed on their admittance during his life, on the scale of a full fine.

A full fine means, at the very utmost, two years' improved value; here, the full fine was estimated as on 20l. per annum improved value, whereas the improved value was only 16l. 8s. 1d. per annum. Three years' improved value, at 20l. per annum, are assessed as the fine on the admittance of Mr. Henry Kensit the elder and his wife.

The plaintiff's claim is informal in law, unless it appear that there is a special custom in this manor,—that after a tenant for life has been admitted and paid a full fine, the remainder-man is, on admittance, also liable to a full fine, and those in successive remainder on him, if admitted during his life, are also liable on such admittance, the first in succession to him, to half a full fine; the next to a fourth of a full fine; and so on. No such special custom is shewn.

The assessment is also ill, in being on the premises generally, and not on each tenement separately.

[490] The case was argued in Hilary term last (Jan. 19th, before Tindal C. J., Erskine and Cresswell JJ.).

Bompas Serjt. for the plaintiff. The questions in this case are ; first, whether the lord of the manor is entitled to call upon the remainder-man to be admitted and to pay a fine ; and, secondly, whether the fine demanded on this occasion, was reasonable.

With regard to the first point, it may be conceded that *prima facie* an admittance to a particular estate will be an admittance to the remainder ; and it lies therefore upon the plaintiff in this case, the lord of the manor, to shew that he is, by the custom of the manor, entitled to a fine on the admittance of a remainder-man ; *The Dean and Chapter of Ely v. Caldecott* (8 Bingh. 439 ; 1 M. & Scott, 633). Such a custom, however, is undoubtedly good ; *Doe d. Whitbread v. Jenney* (5 East, 522). And the extracts from the court-rolls, notwithstanding some slight variations in the sums, which, in all probability, might easily be accounted for, shew, that in this manor the custom was, that the remainder-man should pay on admission half the fine that had been paid by the tenant of the particular estate ; and the next remainder-man half the fine so paid by his predecessor. The cases of *Sheppard v. Woodford* (5 M. & W. 608) and *Wilson v. Hoare* (2 B. & Ad. 350, 10 A. & E. 236, 2 P. & D. 659) shew that such a principle of calculation, when warranted by custom, is unobjectionable. As to the reasonableness of the fine, the calculation has been made with reference to the full value of the premises at the time of the testator's death ; but the defendant contends that deductions should be made in respect of repairs and other matters. There is no authority for [491] making such deductions. In *Halton v. Hassell* (2 Stra. 1042) it was held that fines were to be set according to the improved value (see *Simpson v. Clayton*, 4 New Ca. 758, 6 Scott, 469). In *Grant v. Asle* (2 Dougl. 722, 724, n.) the rule seems to have been laid down by Lord Loughborough that deductions were only to be made in respect of quit rents. (The learned serjeant also referred to 1 Watk. Copyh., 316 ; Com. Dig., tit. Copyhold (H. 4).) It cannot be assumed that the premises will get out of repair, as it is as much the duty of the tenant to keep them in repair as it is to attend the lord's court.

Channell Serjt. (with whom was J. Henderson) for the defendant. It is submitted, first, that the custom set up in this case is unreasonable ; secondly, if it be not so, that it is not established in fact ; and thirdly, that the value of the premises is taken at too high a rate, by not allowing deductions for repairs.

First, where a fine is arbitrary, the court will consider it unreasonable if it exceed two years' purchase ; and though that rule is not applicable where the fine is payable by custom, still there is no case where a fine has been supported which has been based upon such a calculation as the present. In *Sheppard v. Woodford*, and *Wilson v. Hoare*, the argument was, that the trustees took a new estate ; but here, according to the ordinary rule of law, the remainder-man is in upon the admittance of the tenant for life, and might have maintained ejectment on that admittance. A fine of 40l. was paid by Amy Lincoln, the tenant for life ; and 75l. is now further claimed by the lord ; that is, 60l. from Henry Kensit the elder and his wife, 10l. from Susannah Kensit, and 5l. from the defendant, making in all the sum of [492] 115l. payable as a fine upon the whole corpus of the estate, which amounts to five years and three quarters' improved value. But a fine never could reach that sum on the computation in *Sheppard v. Woodford* and *Wilson v. Hoare*. According to those cases, a fine never ought to reach four years' purchase, though it may exceed two. The fine, therefore, is unreasonable.

Secondly, a custom is to be construed liberally, in favour of the tenant, and strictly, against the lord. Watk. Copyh., 60. There is no other evidence of reputation in the case than what is contained in the court-rolls ; which, although receivable, are not entitled to much weight. And the entries thereon only amount to evidence of the fact that fines have been paid on the admittance of a tenant for life, and also of a remainder-man ; but such fines may have been taken on the principle of apportionment.

Thirdly, the amount of the fine is at any rate unreasonable in respect of the annual value claimed. The rule in *Halton v. Hassell* is not disputed ; but the term "improved value" there used, must be taken to mean improved annual value ; that is, the sum at which the property would let by the year. No deduction is asked in this case in respect of ornamental repairs, but only of such repairs as would render the premises wind and water-tight, such as a tenant might do, and deduct from his rent. It is said that a copyhold tenant is as much bound to repair as to attend his lord's court ;

but that is not correct with regard to a copyholder in fee who, it is submitted, is not responsible for permissive waste. Cruise's Digest, tit. Copyhold, ch. 3, sect. 15 (p. 299, 3d ed.).

Bompas Serjt. was heard in reply.

Cur. adv. vult.

[493] TINDAL C. J. now delivered the judgment of the court.

In this case the plaintiff, the lord of the manor of Chipping-Barnet and East-Barnet, on the 17th of April 1838, admitted the defendant, as tenant, to a certain copyhold tenement, within, and parcel of, that manor, to which he prayed to be admitted as tenant in remainder in fee, and upon such admission the lord claimed a fine of 5l.

It appears upon the special case, that Thomas Balshaw, being tenant in fee according to the custom of the manor, devised the tenement in question to Amy Lincoln for her life, remainder to Henry Kensit and Sarah his wife, during their lives and the life of the survivor, remainder to Susannah Sophia Kensit, their daughter, for life, remainder to the defendant in fee.

After the death of the testator, in 1830, Amy Lincoln was admitted tenant, and paid 40l. for a fine, as for two years' value of the premises at that time, and died in 1834. And on the 17th of April, 1838, the several persons who claimed under the will, in remainder, came to the lord's court, and prayed, severally and respectively, to be admitted, as tenants, to the premises; and, after a presentment by the jury that the premises were of the annual value of 20l., those several persons were admitted to the respective estates in remainder, under the said will. The fines were then assessed as follows; viz., 60l. for the estate and interest of Henry Kensit the elder, and Sarah, his wife; 10l. for the estate and interest of Susannah Sophia Kensit; and 5l. for the estate and interest of the defendant.

Upon this state of facts, two questions were made upon this special case; first, whether the extracts from the court-rolls are sufficient evidence of the existence of a custom in the manor for the payment of the fine by a [494] remainder-man on admittance to a copyhold; secondly, whether the fine assessed is a reasonable fine.

Upon the first and general question, we cannot entertain any doubt but that, by the custom of this manor, a fine is due on the admittance of a remainder-man, whether he pray his admittance, and is admitted at the same time as the tenant of the particular estate, or whether his admittance take place during the continuance of such estate. The extracts from the court-rolls furnish numerous and repeated instances of such admittances, and of payment of fines thereon, and no instances to negative such custom.

It is the second question upon which the real dispute between the parties arises, viz., whether this is a reasonable fine, first, with respect to the mode and principle upon which it has been assessed upon each successive remainder-man; and, secondly, with respect to the principle upon which the annual value of the premises has been ascertained.

The principle on which the assessment has been made upon the tenant, of the successive estates in remainder is, to claim a fine amounting to a full two years' value from the tenant who takes the immediate estate; but as upon this occasion the husband and wife were jointly admitted for their lives and the life of the survivor, to consider the admittance of the wife as an admittance of one next in remainder, and to claim on their joint admittance, a fine and a half, or 60l.; to claim a fine of half the amount of that on the wife's admittance on the admittance of Susannah Sophia Kensit the next in remainder, that is, a fine of 10l.; and to claim a fine of half that amount on the admittance of the defendant, treating him as the fourth in remainder.

Now whether this mode or principle of assessing the fine with respect to tenant for life and remainder-man, is a mode which will bind the tenant, must be determined by reference to the custom of the manor; and, [495] amongst the extracts from the rolls, there are instances in which a tenant in fee has surrendered to the use of himself for life with remainder to J. S., and where the tenant and the remainder-man have been admitted on this surrender, and the remainder-man has paid half the fine which was paid to the lord on the original admittance of the surrenderee; some in which the tenant for life has been first admitted, and the remainder-man at a subsequent period; some in which husband and wife have been admitted on the surrender of the husband, on which occasion the wife has paid half the fine which the husband paid on his original admittance; and, although in some of these instances the fine paid upon the

remainder-man's admittance has not been the precise half of the amount of that paid on the admittance of the tenant of the particular estate, being in some instances rather more, and in some rather less, yet we do not think such variations, which at this distance of time it may be difficult to account for, ought to prevent us from drawing the inference which we do draw, that there exists a custom in this manor of claiming a fine on the admittance of the remainder-man, to the extent of half the fine claimed on the admittance of the tenant of the particular estate (a)¹; and, unless upon general grounds of law it would be unreasonable to extend such calculation beyond the admittance of the first remainder-man, we hold the mode of calculation adopted in the present case to be reasonable. The cases of *Sheppard v. Woodford* (5 M. & W. 608) and *Wilson v. Hoare* (c), recognise the reasonableness, in point of law, of a custom existing in a manor, to claim, upon the admittance of several joint-tenants, a full fine for the first, half that fine for the second, and a half of that half for the third, [496] and so on: and we think the same mode of calculation may reasonably be held to apply to the case of remainder-men, where there is a custom in the manor, that after the first tenant, the next remainder-man shall pay a half fine.

The second question which has been raised as to the reasonableness of this fine, is, whether the deduction for the repairs ought to be allowed by the lord or not. The rule laid down by law has always been taken, at least since the case of *Halton v. Hassell* (2 Stra. 1042), to be this—two years improved value of the land, deducting quit-rents. What is the improved value of the premises, is therefore the question. If they are let at a fair rent to a tenant, the rent which he pays to his landlord will be the best evidence of the improved annual value. This, indeed, appears to have been taken for granted by the court in the case of *Dow v. Golding* (Cro. Car. 196). And if, upon such letting, the tenant undertakes to keep the premises in repair, such tenant, when he agrees to pay the rent, must have taken into his calculation the annual expenditure which the repairs will cost him, and will pay so much less to the landlord as such estimated annual repairs will amount to. In such case, therefore, the amount of the annual repairs would virtually and substantially be deducted out of the value; that is, the rent, which is the evidence of such value, is not ascertained and arrived at without making such deduction. So, again, if the premises are kept in the landlord's own hand, in estimating the value which the premises are of to him, it seems to us that the same process must be resorted to, and that one of the data of the calculation of actual value must be, an allowance for the ordinary annual expenditure necessary to keep the premises in tenantable repair. It is not so proper, [497] however, as it appears to us, to call this a deduction from the annual value, as to consider it as a necessary allowance to be made in calculating the amount of that annual value: and we understand the finding of the arbitrator to amount to that and nothing more. When the arbitrator to whom the question was referred, finds the annual value to be 16l. 8s. 1d., we understand him to mean that such sum would be the amount of the improved rent which a lessee would pay if he took the repairs upon himself; or such value as the owner of the copyhold would derive from the premises, if the premises were in his own occupation, or if he let them and repaired them himself (a)². And we think the real amount of the beneficial value to the tenant of the copyhold, amounts to that sum, and no more.

Thinking, therefore, that the sum of 20l., which has been assessed as the improved annual value, is too large, we are of opinion that the fine claimed is unreasonable; and we therefore direct a non-suit to be entered.

Judgment of nonsuit.

(a)¹ Vide *Peter v. Kendal*, 6 B. & C. 703.

(c) 10 A. & E. 236; 2 P. & D. 659. And see 2 B. & Ad. 350.

(a)² If the rent were taken without any deduction for repairs, the five years' and a half fine, receivable in this manor, might amount to 115l. upon a rental of 20l., although the occupier paid to his landlord, the copyholder, only 2l. a year, 18l. being kept back for repairs. In such a case the fine would greatly exceed the value of the fee simple.

[498] PARKER v. MARCHANT AND OTHERS. SYKES v. SAME. SAME v. DUKE AND OTHERS. SAME v. HOLMAN AND OTHERS. SAME v. KNIGHT AND OTHERS. 1843.

[S. C. 6 Scott, N. R. 485; 12 L. J. C. P. 170. See S. C. 1 Y. & C. C. C. 290; 62 E. R. 893; 2 Y. & C. C. C. 279; 63 E. R. 123; 1 Ph. 356; 41 E. R. 667.]

Devise in a will, anterior to the 1st of January, 1838 (vide post, 503 (c)), as follows:—"As to my messuages, lands, tenements, and real estate, I devise unto A. and his heirs, Whiteacre and Blackacre, and all other my messuages, lands, tenements, and hereditaments which may not be herein particularly described or mentioned. And I do further bequeath to my wife all my jewels, plate, &c. and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever, and appoint her sole executrix," &c. At the date of the will, and at his death, the testator was possessed of certain leaseholds, but had no other real estates than Whiteacre and Blackacre. Held, that the leaseholds did not pass to A.

The following case was submitted for the opinion of the judges of this court, pursuant to an order made on the hearing of the above-mentioned causes, on further directions, by Sir J. L. Knight Bruce, V. C., bearing date the 8th of March, 1842 (see *Parker v. Marchant*, 1 Y. & Coll. 290).

Robert Parker, Esq., was, at the date of his will hereinafter set forth, seised and possessed respectively of the following real and leasehold properties, and of no other real or leasehold property, that is to say:

Real Property. A freehold messuage or tenement and farm called the Great Lodge of Otford Park, together with the barns, &c. and appurtenances thereto belonging, and twenty-one several closes, &c. A freehold messuage or tenement and farm called the Place Farm, together with the granary, &c., and the ruins of the ancient castle and palace of Otford, yards, &c., and appurtenances thereunto belonging, and twenty-seven [499] closes, &c., all which said several messuages, &c., with the appurtenances are situate, &c., in the several parishes, villages, or hamlets of Otford and Kemsing, or one of them, in the county of Kent. A freehold plot or parcel of ground, together with the messuage, &c. thereon erected and built, being No. 18 in Catherine Place, in that part of the parish of Walcot, in the county of Somerset, which lies without the jurisdiction of the city of Bath. A freehold messuage or farm, &c., with the appurtenances situate, &c., in the parish of Ifield, in the county of Sussex. A freehold messuage or farm, &c., and appurtenances situate in the said parish of Ifield, in the said county of Sussex. A freehold messuage, &c., and several pieces or parcels of land, &c., situate in the parish of Charlewood, in the county of Surrey. One undivided third part or share, and the half of one other undivided third part or share, of and in a freehold piece or parcel of meadow land, &c., one other piece of meadow land, &c., one other piece or parcel of land called, &c., one other piece or parcel of land, all which pieces or parcels of land are situate in the parish of Hoo, in the county of Kent. A freehold messuage, &c., and nine several pieces or parcels of land, &c., situate in Cherington and Hargrave, in the county of Suffolk. A freehold messuage, &c. situate in Heggeset, otherwise Hessett, in the county of Suffolk, &c. All those copyhold lands, &c., situate in Hessett, in the county of Suffolk, and holden of (a) the manor of Rougham with the members. All those copyhold lands, &c., situate in Hargrave, in the county of Suffolk, and holden of (a) the manor of Hargrave. And all those copyhold lands, &c., situate in Hessett, in the county of Suffolk, and holden of (a) the manor of Heggesett or Hessett.

(The case then set forth several leasehold properties.)

[500] The said Robert Parker continued seised and possessed of the above real and leasehold properties respectively until and at the time of his death, and did not acquire any additional real or leasehold property in the interval. All the above real estates are mentioned or described in the will of the said Robert Parker hereinafter mentioned.

The said Robert Parker made his will, which was executed and attested so as to pass real estates by devise.

(a) Properly "within and parcel of."

(A copy of the will was then set forth, the material clauses of which are given in *Knight v. Selby* (a).)

The said Robert Parker made a codicil to his will. (A copy of the codicil was set out. The testator thereby bequeathed sums of money to different parties)).

The said Robert Parker died on the 27th day of March, 1837, without having revoked or altered his said will, except so far as the said will may have been revoked or altered by the said codicil, and without having revoked or altered the said codicil.

The executrix assented, without prejudice to any question of construction, to all such bequests as were made by the will, to the said Sir Timothy Shelley and Sir John Shelley Sidney.

The question upon the above case is—whether the leasehold properties hereinbefore mentioned, or any and which of them, passed under the said will to the Sir Timothy Shelley and Sir John Shelley Sidney.

The case was argued in last Hilary term (18th of January) by

Channell Serjt. (with whom was Stone) for the defendants. The leasehold property of which the testator was possessed, is comprised under the words “and all other my messuages, lands, tenements, and heredita-[501]-ments, which may not be herein particularly described or mentioned,” and passed therefore to the trustees. *Rose v. Bartlett* (Cro. Car. 292), which is a leading case upon this subject, will be mainly relied upon by the other side. It was there decided that “if a man hath lands in fee and lands for years, and demiseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years. And if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void.” The second part of this proposition has been acted upon, even beyond the letter; *Day v. Trig* (1 P. W. 286); but the first part, though it has been subject at various times to judicial criticism; *Lowther v. Cavendish* (Ambl. 356; 1 Eden, C. C. 99), *Addis v. Clement* (2 P. W. 456), *Turner v. Husler* (1 Bro. C. C. 78); has been upheld in other cases; *Knotsford v. Gardiner* (2 Atk. 450), *Chapman v. Hart* (1 Ves. sen. 271), *Thompson v. Lawley* (5 Ves. jun. 476; 2 Bos. & Pull. 303); and cannot, therefore, now be disputed. But the question is, whether the doctrine is to be carried further. Here the intention of the testator is clearly expressed, of disposing of his “messuages, lands, tenements, and real estate;” he then proceeds to dispose of his real estate nominatim, and after that he bequeaths all other his messuages, &c., not therein described. It cannot be supposed that he did not mean all his property, of whatever description, to pass under this devise; and the court will, if possible, give full effect to the intention of the testator; *Doe dem. Humphreys v. Roberts* (5 B. & Ald. 407). The clause “all other my messuages,” &c. will be wholly inoperative, unless it be held to refer to the leasehold property. The terms of the residuary bequest to the wife, of all “other [502] goods, chattels, and effects whatsoever,” including plate, linen, china, &c., might be sufficient, of themselves, to pass leaseholds; but they are less adapted to that purpose than the words of the clause referred to. It was held in *Lane v. Lord Stanhope* (6 T. R. 345), that under a devise of all the testator’s “manors, messuages, houses, farms, hereditaments, and real estate whatsoever,” a leasehold estate passed, the testator’s intention being clear from the whole tenor of the will.

The learned serjeant also referred to *Goodtitle dem. Paul v. Paul* (2 Burr. 1089), *Doe v. Williams* (1 H. Bl. 25), and 2 Powell on Devises by Jarman, cap. 8, p. 127, where most of the cases on the subject are collected.

Talfourd Serjt. (with whom was Morley) for the plaintiff (the executor of the testator’s widow). The leasehold property did not pass to the trustees. This case is governed by the rule in *Rose v. Bartlett*. Even the words “real estate” will not pass leaseholds; *Davis v. Gibbs* (3 P. W. 26), *Whitaker v. Ambler* (1 Eden, 151). The ordinary rule of construction must be applied to this will. The expression “my messuages, lands, &c., which may not be herein particularly described or mentioned,” has reference to some possible misdescription or omission of those he had enumerated, but certainly not to a distinct portion of his property, such as the leaseholds were. There was, in fact, a misdescription as to the real property, the case finding that the lands described by the will as “situate at Otford in the county of Kent” are in reality

(a) Ante, vol. iii. 92; 3 Scott, N. R. 409. See also *Parker v. Marchant*, 1 Y. & Coll., Chancery, 290.

situated in the parishes or hamlets of Otford or Kemsing, or one of them. The leaseholds are included in the residuary bequest to the wife, so that no part of the will is inoperative or inconsistent. The decision in [503] *Lane v. Lord Stanhope* proceeded upon the ground that the testator bequeathed his "farms"; and the land in dispute was a farm, partly leasehold, and partly freehold, and the whole of which had time out of mind been let to one tenant. *Pistol v. Richardson* (2 P. Wms. 459, n.), and *Watkins v. Lea* (6 Ves. 633), are also authorities that leaseholds do not pass under a devise like the present.

Channell Serjt. in reply. The words in *Davis v. Gibbs* and in *Whitaker v. Ambler* were clear and explicit, giving the whole of the personal estate (including leaseholds) to another devisee. But here, the leaseholds are not devised specifically to the widow; and the general bequest to her is restricted by the gifts which precede it.

Cur. adv. vult.

The following certificate was afterwards sent:—

"This case has been argued before us; and we are of opinion that neither of the leasehold properties therein mentioned, passed, under the testator's will, to Sir Timothy Shelley and Sir John Shelley Sidney.

"N. C. TINDAL

W. H. MAULE.

"T. ERSKINE.

C. CRESSWELL" (c).

[504] MATTHEW LYON v. WILLIAM HAYNES, JOHN HUNT, JAMES PICKFORD BLOOR, WILLIAM ECKERSLEY, JOHN HAIGH, ALLEN ROBINS, AND ALEXANDER OGILVIE. February 8, 1843.

[S. C. 6 Scott, N. R. 371.]

A. and B., C., and D., and others, carried on the business of bankers, under the provisions of the 7 Geo. 4, c. 46, for some years prior to and upon the 29th of August, 1839, upon the terms contained in two deeds of the 1st of July, 1834, and the 30th of August, 1836, the former deed stating the circumstances under which, and the manner in which, the company might be dissolved at an extraordinary general meeting of the shareholders, called for that purpose by a certain board of directors, of which B., C., and D. were members. In the company A. held 100 shares of 10l. each. The board called an extraordinary general meeting of the shareholders, to be holden on the 29th of August, 1839, pursuant to the provisions of the deed of 1834. At the meeting so called, the shareholders present passed resolutions, in conformity with the provisions of the deed of 1834,—that the company was thereby dissolved; that the winding up of its affairs should be entrusted to the then board of directors, with power to employ and pay for such assistance as might be necessary; that any three directors might act; that the assets should be realised with all convenient speed, and that the portion not required to meet the engagements of the company should be divided amongst the shareholders ratably, in such dividends as the directors might deem fit; a dividend to be declared at least once in every six months; a copy of the proceedings and resolutions to be transmitted to each shareholder; no transfer to parties not already shareholders to be permitted. No shareholder present at the meeting was desirous of continuing the concern. Neither A. nor B. was present at the meeting, but a copy of the state of the said proceedings and resolutions was transmitted to A. and the other shareholders.

(c) This certificate was confirmed, after argument, by Sir J. L. Knight-Bruce V. C. (March 7th).

But now by s. 26 of 1 Vict. c. 26, in wills made on or after the 1st of Jan. 1838, a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person, mentioned in his will, or otherwise described in a general manner, and any other general devise, which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

From the 29th of August, 1839, the business of the company, except so far as was necessary for winding up the affairs, was discontinued, and B. and C. and D., in pursuance of the said resolutions, proceeded to wind up the affairs of the company.—Held, that the company was duly dissolved, and that, notwithstanding the power to wind up the concern, an allegation in a declaration that the company had altogether ceased and determined, was correct.—Held, also, that the partnership having been dissolved, the shareholders present had no authority to pass resolutions binding those who were absent, and that such resolutions could only be considered as an agreement by and amongst the individual parties present, and did not support an allegation in a declaration that the agreement was by and between all the shareholders.—Held, also, that an allegation that B. and C. were allowed and permitted to realise, and were entrusted with, the assets of the company, by the other shareholders, was not supported by the facts.—Held, also, that the resolutions contained no contract upon which any right of action arose, even as between B., C., and D., and the other shareholders present at the meeting, or as between B., C., D., and A.—The directors of a dissolved joint-stock company who, at the request of the shareholders, undertook the winding up of the concern, were held not to contract at law with the shareholders for the due performance of the terms upon which the winding up of the concern was to take place.

Assumpsit. The first count of the declaration stated, that before the making of the defendants' promise, the plaintiffs and the defendants, and divers other [505] persons, being more than six, had for three years carried on together the business of bankers in England, with certain capital, and upon certain terms under and by virtue of, and according to, the provisions of the 7 Geo. 4, c. 46, and were called and known by the name of "The Northern and Central Bank of England;" that, according to certain of the said terms, the plaintiff, the defendants, and several other persons, whilst carrying on business together as aforesaid, were respectively holders of, and possessed, divers shares in the capital of the said bank, which capital was, during the same time, divided into shares of 10l. each, and, amongst others, the plaintiff was, during the same time, and from thence until the making of the promise thereafter mentioned, and the instalment or dividend thereafter mentioned being deemed fit and becoming due and payable, and from thence thitherto, the lawful holder of, and possessed of, divers, to wit, one hundred of the said shares in the said capital; that the plaintiff, the defendants, and the said other persons so carrying on business together and being such holders of shares as aforesaid, shortly before the making of the promise thereafter mentioned, to wit, on the 29th of August 1839, the said bank, and the said business and trade thereof, had been and were duly dissolved, and altogether ceased and determined; that the defendants, before and at the time of the said dissolution, had been and were shareholders as aforesaid in the said capital, and directors of the said bank, and afterwards, to wit, on, &c., a certain general meeting was held of the several persons shareholders in [506] the said capital of the said bank, and members thereof at the time of the said dissolution; that at the said meeting it was, amongst other things, agreed by and amongst the said shareholders and members that the assets of the said bank should be realised with all convenient speed, and that such portion of them as might not be required to meet the engagements of the said bank should be divided amongst the said shareholders ratably, and in proportion to the said shares respectively held by them as aforesaid, in such dividends as the directors might from time to time deem fit, a dividend to be declared at least once in every six months; that thereupon then, in consideration of the premises, and that the defendants, then being directors as aforesaid, were then, at the request of the defendants, allowed and permitted to realise, and were then entrusted with, the assets of the said bank by the said other shareholders of the said capital and members of the said bank, for reward to them, the defendants, in that behalf, the defendants then promised the said several shareholders and members respectively to realise the said assets with all convenient speed, and to divide such portion of them as might not be required to meet the engagements of the said bank, amongst the said shareholders ratably, and in proportion to the said shares respectively held by them, in such dividends as the defendants might from time to time deem fit; a dividend to be declared at least once in every six months.

First breach: that, although from the time of the said meeting the defendants

were allowed and permitted to realise, and were entrusted with, the said assets of the said bank, and although the defendants did afterwards, to wit, on the 27th of February 1840, realise a large amount, to wit, one half thereof, and although a large portion of that amount, amounting to a large sum, to wit, 300,000l., was not then, or at any subsequent time, [507] required or necessary to meet the engagements of the said bank, and the same portion was sufficient, when divided amongst the said shareholders according to the said agreement and promise, to allow to each shareholder an instalment or dividend of 10s. in respect of every one of the said shares respectively held by them, and although the defendants did, on, &c., deem fit that such an instalment or dividend of 10s. in respect of every one of the said shares so respectively held by each and every of the said shareholders should be paid to, and divided amongst, the said shareholders on, &c., and although the defendants were afterwards, to wit, on, &c., requested by the plaintiff, still being and continuing such shareholder as aforesaid, to pay him the said instalment or dividend due and payable in respect of the said shares so held by him as aforesaid, amounting in the whole to a large sum of money, to wit, 50l., according to the promise of the defendants, of all which premises the defendants afterwards, to wit, on, &c., had notice, yet the defendants did not nor would declare to or pay the plaintiff the said instalment or dividend, or any part thereof, but then and from thence thitherto neglected and refused so to do.

Second breach of the same promise: that although from the time of the said meeting, the defendants were so allowed and permitted to realise, and were entrusted with, the said assets as aforesaid, and although the defendants did afterwards, and after the expiration of the two first six months from the said agreement and promise, to wit, on the 27th of February 1840, realise a large amount, to wit, one half thereof, and although a large portion of that amount, amounting to a large sum, to wit, 300,000l., was not then, or at any subsequent time, required or necessary to meet the engagements of the said bank, and the same portion was sufficient, when divided amongst the said shareholders as aforesaid, to allow [508] to each said shareholder an instalment or dividend of 10s. in respect of every one of the said shares respectively held by him being so divided as aforesaid, and although the defendants did, in part performance of their said promise, within the two first six months after the said meeting and promise, deem fit to declare, and did declare, two instalments or dividends, according to their said promise; of all which premises the defendants afterwards, to wit, on, &c., had notice, yet the defendants did not nor would, within the third space of six months from the said agreement and promise, or at any other time afterwards, although the said space had elapsed long before the commencement of this suit, deem fit to declare or declare any instalment or dividend upon or in respect of the said shares as aforesaid, according to their said agreement and their said promise, but wholly neglected and refused so to do, by means whereof the plaintiff had lost, and been deprived of, the said instalment or dividend of 10s. in respect of every share held and possessed by him as aforesaid, which he might, and otherwise would, have been entitled to, and had been otherwise damnified.

The declaration also contained a count for money had and received.

The defendants pleaded, first (to the whole declaration), non assumpsit; secondly (to the first count), that the plaintiff was not the lawful holder, nor possessed, of the said shares in the said capital in the said first count mentioned or any of them, modo et formâ; concluding to the country; thirdly (to the first count), that the said bank and the said business thereof had not been nor was duly dissolved, nor had the said bank and the said business thereof ceased and determined, nor did the same cease or determine, concluding to the country; fourthly (to the first count), that it was not agreed by and amongst the said shareholders [509] and members at a general meeting of the said shareholders and members, modo et formâ; concluding to the country; fifthly (to the first count), that the defendants were not allowed or permitted to realise, nor were they entrusted with, the assets of the said bank, modo et formâ; concluding to the country; sixthly (to the first breach in the first count), that the defendants did not realise the said amount in the first count mentioned, or any part thereof, modo et formâ; concluding to the country; seventhly (to the first breach in the first count), that the said portion of the said amount so realised as in the first count in that behalf mentioned, was required and necessary to meet the said engagements of the said bank, and that there never was any portion of the said amount, not being required or necessary to meet the engagements of the said bank or company, which was sufficient when

divided, as in the first count mentioned, to allow to each shareholder such instalment or dividend as is in the first count in that behalf mentioned, *modo et formâ* ; concluding to the country ; eighthly (to the first breach in the first count), that the defendants did not deem fit that such an instalment or dividend should be paid and divided amongst the said shareholders, *modo et formâ* ; concluding to the country ; ninthly (to the said first breach), that the defendants had no notice of the said several premises, *modo et formâ* ; concluding to the country ; tenthly (to the said first breach), that the defendants did, on the 27th of February 1840, declare to, and pay, the plaintiff the said instalment and dividend ; concluding to the country ; eleventhly (to the second breach in the first count), that the defendants did not realise the amount in the said second breach in that behalf mentioned, or any part thereof, *modo et formâ* ; concluding to the country ; twelfthly (to the second breach in the first count), that the portion in the said second breach mentioned, of the said amount was [510] required and was necessary to meet the engagements of the said bank, and that there never was any portion of the said amount not being required and necessary to meet the said engagements, sufficient, when divided amongst the said shareholders as aforesaid, to allow to each shareholder such instalment or dividend as in the said second breach in that behalf mentioned ; concluding to the country ; thirteenthly (to the second breach), that the defendants had not notice of the several premises *modo et formâ* ; concluding to the country ; fourteenthly (to the second breach), that the defendants did, within the third space of six months in the second breach mentioned, and before the commencement of this suit, to wit, on the 31st of December 1840, deem fit to declare, and did declare, a certain instalment and dividend of 10s. upon and in respect of the said shares in the said bank ; concluding to the country ; fifteenthly (to the two last counts of the declaration), that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on, &c., the defendants paid to the plaintiff a large sum of money, to wit, the money in the two last counts of the declaration mentioned, in full satisfaction and discharge of all the causes of action in those counts mentioned, which the plaintiff then accepted and received of and from the defendants, in such full satisfaction and discharge of the causes of action in those counts mentioned. Verification.

The plaintiff took issue upon the last plea, and joined issue upon the other pleas.

At the trial a special verdict was found, which stated the following facts :—

“Divers persons, to the number of one hundred and upwards, after the passing of the 7th Geo. 4, c. 46, to wit, on the 1st July, 1834, commenced carrying on together, and from thence until the 29th of August, 1839, carried on together, and were then carrying on together [511] in partnership as a company, by virtue and in pursuance of the said act, the business of bankers in England, by the name and under the style of “The Northern and Central Bank of England,” with certain capital and upon certain terms contained in a deed of settlement of the said bank, bearing date the first of July, 1834, and a supplementary deed of settlement containing, amongst others, the clause following :—

“That if at any time hereafter it shall appear to the board of Manchester directors, that losses have been sustained or incurred by the company, not only to the whole amount of the fund hereinafter mentioned, called ‘The Reserved Surplus Fund,’ but also to the amount of one fourth part of the capital which, for the time being, shall have been actually advanced and paid up by the proprietors (and for the purposes of ascertaining the amount of such losses it shall not be necessary for the said board of directors to take into their calculation or account any rise or fall which may have taken place in the price of any of the parliamentary stocks or public funds of Great Britain or Ireland, in or upon which any part of the funds or moneys of the company may have been invested or placed, but such stocks or funds shall be calculated at the cost price), then the said board of directors shall, and they are hereby required to, call an extraordinary general meeting of the proprietors, for the purpose of taking into consideration the propriety of dissolving or continuing the company ; and the directors shall submit to such meeting a full and general statement of the affairs and concerns of the company ; and it shall thereupon be lawful for any one proprietor personally present at such meeting, in writing, to require that the company be dissolved ; and the company shall therefrom be dissolved accordingly, unless such a number of the proprietors personally present at the meeting as shall amongst them be entitled to two [512] thirds of the votes to be given at any ballot as aforesaid,

shall be desirous of continuing and carrying on the said concern, and shall then and there, in writing, undertake so to do, and to purchase the shares of the dissentient proprietors at the then value thereof, and to indemnify the dissentient proprietors against all future losses of the company and from the existing debts and engagements thereof, such value and the nature of such indemnity to be ascertained, in case of difference, by reference to arbitration, as hereinafter mentioned, and on such undertaking being given, the dissolution of the company shall be suspended for the space of sixty days next after such meeting ; and if within that time the purchase of the shares of the dissentient proprietors shall be completed in manner hereinafter expressed, then such dissolution shall not take place, and the purchase of the last-mentioned shares shall be considered as completed for the purposes of this provision whenever the said proprietors proposing to continue the company as aforesaid shall, by writing, having given notice to the dissentient proprietors that they are prepared to pay the purchase money for the said shares, on application by the parties entitled thereto for the same, at the banking-house of the company in Manchester, and shall, in accordance therewith, have actually paid the same to such of the parties as shall have applied for the same, or, in case of difference as to the amount of such purchase-money, shall have offered to refer the question of such amount to arbitration as aforesaid, and have proceeded in such arbitration, and have complied with the award made therein, or have been prevented from so doing by the neglect or default of the other party, and the company, as reduced or newly constituted from time to time, shall be liable to dissolution or to continuance from time to time, in like [513] manner, and under and subject to the same or the like regulations as aforesaid."

The deed of settlement also contained the clause following:—"That all the directors, trustees, public officers, local directors, and other officers, for the time being, of the company, shall be indemnified and saved harmless out of the funds, or property of the company, from and against all costs, charges, losses, damages, and expenses which they respectively shall or may sustain, pay, or incur in or about any action, suit, proceeding, or arbitration to be brought, commenced, carried, or prosecuted, defended, or entered into, by the order or direction of the board of Manchester directors, or in any wise relating thereto, respectively, or otherwise in or about the execution of their respective offices or trusts, except such costs, charges, losses, damages, and expenses, as shall happen by or through the wilful neglect or default of any such directors, trustees, public officers, local directors, or other officers respectively ; and that the directors, public officers, local directors, trustees, or other officers for the time being of the company, and each and every of them, their, and each and every of their heirs, executors, administrators, and assigns, shall be charged and chargeable only for so much money as they and every of them shall, respectively, actually receive by virtue of their respective offices or trusts, and that any one or more of them shall not be answerable, or accountable, for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but each of them for his own respective acts, receipts, neglects, and defaults only ; nor shall they or any of them be answerable or accountable for any person or persons who may be appointed by the said board of directors to be the collector or collectors of the rents, profits, or annual produce of the houses, estates, or other property, for the time being, of the company, or in [514] whose hands the same or any of the moneys of the company shall or may be deposited or lodged for safe custody, or for the insufficiency or deficiency of the title to any house, estates, or other property, which may from time to time be purchased by, or by the order of, the said board of directors, for or on behalf of the company, or for the insufficiency or deficiency of any security or securities in or upon which any of the moneys shall or may be placed out or invested by or by the order of the said board of directors, or for any misfortune, loss, or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, respectively, unless the same shall happen by or through their own wilful neglect or default respectively."

The capital of the bank and of the said persons so carrying on together the said trade or business of bankers, was, during all the time aforesaid, that is to say, from the time when the said trade or business was so as aforesaid commenced to be carried on until the day of the dissolution thereof as hereinafter mentioned, divided into divers shares of 10*l.* each ; and the plaintiff, before and at the time when the said bank and the said trade or business were so as aforesaid dissolved, was, and during all the time

hereafter mentioned continued to be, and yet is, the lawful holder of one hundred of the said shares.

The carrying on of the said trade or business before the said dissolution thereof, was superintended and managed by the directors of the company according to the terms of the deed of settlement, and the defendant William Smith, before and at the time of such dissolution, was the holder of divers of the said shares of the said capital, and managing director of the company, and the other defendants were then also respectively holders of divers of the said shares of the said capital, and respectively directors of the said company.

[515] The board of Manchester directors of the company, afterwards and upwards of fourteen days, and not more than twenty-one days, before the time for the holding of the general half-yearly meeting next hereinafter mentioned, to wit, on the 10th of August 1839, called a general half-yearly meeting of the proprietors of and in the company, in manner directed by the deeds of settlement, to be holden on the 29th of August in the year aforesaid; and because it appeared to the board of Manchester directors that losses had been sustained or incurred by the company, not only to the whole amount of the reserved surplus-fund mentioned in the deed of settlement, but also to the amount of one fourth part of the capital which had then actually been advanced and paid up by the proprietors of the said company, the said directors called an extraordinary general meeting of the proprietors of and in the said company, in manner in that behalf directed by the said deed of settlement, to be holden on the 29th of August in the year aforesaid. The said general half-yearly meeting of the proprietors of and in the said company was in due manner holden, to wit, at Manchester aforesaid, pursuant to the said call in that behalf. At this meeting divers shareholders of and in the company, to the number of one hundred and sixty, or thereabouts, in the whole, and including the defendants Haynes, Hunt, Boor, Smith, Eckersley, Robins, and Ogilvie attended, and were respectively present at, the said meeting: but neither the plaintiff, nor the defendant John Haigh, attended or was present thereat.

At that meeting a certain report of the said directors was openly read in the presence and hearing of the several persons so there present as aforesaid; which report was and is to the purport and effect following; that is to say,—

[516] “Report of the Directors of the Northern and Central Bank of England.

“William S. Stell, Chairman.

“William Haynes, Deputy Chairman.

“William Eckersley. Alexander Ogilvie.

“John Haigh. Allen Robins.

“John Hunt. William Smith.

“Manchester, 29th of August 1839.

“The shareholders of the Northern and Central Bank of England having been informed, by circular bearing date the 16th ult., of the circumstances under which the committee appointed at the general meeting of the 1st of May last, had assumed the office of directors, it simply remains that they should be put in possession of the result of the examination of the books and affairs of the company. In estimating the assets the directors have placed a value, as nearly as could possibly be ascertained, on each separate bill or other security, as well as on every balance of open account.

	£	s.	d.
“By the general balance-sheet, the amount appearing as the paid-up capital on 69,757 shares at 10l. is . . .	697,570	0	0
And the balance, at credit, of undivided profits . . .	133,927	4	4
Making the total . . .	831,497	4	4

[517] The actual assets of the company may, at the present time, be reported to consist of—

Cash on hand and on deposit at call in other banks . . .	74,060	8	10
Bankers' and other approved bills . . .	39,841	2	9
Real estate, mortgages, bills of exchange, bank-shares, and other securities, valued at . . .	142,077	17	9

Carry forward, . . . £255,979 9 4

	£	s.	d.
Brought forward,	255,979	9	4
Outstanding balances on open accounts, valued at	126,642	14	7
	382,622	3	11
From which must be deducted, for notes still in circulation and other liabilities of the company	8,433	11	1
Making a net sum of	374,188	12	10
Being at the rate of £5, 7s. 3d. per share on 69,757 shares, but leaving an estimated deficiency of	457,308	11	6

"From the care with which the valuations have been made, there is every reasonable ground for believing that the whole of the above sum of £374,188, 12s. 10d., will, by proper attention, be ultimately realised.

"The deficiency of £457,308, 12s. 10d. being, however, not only to the full extent of the surplus fund of £133,927, 4s. 4d., but of more than one-fourth of the paid-up capital of £697,570, there has remained no other course for the directors than, in conformity with the requirements of the deed of settlement, to convene an extraordinary general meeting of the shareholders, for the purpose of taking into consideration the propriety of dissolving or continuing the company. WILLIAM S. STELL, Chairman."

[518] The report of the directors having so as aforesaid been read at the said general half-yearly meeting, the said several shareholders of the said company then and there assembled did make and pass a certain resolution, to wit, "That the report so read as aforesaid be received, and entered on the book of proceedings, and that it be printed, and a copy sent to each shareholder."

Immediately after the holding of the said general half-yearly meeting of the said proprietors, that is to say, on the day and at the hour and at the place specified and fixed for the holding the said extraordinary general meeting of the proprietors, to wit, on the 29th of August, in the year last aforesaid at Manchester aforesaid, the said extraordinary general meeting of the proprietors of the company was, in due manner, holden, in pursuance of such call on the part of the said Manchester board of directors as aforesaid, and to the terms and provisions of the deeds; at which extraordinary general meeting such and the same parties and none other, attended and were present, as had so as aforesaid attended, and been present, at the said general half-yearly meeting. At the said extraordinary general meeting so then and there holden as aforesaid, the said report of the directors, and the said resolutions so made and passed at the said general half-yearly meeting as aforesaid, were then and there, in the presence and hearing of the persons so then and there present as aforesaid, openly read; and the directors of the company did then and there submit to the said extraordinary general meeting and to the several persons then and there present, a full and general statement of the affairs and concerns of the company, whereby it appeared, and was the fact, that losses had been sustained and incurred by the company, not only to the whole amount of the reserved surplus-fund in the deed of settlement mentioned, but also to the amount of the one-fourth part of the capital actually advanced and paid [519] up by the proprietors of the company; and thereupon one John Hazledine then and there, being a holder of divers shares in the said company, did, in the presence of the said persons so then and there present, deliver a notice in writing to the chairman at the said extraordinary general meeting, thereby requiring that the said company should be dissolved, which said notice was thereupon then and there openly read; whereupon it was then and there resolved by the several persons then and there present,—first, that in conformity with the said requisition of the said John Hazledine, the said company was thereby dissolved; secondly, that the winding up of the affairs of the company should be entrusted to the then present board of directors, with power to them to employ, and pay for, such assistance as might be necessary for that purpose, and that any three of them should be empowered to act as a quorum; thirdly, that the assets of the company should be realised with all convenient speed, and that such portion of them as might not be required to meet the engagements of the company, should be divided amongst the shareholders rateably, and in proportion to the shares respectively held by them, in such dividends as the directors might, from time to time, deem fit, a

dividend to be declared at least once in every six months; fourthly, that a copy of the said proceedings and resolutions at the said extraordinary general meeting should be transmitted to each shareholder, and that thenceforth no transfer of shares, to parties not already shareholders, should be permitted.

No number whatever of proprietors personally present at the said meeting was desirous of continuing and carrying on the said concern, or did in writing undertake so to do. A copy of the said proceedings and resolutions, as well of and at the said general half-yearly meeting as of and at the extraordinary general meeting, [520] was in due manner transmitted to the plaintiff and to other the shareholders of and in the company; and the said trade or business so theretofore carried on as aforesaid by the company, on and from the said 29th of August 1839, was, and thence hitherto hath been, wholly discontinued, save and except so far as was absolutely necessary for the purpose of winding up the affairs of the company.

The defendants, so being such directors as aforesaid, thereupon, in pursuance, and by virtue, of the said resolutions at the said extraordinary general meeting as aforesaid, did proceed to the winding up of the affairs of the company, and were, by the other shareholders of the said capital and members of the said company, permitted to proceed in realising, and did in fact proceed in realising, the assets of the said company with all convenient speed, and within six months next after the passing of the said resolution for the dissolution of the company, to wit, on the 1st of October 1839, found, and the fact was, that they had sufficient cash in hand belonging to the company to repay the proprietors thereof 1l. per share on 69,757 shares in the company, and the defendants, being such directors as aforesaid, thereupon afterwards, to wit, on the day and year last aforesaid, gave and sent to the plaintiff and other the shareholders of and in the company, a certain notice, to the purport and effect following (that is to say);

“Northern and Central Bank of England.

“First Instalment, 1l. share.

“Manchester, 1st of October 1839.

“Notice is hereby given, that the first instalment, at the rate of 1l. per share, out of the capital stock of the above company, is now payable to the proprietors thereof, at their office in Brown Street, in pursuance of the resolutions passed at the extraordinary general meeting held [521] on Thursday, the 29th of August, for dissolving the company and dividing the assets.

“The scrip-certificate must be produced, and the payment of each instalment will be noted thereon.

“The amounts due to proprietors residing at a distance will be paid to any party applying personally for the same, on the production of the certificate and the annexed order filled up and signed by such proprietor.

“By order of the Board of Directors,

“WILLIAM SMITH, Managing Director.

“Not transferable.

“[Insert place of residence],

1839.

“To the Directors of the Northern and Central Bank of England.

“Gentlemen,—You will please to honour the drafts of _____ for the sum of _____, being the first instalment of 1l. per share on _____ shares held by me in the above company.”

The plaintiff, on the same day and year aforesaid, received of and from the defendants payment of the instalment therein mentioned; and afterwards, to wit, on the _____ day of November in the year last aforesaid, it was arranged and agreed, between the directors of a certain other banking company in Manchester called the Alliance Bank, that for and in consideration of a certain annual payment to be in that behalf made by the Northern and Central Bank of England to the Alliance Bank, the last-mentioned company should undertake the winding up of the affairs of the said Northern and Central Bank of England; whereupon, and from which time, the remaining business of the said Northern and Central Bank of England necessary for the purpose of [522] winding up the affairs thereof, was transferred to the Alliance Bank.

The Alliance Bank consisted principally of persons who had been members of the Northern and Central Bank of England; and it was part of the arrangement and agreement so entered into between the directors of the respective companies, that every person holding five shares in the Northern and Central Bank of England should, on transferring the same at the nominal price of 5l. each, be entitled to be admitted a holder of one share of 25l. in the Alliance Bank. The defendant Smith shortly afterwards became, and yet is, a shareholder in, and managing director of, the last-mentioned company, and, as such managing director, entitled to an annual salary, and the defendants Hunt and Ogilvie shortly afterwards became, and yet are, respectively, shareholders in, and directors of, the said company, and the defendants Haynes, Haigh, and Robins shortly afterwards became, and yet are, respectively, shareholders in, but not directors of, the last-mentioned company. Neither Bloor nor Eckersley was or is director of, or a shareholder in, the said company.

On the 30th of December 1839 the defendants, so being such directors as aforesaid, found, and the fact was, that the cash in hand belonging to the company of the proprietors of the Northern and Central Bank of England then amounted to the sum of 64,925l., without making any deduction for the debts then owing by the said company, and which then amounted to about 8000l., and that the number of shares standing in the books of the company was 61,705; and the defendants, being such directors as aforesaid, then resolved that the sum of 1l. per share, being the second instalment, should be paid to the proprietors of the company on the first of January then next; and the defendants, so being such directors as aforesaid, thereupon afterwards, to wit, on [523] the said 1st of January 1840, gave and sent to the plaintiff and to other the shareholders of and in the company, notice that the second instalment, at the rate of 1l. per share out of the capital stock of the company of proprietors of the Northern and Central Bank of England, was then payable to the proprietors thereof, at the Alliance Bank in Manchester, and which notice was and is, in all other respects, to the same purport and effect as the said other notice lastly above mentioned. The plaintiff afterwards, to wit, on the day and year aforesaid, received of and from the defendants, payment of the said second instalment of 1l. per share therein mentioned. On the 24th of February 1840, the directors, at a certain meeting of the board of directors then and there held, after taking into consideration the half-yearly report, which they intended to issue to the shareholders, and also the draft of a deed of indemnity, which the solicitor of the defendants had, by their directions, prepared, did then and there resolve that the said report and indemnity should be adopted and printed for circulation amongst the shareholders, and did also resolve, and the fact was, that the cash in hand belonging to the company then amounted to the sum of 22,311l. 0s. 3d., and that a certain bank, called the Phoenix Bank, owed the company the sum of 7800l., which would be payable on the 3rd of March then next, which sums, with a bill of one Thomas Jackson, payable on the 3rd of May then next, for the sum of 762l. 6s. 6d. would be sufficient to pay 10s. per share on 61,685 shares; and thereupon the said defendants, so being such directors, resolved that a third instalment of 10s. per share should be paid to such of the proprietors as should execute the deed of indemnity therein and hereinafter mentioned. The defendants, so being such directors as aforesaid, afterwards, to wit, on the 27th of February 1840, gave and sent to the plaintiff [524] and to other the shareholders of and in the company a certain printed statement or report, which was and is to the purport or effect following; that is to say,—

“Northern and Central Bank of England.

“Manchester, 27th of February 1840.

“Directors.

“William Haynes, Chairman.

“John Hunt, Deputy Chairman.

“James Pickford Bloor. Alexander Ogilvie.

“William Eckersley. Allen Robins.

“John Haigh. William Smith.

“The resolutions passed at the extraordinary general meeting, held on the 29th August 1839, for dissolving the Northern and Central Bank, and providing for the

realisation and distribution of the assets, having superseded the necessity of again convening the shareholders, the board of directors have merely to make the following half-yearly report of their proceedings.

"Amongst the first steps towards bringing the affairs into smaller compass, they felt it their duty to call upon those shareholders who were indebted to the bank to pay up their balances, and in cases of default the directors proceeded (by virtue of the powers conferred by the deed of settlement) to forfeit the shares of the parties at the market price of the day, placing the proceeds towards the liquidation of their respective accounts. The number of shares has been consequently reduced from 69,757, as given in the last report, to 61,685.

"On the 1st October 1839 the directors declared a first instalment of 1l. per share out of the capital stock of the company.

"On the 31st December 1839 the estimated assets, after [525] deducting the expenses of the establishment to that date, were as follows:—

	£	s.	d.
"Cash at interest in various banks	67,901	3	11
Real estate, mortgages, bills of exchange, bank and railway shares, and other securities, valued at	80,852	0	0
Outstanding balances in open accounts, valued at	123,577	19	0
	272,331	2	11
From which must be deducted, for notes still in circulation, legal expenses, and other liabilities of the company	7,965	15	5
	£264,365	7	6

"These valuations having been made with great care, and after further acquaintance with the circumstances of the several accounts, the shareholders will be gratified to observe that the prospects held out in the report of the 29th of August as to the ultimate result, have been substantially borne out.

"On the 1st of January last the directors declared a second instalment of 1l. per share out of the capital stock of the company.

"In consequence of the large interest held by the Alliance Bank in the assets of the Northern and Central Bank of England, the directors have thought it desirable to conclude an arrangement with that establishment for securing, at a defined expense, the most efficient assistance in the liquidation of the affairs of the company. As the basis of remuneration the two boards have [526] assumed the minimum annual amount at which such liquidation could have been conducted as a separate establishment; and the sum of 2000l. has been fixed as an equivalent for the salaries of the managing director, clerks, and other servants, rent, taxes, coals, and stationery, and, in short, every other incidental expense except travelling and law charges.

"The directors are sorry to announce that they have received notice of contemplated proceedings in equity by certain parties, for the recovery of principal and premium paid on shares allotted in the latter part of 1836, on the ground, as they allege, of the subsequently ascertained condition of the bank. The directors refrain from giving an opinion as to the merits of the question in a public report; but they are satisfied that they will receive the cordial concurrence of the shareholders at large in a strenuous resistance to all such proceedings.

"The directors are happy to be enabled to declare a further instalment of 10s. per share out of the capital stock of the company; and while they appeal to the fact of their having within the first six months since the dissolution of the company, distributed to the shareholders what may be estimated as a moiety of the net amount to be eventually realised, as the best evidence of their anxiety to throw no obstacle in the way of a speedy termination of their trust, they feel it a duty which they owe to themselves (particularly with reference to the proceedings above noticed) to require such an indemnity from the shareholders as is contemplated by the deed of settlement, and as will suggest itself to the unbiassed judgment of all parties concerned.

"For the information of the shareholders a copy is hereto annexed of the document, to which the directors have been advised to require the signature of each individual shareholder on receipt of the present instalment.

"WILLIAM HAYNES, Chairman."

[527] A printed paper, purporting to be the draft or copy of a deed of indemnity, was annexed to the last-mentioned statement or report at the time when the same was so sent and given to the plaintiff and other the shareholders, and was therewith in fact sent to the plaintiff and other the shareholders, which printed paper was and is of the purport and to the effect following; that is to say,

"This indenture, made the 27th day of February 1840, between the several persons whose names and seals are subscribed and affixed to these presents, being respectively holders of the shares set opposite their respective names in the same schedule, in the joint-stock banking company established at Manchester in the county of Lancaster, called the Northern and Central Bank of England, of the first part, and William Haynes, John Hunt, James Pickford Bloor, William Eckersley, John Haigh, Alexander Ogilvie, Allen Robins, and William Smith, being the present directors of the said company, of the second part: Whereas on or about the 29th day of August 1839 the proprietors of the said bank, in due form of law, came to a resolution to dissolve the said company and wind up and close the affairs thereof, and that the net assets of the same, after discharging all the charges and obligations thereof, should be returned to, and equally divided among, the shareholders, so far as such assets would extend, in the nature of a dividend on their respective shares in the capital of the said company: And whereas the said directors, in pursuance of such resolution, proceeded to realise the assets and discharge the obligations of the said company, and out of the net assets thereof did, on or about the 1st of October and the 1st of January now last past, respectively pay unto the respective shareholders two several dividends of 1l. and 1l. upon each share: And whereas since the payment of such last-mentioned dividend the directors [528] of the said company have realised further assets thereof, and have now in their hands funds sufficient, if applied for that purpose, to pay to the shareholders a further dividend of 10s. per share: And whereas various claims and demands have recently been made, and actions and suits at law and in equity threatened to be commenced and prosecuted against the directors, parties hereto, or against the company or the public registered officers thereof, in respect of the transactions of the said company or the said directors on behalf of the same, and the said directors are advised to retain the said funds and assets so being in their hands, for and towards their indemnity and reimbursement against and in respect of such claims, demands, actions, and suits, and the damages, costs, and expenses which may be recovered and levied or enforced from and against them and the said company by reason or means thereof; but the said directors being desirous, instead of so retaining the said funds, to apply the same, so far as they safely can, in making and paying a further dividend of 10s. per share to the shareholders of the said company, as before mentioned, have consented and agreed to apply the said funds in payment of such dividends to such of the shareholders as shall become parties to, and execute, these presents, and give and execute to them the said parties hereto of the second part such covenants, protection, and indemnity, as in these presents are contained: Now this indenture witnesseth, that in consideration of the premises, and more especially in consideration of the respective dividends, or sums of 10s. per share, paid by the said directors, at or before the execution of these presents, unto the several shareholders, parties hereto of the first part, upon or according to the number of shares of which each such party is or are a proprietor or proprietors, they the said several shareholders, parties hereto of the first part, do hereby jointly, for themselves, [529] their heirs, executors, and administrators, and every two jointly, and every greater number than two respectively jointly, do for themselves, their heirs, executors, and administrators, and each and every of them, the said several persons parties hereto of the first part, doth hereby for himself and herself separately, and his or her heirs, executors, and administrators, covenant with the said several persons parties hereto of the second part, their executors and administrators, and with every of them separately, his executors and administrators, that they the said parties hereto of the first part, their heirs, executors, and administrators, or some one of them, shall and will from time to time, and at all times hereafter, well and effectually defend, save harmless, and keep indemnified, the said directors,—parties hereto of the second part,—their heirs, executors, administrators, and assigns, and each and every of them, and his heirs, executors, administrators, and assigns, and their and every of their estates and effects, and all and every other persons and person who may hereafter become directors or a director of the said company, their and his heirs, executors, and administrators, and assigns, and every of them, their and every of their estates

and effects, and all the officers of the said company and every of them, and their and every of their heirs, executors, and administrators, of, from, and against all and all manner of actions, suits, attachments, and other proceedings whatsoever, either at law or in equity, which have already been, or may hereafter be, had, commenced, prosecuted, brought, or sued out, against, and all and all manner of costs, charges, losses, damages, and expenses, which may be paid, incurred, or sustained, by the said directors, parties hereto, or any of them, their or any of their heirs, executors, or administrators, or any future directors of the said banking company, or any one, two, or more of them, their or [530] any one, two, or more of their heirs, executors, or administrators, or any officer of the said company, or the heirs, executors, or administrators of any such officers, for or on account or in respect or by reason of the application of the assets now in hand, or any part thereof, in or towards payment of the aforesaid dividend of 10s. per share, or for, or on account, or in respect, or by reason of the past or present management, transactions, dealings, operations, acts, or deeds of or in or about or concerning the affairs, accounts, or business of the said banking company, or for or on account or in respect of any matter or thing whatsoever in anywise relating to the premises: And whereas it may frequently be necessary to transmit these presents to various places for execution by shareholders or for other purposes, and in order to guard against the consequences of loss or destruction of these presents, it has been deemed expedient that two parts thereof (duplicates of each other) should be prepared and executed, and inasmuch as many of the persons who shall execute one part of these presents may not execute the other part, it has also been thought expedient that two parts thereof (duplicates of each other) should be prepared and executed; and inasmuch as many of the persons who shall execute one part of these presents, may not execute the other part, it has also been thought expedient, in order to preserve conformity between the two, that each shareholder, a party to these presents of the first part, who shall personally execute one part of these presents, shall empower some one or more person or persons as the attorney or attorneys of him, her, or them, to sign, seal, and deliver the other part of these presents: Now, therefore, this indenture also witnesseth, that for effectuating the purposes last aforesaid, each of the shareholders, parties hereto of the first part, personally executing one part of these presents, doth hereby make, [531] ordain, constitute, and appoint John Farrer, gentleman, who is one of the present cashiers of the said banking company, and James Drew of Manchester, gentleman, who is one of the present clerks of the Alliance Bank, and also such other person as shall for the time being be the acting cashier of the said company, severally and any of them separately, the lawful attorneys and attorney of him or her the shareholder so executing one part of this deed as aforesaid, for and in the name, and as the act and deed of him or her and either jointly or severally, to sign, seal, deliver, and execute the duplicate or counterpart of this present deed, each such constituent respectively hereby declaring that every duplicate or counterpart of this deed so executed by his or her said attorney or attorneys as aforesaid shall be of the like force and effect as if executed by him or her, each such constituent hereby agreeing to ratify and confirm all and whatsoever such attorney or attorneys shall lawfully do in the premises by virtue of this present power. In witness, &c."

The above written indenture was signed, sealed, and delivered, on parchment duly stamped, by the several persons parties thereto, in the presence of the several persons whose names are respectively written on the dexter side of the respective signatures of the parties so executing.

The schedule to the above written indenture:—

Name of each Proprietor.	Number of each Proprietor's Share.	Signature of Proprietors.	L. s.	Witnesses' Signature.

The defendants, so being such directors as aforesaid, at the time of so sending and giving to the plaintiff and [532] other the shareholders, such statement or report and such printed paper annexed thereto as aforesaid, did also annex to the said state-

ment or report a certain notice which was and is to the purport following, that is to say :—

“Northern and Central Bank of England.

“Third Instalment, 10s. per share.

“Manchester, 27th February, 1840.

“Notice is hereby given that a third instalment, being at the rate of 10s. per share out of the capital stock of the above company, is now payable to the proprietors thereof at the Alliance Bank, at, &c., in pursuance of the resolutions passed at the extraordinary general meeting held on Thursday the 29th of August, 1839, for dissolving the company and dividing the assets.

“The scrip certificate must be produced, and the payment of the instalment will be noted thereon. In consequence of the necessity which exists for requiring the signature of each proprietor to the deed of indemnity previous to receiving the instalment, the directors are obliged in the present instance to omit the order which has hitherto been annexed for the convenience of distant shareholders, but it is intended to transmit the deed together with the instalment to the several towns where any number of shareholders reside, and of which due notice will be given.

“By order of the Board of Directors.”

The affairs of the company before and at the time of the said dissolution thereof were and thence continually had been greatly involved and embarrassed, and the company, and the defendants as such directors as aforesaid, for and on behalf of the company, respectively entered into divers covenants and agreements, and had [533] thereby subjected themselves to divers liabilities to a much greater amount in the whole than the amount of all the assets of the company by them the defendants ever realised, and which liabilities at the time of giving and sending the said statement or report, bearing date the 27th of February, 1840, were and continued and thence had continued and still were outstanding and undischarged, and legal proceedings had shortly before the time of giving and sending the last-mentioned notice or statement, been threatened to be commenced against the company and the defendants as such directors as aforesaid in respect thereof; and thereupon the defendants had just before the giving and sending the last-mentioned statement or report determined not to make or pay the said third instalment or dividend, to wit, of 10s. per share, unless the shareholders of and in the company would execute a deed of indemnity to such purport or effect as the printed paper so annexed to the said statement or report, and had thereupon caused such deed of indemnity thereinbefore mentioned,—and which was to such purport and effect as the said printed paper,—to be, and the same was, accordingly prepared and ingrossed, and was, to wit, on the day and year last aforesaid, and thenceforth had been, ready to be executed by the said several shareholders, and was, in fact, thereupon in due manner executed by divers of the shareholders of and in the company, and the last-mentioned instalment or sum of 10s. per share was in due manner paid by the defendants to such of the shareholders as executed the deed of indemnity, and the defendants were, on and from the day and year last aforesaid, ready and willing to pay the same to all and every other the shareholders of and in the said company upon their executing such deed of indemnity; of all which premises the plaintiff during all the time aforesaid had notice. The plaintiff so being such shareholder as aforesaid, after the giving and send-[534]-ing to him of the said statement or report, bearing date the day and year last aforesaid, together with the said printed paper and notice thereunto annexed as aforesaid, to wit, on the 16th of November 1840, caused a certain paper writing, signed with his hand, to be delivered to the defendant William Smith, which said paper writing was and is to the purport and effect following; that is to say,

“To William Smith, Esquire, the managing director, and to the other directors of the Northern and Central Bank of England: I hereby demand payment from you of the two instalments of 10s. each, upon the shares held by me in the above bank, which instalments you have admitted to be ready for each shareholder, but which you refuse to pay to me unless I execute a certain deed of indemnity required by you; which I decline to do, being advised that I am improperly required to sign it. And I hereby give you notice, that I am prepared and ready to give you a valid discharge

for the amount of the said instalments, and that I shall require interest to be paid on the amount thereof for the time the same have been illegally withheld, and that interest will also be required by me from the date of this demand."

The plaintiff hath always hitherto refused to execute the deed of indemnity, and the defendants, so being such directors as aforesaid, have always hitherto refused to permit the last-mentioned instalment or sum of 10s. per share mentioned in the said statement and notice, bearing date the 27th of February 1840, to be paid to the plaintiff, or to other the shareholders, until he and they should respectively execute the said deed.

The special verdict concluded in the usual form, with the finding of the jury upon each issue subject to the opinion of the court.

The case was argued in Michaelmas term last by Bompas Serjt. (with whom was Starkie and Crompton) for [535] the plaintiff, and by Sir T. Wilde Serjt. (with whom were Channell Serjt. and John Henderson) for the defendants; but it has not been thought necessary to report their arguments, as they are fully adverted to in the judgment pronounced by the court.

Cur. adv. vult.

TINDAL C. J., now delivered the judgment of the court. This was an action of assumpsit, brought by Matthew Lyon against William Haynes and seven other defendants. The first count of the declaration, in substance, alleged that the plaintiff and defendants and others had, for three years, carried on the business of bankers under the provisions of the statute 7 G. 4, c. 46, by the name of The Northern and Central Bank of England, and that the plaintiff was the holder of 100 shares in the capital of the said bank, of 10l. each; that shortly before the making of the promise thereafter mentioned, the bank or company and the business thereof were duly dissolved and altogether ceased and determined; that the defendants were shareholders and directors of the company; and that at a general meeting of the shareholders, at the time of the dissolution, it was agreed by and amongst the shareholders that the assets of the said bank or company should be realised with all convenient speed, and that such portion of them as might not be required to meet the engagements of the said bank or company should be divided amongst the said shareholders ratably and in proportion to the shares respectively held by them in such dividends as the directors might from time to time deem fit, a dividend to be declared at least once in every six months. The declaration then proceeded to allege that thereupon and in consideration that the defendants were allowed and permitted to realise, and were then intrusted with, the assets of the company by the other shareholders, for [536] reward to them the defendants in that behalf, they the defendants promised the several shareholders to realise the said assets with all convenient speed, and to divide such portion of them as might not be required to meet the engagements of the company, amongst the shareholders ratably and in proportion to the shares respectively held by them in such dividends, as they the defendants might from time to time deem fit, a dividend to be declared at least once in every six months. The declaration then proceeded to aver that although the defendants were allowed to realise, and were intrusted with, the assets of the company, and although they did realise a large sum of money, of which a large portion was not required or necessary to meet the engagements of the said bank or company, and which portion was sufficient when divided amongst the shareholders to allow to each shareholder a dividend of 10s. for each share, and although the defendants did deem fit that such dividend of 10s. for each share should be paid to each shareholder, and although they were requested by the plaintiff to pay him the dividend on the shares so held by him, yet that the defendants would not declare or pay to the plaintiff the said dividend or any part thereof. The declaration then proceeded to assign a second breach of the defendant's promise by alleging that although the defendants were so allowed to realise, and were intrusted with, the assets of the company, and although they did, after the expiration of the two first six months from the agreement and promise, realise a large amount, of which a large portion was not required or necessary to meet the engagements of the said bank, and which was sufficient when divided among the shareholders to allow to each shareholder a dividend of 10s. for each share, and although the defendants in part performance of their promise did within the two first six months after the said meeting and promise deem fit [537] to declare, and did declare two dividends according to their promise, yet they did not within the third space of six months or at any other time afterwards, although the

time had long elapsed before the commencement of the suit, deem fit to declare, or declare any dividend in respect of the said shares whereby the plaintiff had lost the dividend of 10s. for every share so held by him as aforesaid. The declaration also contained counts for money had and received, and on an account stated.

The defendants pleaded—first, to the whole declaration *non assumpsit*; secondly, to the first count, that the plaintiff was not the lawful owner of shares, as alleged; thirdly, also to the first count, that the bank or company and the business or trade thereof, had not been nor was duly dissolved, nor had the said bank or company, and the business or trade thereof, ceased or determined, nor did the same cease and determine, *modo et formâ*; fourthly, also, to the first count, that it was not agreed by and amongst the shareholders, *modo et formâ*, &c.; fifthly, also to the first count, that the defendants were not allowed to realise, nor were they intrusted with, the assets of the company, *modo et formâ*, &c.; sixthly, to the first breach of the first count, that the defendants did not realise the amount in that count mentioned; seventhly, also to the first breach of the first count, that the portion of the amount so realised, as in that count mentioned, was required and necessary to meet the said engagements of the said bank or company, and that there never was any portion of the said amount, not being so required or necessary, which was sufficient when divided, as in the first count mentioned, to allow each shareholder such dividend as in the first count mentioned: eighthly, also to the first breach of the first count, that the defendants did not deem fit that such dividend should be paid and divided amongst the shareholders, *modo et formâ*; ninthly, also, to the same [538] first breach, that the defendants had no notice of the several premises, *modo et formâ*; tenthly, also to the same first breach, that the defendants did declare and pay to the said plaintiff the said dividend; eleventhly, to the second breach in the first count, that the defendants did not realise the amount in the breach mentioned, *modo et formâ*; twelfthly, also to the second breach, a plea like that secondly pleaded to the first breach; thirteenthly, also to the second breach, that the defendants had no notice, *modo et formâ*; fourteenthly, also to the second breach, that the defendants did within the said third space of six months, deem fit to declare, and did declare, a dividend of 10s. in respect of the shares in the bank; fifteenthly, to the last two counts of the declaration, payment in full satisfaction and discharge, &c.

The plaintiff by his replication traversed the allegation in the last plea, upon which issue was joined, and joined issue on all the other pleas.

Upon the trial a special verdict was found by the jury; and we have been called upon to decide how the finding upon the several issues is to be entered.

Upon the argument it was contended on the part of the plaintiff that, upon the facts found by the special verdict, he was entitled to have the verdict on all the issues entered for him. On the part of the defendant it was admitted that the plaintiff was entitled to have the verdict entered for him on the second and sixth, tenth and eleventh and fifteenth issues; but it was contended that the rest, either in part or altogether, ought to be entered for the defendants. In order to determine this case, therefore, it will be necessary to consider the several disputed issues in connection with the facts applicable to each as found by the special verdict; but as the decision upon the first issue must depend upon the result of the argument upon some of the other issues, it [539] will render the explanation of our judgment more distinct if we postpone the consideration of the first issue at present.

Under this arrangement the third issue will be the first in order for discussion, and that is, whether the bank or company had been duly dissolved, and the business or trade thereof had altogether ceased and determined. Upon reference to the special verdict, it appears that the company had, for some years prior to and up to and upon the 29th of August 1839, carried on the trade and business of bankers under the provisions of the 7 G. 4, c. 46, upon the terms and conditions contained in two deeds of settlement, dated respectively the 1st of July 1834, and 30th of August 1836, and after setting out those provisions of the first deed of settlement, wherein are contained the circumstances under which, and the manner in which, the bank and company might be dissolved at an extraordinary general meeting of the shareholders called for that purpose by the Manchester board of directors, the special verdict proceeds to state in detail the calling of an extraordinary general meeting by the Manchester directors, pursuant to these provisions of the deed of settlement; the meeting of the shareholders on the 29th of August, in pursuance of such call; circumstances which, according to the provisions of the deed, authorised the shareholders present at the

meeting to dissolve the company; and the adoption at that meeting of those steps which were prescribed by the deed of settlement, as the means of effecting the dissolution; and afterwards, in terms, finds that it was at that meeting resolved by the several persons present—first, that in conformity with the said requisition of the said John Hazledine, the said company was thereby dissolved; secondly, that the winding up of the affairs of the company should be intrusted to the then present board of directors, with power to them to employ and [540] pay for such assistance as might be necessary for that purpose, and that any three of them should be empowered to act as a quorum; thirdly, that the assets of the company should be realised with all convenient speed, and that such portion of them as might not be required to meet the engagements of the company, should be divided amongst the shareholders, ratably and in proportion to the shares respectively held by them, in such dividends as the directors might, from time to time, deem fit; a dividend to be declared at least once in every six months: fourthly, that a copy of the said proceedings and resolutions at the said extraordinary general meeting should be transmitted to each shareholder, and that thenceforth no transfer of shares to parties not already shareholders should be permitted. The special verdict then proceeds to state, that no number whatever of proprietors personally present at the said meeting, was desirous of continuing and carrying on the said concern, or did in writing undertake so to do; that a copy of the said proceedings and resolutions, as well of the general half-yearly meeting as of the extraordinary general meeting, was, in due manner, transmitted to the plaintiff and other the shareholders of the company, and that the said trade or business so theretofore carried on as aforesaid by the said company, on and from the said 29th of August 1839, was and thence hitherto had been wholly discontinued, save and except so far as was absolutely necessary for the winding up of the affairs of the said company; and that the defendants, so being such directors as aforesaid, thereupon, in pursuance and by virtue of the said resolutions at the extraordinary general meeting as aforesaid, did proceed to the winding up of the affairs of the said company.

Upon the argument it was contended on the part of the defendants, that although by the resolutions passed at the extraordinary general meeting, it was resolved [541] that the company should be dissolved, yet as the winding up of the affairs of the company had been intrusted to the defendants as the directors of the company, and as for that purpose it would be necessary, partially at least, to continue the business, and as the jury had qualified their finding that the trade and business of the company had been discontinued, the allegation in the declaration that the business and trade of the company had altogether ceased and determined was not made out, and therefore that the third issue ought to be found for the defendants.

But we are of opinion that the company was duly dissolved according to the provisions of the deed of settlement, and that it had altogether ceased and determined according to the meaning of the allegation in the declaration; for we think that averment must be taken to mean that the plaintiffs and defendants, and the other shareholders, had ceased to carry on the business as partners. The object of that averment was obviously to clear the way for the statement of the agreement and promise that follow, which could have afforded the plaintiff no ground for an action at law if the partnership had continued. Now although for the purpose of making good their engagements with third persons, the partnership in this, as in all other cases, must subsist, notwithstanding a formal dissolution, yet it subsists for no other purpose; and the object of the resolution was, to place in the hands of a few the powers necessary for realising the assets, and discharging the engagements, of the former partnership, which otherwise the shareholders, as tenants in common of the partnership securities, must have exercised for themselves. Whether such powers were legally conferred by that resolution, forms no part of the inquiry on the issue now under consideration. We therefore are of opinion that the third issue must be found for the plaintiff.

[542] The fourth issue is, whether, at the time of the dissolution, it was agreed by and amongst the shareholders and members of the company, that the assets should be realised and divided as alleged in the declaration, and upon this issue two points have been raised by the defendants. First, it is said that the facts stated in the special verdict do not shew, that any such agreement was made by and between the shareholders present at the time of dissolution; and, secondly, that the declara-

tion must be taken to aver that it was agreed at that time by and amongst all the shareholders; whereas by the finding of the jury it nowhere appears that all the shareholders were present, or that those who were present had authority to bind the absentees; but on the contrary it is expressly found that neither the plaintiff nor the defendant Haigh, who were both shareholders, were present on that occasion, and there is no allegation that they had authorised any one to make any such agreement for them. On the part of the plaintiff it was answered that the subsequent conduct of the plaintiff and the defendant Haigh, as found by the jury, would be sufficient to shew either a previous authority given, or, what would amount to the same thing, an adoption by them of the agreement afterwards, without entering into the question whether the facts stated in the special verdict would be sufficient to warrant the conclusion contended for.

It is enough to say that the conclusion is not a conclusion at law, but a conclusion of fact, which the jury have not drawn, and which the court cannot draw for them. The partnership having been dissolved, the members present could have no legal authority to bind the absent shareholders unless it had been expressly given. In the absence therefore of any finding of such authority, we can only consider an agreement made at that meeting as an agreement by and amongst the par-[543]-ties present. The next question then will be, does the averment in the declaration assert that the agreement was between all the shareholders? and we think it must be so read. It is first alleged that the plaintiff was a shareholder, then that the defendants (of course including Haigh) were at the time of the dissolution shareholders and directors; it then states that a general meeting of the several persons, shareholders in the said capital of the said bank or company, and members thereof, at the time of the dissolution, was held and took place; and at the said meeting it was agreed by and amongst the said shareholders and members as stated in the resolutions already referred to. Looking therefore to the language of the averment, and to the purpose for which it is avowedly introduced, namely, as the basis and consideration of the promise upon which this action is brought, we cannot understand it in any other sense than as an averment of an agreement between all the shareholders, including especially the plaintiff and all the defendants; and being so understood, it is expressly negatived by the finding of the jury, that neither the plaintiff nor the defendant Haigh were present at the meeting.

But we also think that if the special verdict had expressly found that the plaintiff and all the defendants were present at the meeting, the facts stated would not shew that any contract had been entered into between them at that meeting. It is true that the declaration only avers that it was agreed; and that in some sense at least it is clear that the parties present did agree to the terms of the resolution. But we think that the declaration must be read as averring a contract between the parties; because in no other way would it form any consideration for the promise upon which the action is brought; and reading the averment in this sense, we think it is not made out by the facts stated. But as [544] this branch of the question will be more fully considered when we give our opinion on the first issue, it is enough for the present to declare our opinion that upon the grounds already stated, the verdict on the fourth issue should be entered for the defendants.

The fifth issue we think must also be found for the defendants; for though it is found by a special verdict that in pursuance of the resolutions at the extraordinary general meeting, the defendants proceeded to wind up the affairs of the company, and were, by the other shareholders and members of the company, permitted to proceed in realising the assets of the company with all convenient speed, and although, as admitted at the bar, the finding upon the sixth issue must, upon this verdict, be entered for the plaintiff, yet as the averment traversed by the fifth plea alleges that the defendants were permitted to realise the assets for reward to them the defendants in that behalf, and as there is nothing in the special verdict to support the material allegation of the reward, which suggests a consideration for the promise that follows, we are of opinion that this averment in the declaration is not proved, and that the finding upon the fifth as well as upon the sixth issue must be entered for the defendants.

Having thus disposed of all the issues that form the basis and consideration for the promise upon which the action is founded, we will now proceed to examine the issue raised by the first plea upon the promise itself. And first it must be observed that the special verdict finds no express promise by the defendants, otherwise than as

it may be contained in the resolutions passed at the extraordinary general meeting; and as we have already decided that those resolutions, per se, contained no binding contract between the plaintiff and the defendants, because the plaintiff and one of the defendants were absent at the time they were passed, and because [545] there is no finding of the fact that they or either of them had, by previous authority or subsequent adoption, made themselves parties to any agreement then made by the shareholders present, it might be enough to say that as a necessary consequence the first issue, so far as it applies to the first count, must also be found for the defendants. But we also intimated our opinion that (for reasons more obviously connected with the first issue) the resolutions relied on contained no contract upon which any right of action at law could be founded even as between the defendants and the other shareholders present at the meeting. We will state our reasons for so thinking.

In deciding this point it is necessary to consider the position of the parties at the time of the meeting,—the purpose of that meeting,—and the object to be effected by the resolutions. The object of the meeting was, to put an end to the partnership; and the company was accordingly dissolved; the authority of the directors to bind the other shareholders was thereby put an end to, and it became necessary, therefore, to make arrangements for realising the assets, and discharging the liabilities of the company, and dividing the surplus. Without such an arrangement, any one of the shareholders might receive payment of the debts due to the company, and each shareholder would have to concur in the indorsing and disposing of the securities of the company, and in settling the engagements into which they had entered during their partnership. The course adopted was the most prudent and natural,—to place the management and winding up of the concerns of the company in the hands of a few members, best able to understand, and wind up, its concerns. By so doing the shareholders gave up no advantage, and conferred no benefit upon the defendants. And there is nothing stated on the face of this special verdict to shew that in un-[546]-dertaking this onerous duty, the defendants intended to bind themselves by any contract, to declare and pay out of the assets realised, the dividends according to the terms of the resolutions. They undertook a burdensome trust; and having undertaken the trust it would be their duty, after collecting the assets and paying off the debts and liabilities of the company, to divide the surplus rateably amongst the shareholders. But it was a duty unconnected with any profit, and in discharge of which the defendants were, by the very terms of the resolution, to exercise their discretion. In the case of *Owston v. Ogle* (13 East, 538), relied upon by the plaintiff's counsel, there was an express and several agreement in writing by the defendant with each part-owner, to make out an account and divide the net profits upon the ship's return. Each part-owner therefore was, by the express agreement of the defendant, entitled to an account whatever might be the result of the voyage. In this case the dividends were to depend upon the judgment of the defendants, who have nowhere stipulated with the several shareholders to render them an account, so as to subject themselves to an action at law at the suit of each for not accounting or declaring a dividend according to the terms of the resolution.

Upon a view of the facts found upon this verdict, we consider the defendants as bare trustees for the shareholders, liable to account to them in equity for the execution of their trust, but not as binding themselves by any such contract as that stated in the first count of the declaration.

The first plea, however, also puts in issue the promises stated in the last two counts; and this makes it necessary to see whether there are any facts stated in the special verdict, that make out any subsequent con-[547]-tract by the defendants with the plaintiff to pay him any money had and received by them to his use, or due to him upon any account stated. On the part of the plaintiff it was contended that as it appeared by the special verdict that the defendants had in their hands a sum of money sufficient to pay every shareholder a dividend of 10s. per share, and that they had actually declared a dividend to that amount, the plaintiff became entitled to the dividend on his shares to the amount of 50l., and that the law would imply a promise on the part of the defendants to pay him that sum, which they had, on their own admission, in their hands, for his use; and the case of *Brown v. Bullen* (1 Dougl. 407 a.) was relied on as an authority. That was the case of a creditor suing the assignees under a commission of bankrupt, for the amount of a dividend declared by the commissioners. In that case therefore the assignees had no discretion to exercise; but

after the declaration of the dividend by the commissioners they held the money under the assignment, simply for the purpose of paying it over to the creditors in proportion to their several debts. To bring this case therefore within the principle of that decision, the plaintiff must shew that the defendants had declared themselves possessed of the several dividends ready to be paid over unconditionally to the several shareholders applying for them. But upon reference to the special verdict it appears that the very instrument by which the dividend is declared, commences, with a statement of certain claims that had been made on the funds of the company and of threats of proceedings in equity which the defendants (though they declare a further dividend of 10s. per share) urge as an excuse for making such dividend payable only to such of the shareholders as should execute a deed of indemnity, the form of which was annexed. If therefore the defendants' legal liability to pay the plaintiff his dividend is to rest on a promise implied from the above declaration of it (and we have already decided that no other has been found), it would at the most amount to a promise to pay the plaintiff as soon as he should have executed the required indemnity. On the part of the plaintiff it was urged, that the defendants had no right to require an indemnity to the extent stipulated for by them as the condition for the payment of this dividend; but the question we are now considering is, not whether in the due execution of their duty they ought to have declared and paid a dividend unincumbered by the conditions imposed (which might be a fit subject of inquiry in a court of equity), but whether they had in fact declared a dividend payable unconditionally so as to make the amount of the plaintiff's proportion recoverable at law as money had and received to his use.

We think that the instruments as set out on the special verdict shew a conditional undertaking only. And as it also appears that the condition required has not been complied with by the plaintiff, we are of opinion that he is not entitled to recover on either of the last two counts, and therefore that the first issue must be found entirely for the defendants.

This view of the subject renders the finding upon the remaining issues of little importance. It is necessary, however, to direct how they should be entered up with a view to the costs upon each issue. The issues raised upon the seventh plea to the first breach, and upon the twelfth to the second breach, are, whether there was in the hands of the defendants any portion of the amount realised not being required necessary to meet the engagements of the company which was sufficient, when divided as in the first count mentioned, to allow to each shareholder the instalment dividend of [549] 10s. per share. Upon these issues the burthen of proof lies upon the plaintiff, although very slight evidence would be sufficient to shift it upon the defendants, who must be taken to know best the amount of the assets, and the liabilities of the company. Upon reference to the special verdict, we find it stated that at the time of the dissolution of the company, the affairs of the company were, and thence continually had been, greatly involved and embarrassed, and that the company, and the defendants as directors on behalf of the company, entered into divers covenants and agreements, and had thereby subjected themselves to liabilities to a much greater amount in the whole than the amount of all the assets of the company by them, the defendants, ever realised. Upon this finding we think the seventh and twelfth issues must be entered for the defendants.

The question on the eighth issue is, whether the defendants did deem fit that an instalment or dividend of 10s. per share should be paid and divided amongst the shareholders. The burthen of proving this issue was also on the plaintiff. But on referring to the special verdict, we find, as already noticed, that the defendants, although they declared a dividend of 10s. per share as payable to such of the shareholders as should execute the indemnity, expressly limited the payment of it to such of the shareholders as should execute the proposed indemnity, and we nowhere find any declaration that they deemed fit that such dividend should be paid in the general and unqualified manner alleged by the declaration. The finding upon this issue, therefore, should also be entered for the defendants.

The issue on the fourteenth plea, which is pleaded to the second breach, is in some respects like the eighth, and was treated on the argument as the converse of that presented on the eighth, and as necessarily depending upon the decision of the eighth; but there is this difference between them, viz., that the allegation in the declaration put in issue by the fourteenth plea, is, not that the defendants did not deem

fit that the dividend should be paid, but that they did not deem fit to declare, and did not declare a dividend, though they had assets sufficient in their hands. Now, the special verdict in terms finds that the defendants did declare a dividend, though they made the payment of it contingent upon the execution of the indemnity. We therefore think that this issue should be also entered as found for the defendants.

The question on the ninth and thirteenth issues, is, whether the defendants had notice of the several facts of which notice to them is alleged in the declaration. Of those facts which the special verdict does not find as alleged, the defendants could have had no notice, and therefore as to them the issue will be entered for the defendants. Of those which the finding of the jury shews to have existed to the knowledge of the defendants, the defendants had notice, and as to them these issues will be found for the plaintiffs. It is unnecessary that these should be set out in detail; the parties will have no difficulty, from what we have said on the several other issues, to distribute this finding according to their rights.

There only then remains the fifteenth issue taken on the plea of payment, which by assent of both parties, is to be entered as found for the plaintiff.

The result of our judgment will therefore be, that the second, third, sixth, tenth, eleventh, and fifteenth issues will be found for the plaintiff; the first, fourth, fifth, seventh, eighth, twelfth, and fourteenth will be found for the defendants; and the ninth and thirteenth will be found partly for the plaintiff, partly for the defendants, in the manner already stated, and the judgment upon the whole record will be for the defendants.

Judgment for the defendants.

[551] **RAPHAEL v. PICKFORD AND ANOTHER.** Feb. 8, 1843.

[S. C. 6 Scott, N. R. 478; 2 D. N. S. 916; 12 L. J. C. P. 176; 7 Jur. 815. Dictum adopted, *Taylor v. Great Northern Railway*, 1866, L. R. 1 C. P. 388.]

In case against a carrier, where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be non-delivery within a reasonable time.—And where the declaration alleged a contract to carry for hire, and stated the defendants' duty to be to carry safely and deliver, and the breach assigned was that a reasonable time for the delivery had elapsed, but that the defendants had not delivered the goods: it was held, that the plaintiff was entitled to recover upon proof of non-delivery within a reasonable time.

Case. The declaration stated that on the 1st of August, 1842, the defendants were common carriers of goods for hire from London to Birmingham, in the county of Warwick, and the plaintiff then delivered to the defendants as such carriers, and the defendants then received from the plaintiff, divers goods, to wit, 20,000 quills, 20,000 pens, one box, one case, and one bag of the plaintiff of great value, to wit, of the value of 20l., to be carried for hire by the defendants as such common carriers from London to Birmingham aforesaid, and there, to wit, at Birmingham aforesaid, to be delivered by the defendants for the plaintiff for reasonable hire and reward to the defendants in that behalf, and it then became the defendants' duty (a) safely and securely to carry and convey and deliver the said goods as aforesaid. Averment, that a reasonable time for the defendants' carrying and conveying and delivering the said goods as aforesaid elapsed before the commencement of the suit. Breach that the defendants, neglecting their said duty in that behalf, did not safely or securely carry or convey the said goods from London to Birmingham aforesaid, or at Birmingham aforesaid safely or securely deliver the same for the plaintiff, but then so negligently and improperly behaved and conducted themselves, that, by and through the negligence, carelessness, and default of the defendants in the premises, the said goods, then and before the commencement of the suit, became and were and are wholly lost to the [552] plaintiff; and, by reason of the premises, the plaintiff was before the commencement of the suit necessarily detained in Birmingham aforesaid, and obliged to waste

(a) Quære, whether the statement of the duty might not have been omitted, the court being bound to know and state to the jury what were the duties resulting from the contract set out.

and consume his time, to wit, eight days from the day and year aforesaid, in and about attempting to procure the delivery to him of the said goods; and he thereby also lost great profits, to wit, profits to the amount of 5l., which he would have derived from the delivery of the said goods, if they had arrived in Birmingham aforesaid, to divers persons to whom the plaintiff had sold the same, &c.

Pleas, first, not guilty; secondly, that the plaintiff did not deliver to the defendants, nor did the defendants receive from the plaintiff, the goods in the declaration mentioned, to be carried and delivered for the plaintiff by the defendants, modo et formâ; concluding to the country. Issue thereon.

At the trial before Tindal C. J. at the adjourned sittings in London, after Michaelmas term, the following facts appeared:—

In July, 1842, the plaintiff being at Birmingham, and having there entered into a contract for the sale, to one Myers, of a quantity of quills and pens, sent an order for them to a pen-manufacturer in London. A parcel containing the pens ordered was accordingly addressed to the plaintiff at the Green Man, Edgbaston Street, Birmingham, and was delivered at the office of the defendants, who were common carriers, on the 8th of August, 1842. The parcel not arriving in due course, the plaintiff and another person went on the 10th to the defendants' office in Birmingham, and were told it had not arrived. The plaintiff called a second time, and received the same answer. Upon a subsequent application to the defendants in London, the plaintiff was told that the parcel should be sent. It was at length sent, but not until the 3d or 4th of September, which was too late [553] for the performance of the plaintiff's contract with Myers. The delay was caused by the direction having been accidentally destroyed.

The defendants' counsel applied for a nonsuit, on the ground that, the plaintiff had merely alleged that it was the duty of the defendants to deliver safely, and not to deliver within a reasonable time, and that he had assigned a breach in not delivering at all.

His lordship declined to nonsuit the plaintiff, and left it to the jury to say, whether the parcel had or had not been delivered according to its direction, within a reasonable time, reserving to the defendants (should it become necessary) leave to move to enter a nonsuit. The jury returned a verdict for the plaintiff, damages, 40s.

In Michaelmas term last, Bompas Serjt. obtained a rule nisi for entering a nonsuit.

Talfourd Serjt. (with whom was Montague Chambers), in Hilary term last shewed cause. It was correctly held at the trial, that the plaintiff was not at liberty to give evidence of special damage, because the declaration had not named any party to whom the quills were sold. But it appeared that the defendants had been guilty of a clear breach of the duty stated in the declaration, in not delivering the goods, although repeated applications had been made for them by the plaintiff at the defendants' office. [Cresswell J. The goods were delivered before action brought.] The duty, as stated in the declaration, must be taken to import a liability to forward the goods forthwith, that is, by the first conveyance. It was not necessary, nor would it have been proper, to allege that the duty was, to deliver within a reasonable time. [Tindal C. J. Sufficient time must be allowed for the conveyance and delivery. Cresswell J. If the right of action accrued [554] it has not been destroyed by any thing which has occurred since. If the grievance charged in the declaration had been confined to the loss of the parcel, that grievance would have been answered by the delivery of the parcel.] The allegation of loss is not to be understood as the allegation of an irretrievable loss. The allegation is, that the goods were and are wholly lost. But a plaintiff in tort is not bound to prove a grievance to the full extent of the allegation. *Bonafous v. Walker* (2 T. R. 126), *Gardiner v. Croasdale* (2 Burr. 904), *Davis v. Chapman* (ante, vol. ii. 921; 3 Scott, N. R. 238; 9 Dowl. P. C. 645).

Bompas Serjt., in support of the rule. The parcel was directed to be taken to Myers. The parcel was taken to Myers, who was the agent of the plaintiff for the purpose of receiving the parcel. Myers accepted the goods, and the plaintiff had the benefit of that acceptance. If the declaration had averred the duty to be to carry within a reasonable time, and had alleged, that, by reason of the non-delivery within a reasonable time, the goods had been wholly lost, it would have been difficult to contend that the plaintiff was not entitled to retain his verdict. Before the new rules of pleading, it was usual to insert a second count for not delivering within a reasonable time; which shews that the general count was not considered sufficient. *Golden v.*

Manning (3 Wils. 429). Now the plaintiff must make his election. [Cresswell J. The question between the parties is, what is the meaning of the issue;—whether it involves a liability to deliver within a reasonable time. Tindal C. J. Are not the words “within a reasonable time” to be introduced on the part of the defendant, and for his protection.] If it had been pleaded that they did deliver before the commencement [555] of the action, the defendants must have succeeded upon that issue (a). If the plaintiff had replied a non-delivery within a reasonable time, it would have been a departure (Com. Dig. tit. Pleader, F. 7-11. Ante, 729 (b)). According to the construction contended for, the declaration would mix up two grounds of complaint, which were totally distinct, namely, that the goods were injured or were not delivered at all, or that they were not delivered within a reasonable time. [Erskine J. Would the declaration have been good, if it had contained no allegation that a reasonable time for delivering the goods had elapsed? Coltman J. Suppose the carrier to be robbed, and that he afterwards recovered the property, would that satisfy an allegation that the goods were safely and securely carried and conveyed?] It is submitted that it would. In *Rucker v. Palsgrave* (1 Campbell, 557; 1 Taunt. 419) it was held, that the payment of money into court upon a count for a total loss, on a valued policy, is no admission that the loss is total. The case of *Davis v. Chapman*, referred to on the other side, is to the same effect.

TINDAL C. J. We should like to look at some of the older precedents.
Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

After stating the pleadings, his lordship proceeded thus. Upon the trial it appeared that a parcel containing quills had been delivered to the defendants on the 8th of August 1842, addressed to the plaintiff [556] at Birmingham, and that it had in fact been delivered for the plaintiff according to the direction, before the commencement of the action, but not till the 3rd or 4th of September, when it was too late for the plaintiff to use the quills for the purpose for which they had been purchased by him; whereas, according to the ordinary course of carriage, they should have been delivered on the 10th of August. On this evidence the plaintiff claimed a verdict for damages for the nondelivery within a reasonable time; but the defendants' counsel objected that such damages could not be recovered under this form of declaration, and that, as the plaintiff had neither alleged a duty to deliver within a reasonable time, nor a failure to deliver within a reasonable time, but merely a duty safely and securely to carry and deliver generally, and a breach in not delivering at all, the plaintiff had not made out his case, and ought therefore to be nonsuited. I reserved the point, giving my brother Bompas leave to move to enter a nonsuit, and left to the jury the question whether the parcel had been delivered within a reasonable time. The jury found a verdict for the plaintiff, damages 40s.

In the beginning of last term my brother Bompas obtained a rule nisi for a nonsuit upon the point reserved, and the question was argued on the 24th of January last. For the defendants it was contended that the declaration ought to have alleged that the parcel was received by them to be safely and securely carried and delivered to the plaintiff within a reasonable time, and also have averred, either the promise, or the duty, of the defendants so to carry and deliver the parcel, and then to have stated, as a breach, that the defendants had not delivered the parcel within a reasonable time; and we were referred to the case of *Golden v. Man-[557]-ning* (3 Wilson, 429), where the declaration contained three counts, the first like that under discussion, the second in the form which my brother Bompas contended, as I have already stated, this declaration ought to have followed, and a third alleging a promise to deliver in a reasonable time, and a breach like the breach in the present declaration; and it was said that before the new rules for pleading, counts for not delivering within a reasonable time were usually added to the general count; but no authority was cited to shew that this was necessary; and there is nothing in the case in 3 Wilson, either by way of argument from the bar, or dictum from the Bench, upon the subject; and if the practice before the new rules were to be taken as affording a safe guide as to the necessity of such a count, it would lead to the conclusion that a plaintiff could not recover, upon a common indebitatus count for goods sold and delivered, the value of

(a) But the plaintiff might have demurred to a plea which left unanswered the allegation of mere delivery within a reasonable time.

goods, or upon the general count for work and labour, where no price had been agreed upon, because, in former days, the pleaders always added counts upon the quantum valebant and quantum meruit.

In the absence of all authority, therefore, we must examine the argument as presented to us; and, in so doing, we must keep in mind that we are not discussing a question of pleading upon a special demurrer, but simply ascertaining whether the allegations in the declaration are supported by the evidence: And we will consider, first, the allegation of the defendants' duty, and, secondly, the allegation of the breach.

It was not denied that, if the action had been brought for the total loss of the parcel, and the evidence had shewn that it had never been delivered, the plaintiff would have been entitled to recover upon the declaration as now framed; and, if so, then it necessarily follows [558] that the evidence given as to the contract and duty of the defendants would prove the duty as laid. Neither could it be denied that if it had been alleged to be the defendants' duty to deliver within a reasonable time, the same evidence would have been sufficient to support that allegation, the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon a promise or duty to deliver generally. No valid objection, therefore, exists to the proof of the duty as alleged. Whether such allegation would have been good upon special demurrer, if the only breach had been the non-delivery within a reasonable time, is another question, not material to our present inquiry.

But it is said no such breach is alleged in this declaration, and yet that is the only breach supported by the evidence. But we think that the breach in this declaration may be read as, in effect, stating that the defendants did not within a reasonable time, or at any time afterwards, deliver the goods to the plaintiff, but that, by the defendants' negligence, they became wholly lost to the plaintiff. And if the breach had been so in form it would have been sufficient for the plaintiff to prove so much of the breach as would support his right of action; and as the onus of proving the delivery would rest upon the defendants, unless they proved a delivery within a reasonable time, the plaintiff's right of action, and, consequently, the breach alleged, would be established.

We are, therefore, of opinion that the plaintiff is entitled to retain his verdict; and that this rule must be discharged.

Rule discharged.

[559] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN
EASTER TERM, IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term were, Tindal Lord C. J., Coltman J., Erskine J., Cresswell J.

HITCHCOCK AND ANOTHER v. HUMFREY. April 29, 1843.

[S. C. 6 Scott, N. R. 540; 12 L. J. C. P. 235; 7 Jur. 423. Adopted, *Carter v. White*, 1883, 25 Ch. D. 671.]

The defendant having guaranteed the payment of goods to be supplied by the plaintiffs to A. up to the 1st of July, gave on the 9th of April the following additional guarantee. "In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the 1st of the following month, for all goods purchased up to the 20th of the preceding month; I hereby guarantee the payment of any sum that shall be due and owing to you upon his account for goods supplied."—Held, a continuing guarantee.—Held also, substantially a guarantee for the payment of the price of the goods sold to A., and not of the amount of the bill drawn upon him.—The declaration upon the guarantee, stated that the bill was drawn by the plaintiffs and accepted by A., but that he did not pay the amount thereof, although the bill was presented when due, of all which the defendant had notice, and was requested to pay the amount of the bill, to wit, &c., but the same still remained due.—Held, a sufficient allegation of non-payment of the price of the goods.—Where a person not party to a bill, guarantees the payment

by the acceptor, he is not entitled to require proof of presentment or of notice of dishonour. A plea to such a declaration, that the bill was not presented, and a plea, that the defendant had no notice of non-payment, were therefore held to contain no answer to the action; and the defendant having obtained a verdict upon issues joined upon these traverses, the plaintiffs had judgment non obstante veredicto.

Assumpsit. The first count of the declaration stated, that before the making of the promise of the defendant, &c., to wit, on the 5th of March 1841, in [560] consideration of the plaintiffs agreeing to supply his the defendant's son, Thomas Humfrey, the younger, with goods upon credit, the defendant then guaranteed the payment, and promised the plaintiffs to pay them any sum owing to them that should be due the 1st day of July 1841; and thereupon afterwards, to wit, on the 9th of April 1841, in consideration that the plaintiffs would extend the credit already given as aforesaid to his the defendant's said son, and then agreed to draw upon him, the defendant's said son, at three months from the 1st of the following month for all goods purchased up to the 20th of the preceding month, the defendant then guaranteed the payment, and promised the plaintiffs to pay them any sum that should be due and owing to them upon his said son's account for goods supplied. **Averment:** that the plaintiffs, confiding in the last-mentioned guarantee, did afterwards, to wit, on the 24th of August 1841, and on divers days and times between that day and the 20th of September 1841, and up to the last-mentioned day, sell to the said Thomas Humfrey, the younger, and the said T. H. the younger, then purchased of the plaintiffs, certain goods to a large amount, to wit, to the amount of 35l. 18s. 6d.; and that they the plaintiffs afterwards, and after the said goods had been so sold and purchased as aforesaid, to wit, on the 1st of October 1841, the same being the first day of [561] the month following the said 20th of September 1841, up to which day the said goods were so sold and purchased as aforesaid, for and on account of the said goods, made their bill of exchange in writing, bearing date a certain day, to wit, the day and year last aforesaid, and then directed the same to the said T. H., the younger, and thereby required the said T. H., the younger, to pay to the order of the plaintiffs, a certain sum, to wit, the said sum of 35l. 18s. 6d., three months after the date thereof, which period had elapsed before the commencement of this suit; and the said T. H., the younger, then accepted the said bill, and promised the plaintiffs to pay the same according to the tenor and effect thereof, and of the said acceptance thereof; but the said T. H., the younger, did not pay the amount thereof, although the said bill was presented to him when it became due; of all which premises the defendant, afterwards, to wit, on the 5th of January 1842, had notice; and he was then requested by the plaintiffs to pay them the amount of the said bill, to wit, the said sum of 35l. 18s. 6d.; yet the defendant had not paid the same, or any part thereof, to the plaintiffs, but the same still remained due, in arrear, and unpaid, &c. There was also a count upon an account stated.

Pleas: first, to the whole declaration, non assumpsit: secondly, to the first count, that the plaintiffs did not sell to the said T. H., the younger, nor did the said T. H., the younger, purchase of the plaintiffs, the said goods in the first count mentioned, modo et formâ: thirdly, that the plaintiffs did not make the said bill of exchange in the said first count mentioned, modo et formâ: fourthly, that the said T. H., the younger, did not accept the said bill of exchange in the said first count mentioned, modo et formâ: fifthly, that the said bill of exchange in the said first count mentioned was not presented to the said T. H., the younger, for payment thereof, when the [562] same became due, modo et formâ: sixthly, that he the defendant had not notice of the non-payment of the said bill in the first count mentioned, modo et formâ.

Upon all of these pleas issue was joined.

At the trial, before Coltman J., at the sittings for Middlesex, during last term, the following facts appeared:

The first guarantee, dated the 5th of March 1841, was in these terms:—

“To Messrs. Hitchcock and Rogers.

“In consequence of your agreeing to supply my son, Thomas Humfrey, junior, of Stanmore, Middlesex, with goods upon credit, I hereby, at your request, guarantee the payment, and agree to pay to you any sum owing to you that shall be due the 1st of July 1841.”

The second guarantee, dated the 9th of April 1841, was as follows :—

“To Messrs. Hitchcock and Rogers.

“In consideration of your extending the credit already given to my son, Thomas Humfrey, junior, of Stanmore, Middlesex, and agreeing to draw upon him at three months, from first of the following month, for all goods purchased up to the 20th of the preceding month, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you upon his account for goods supplied.”

The supply of goods by the plaintiffs to T. Humfrey, the younger, between the 24th of August and the 20th of September 1841, to the amount mentioned in the declaration, was admitted. The drawing and acceptance of the bill were proved ; but there was no evidence of presentment to the acceptor, or of notice of non-payment to the defendant, so as to support the affirmative of the fifth and sixth issues.

A verdict was returned for the plaintiffs on the first four issues, and for the defendant on the fifth and sixth.

[563] Channell Serjt., in Hilary term last (January 21st), obtained a rule nisi to enter judgment for the plaintiff on the fifth and sixth issues. He cited *Warrington v. Furber* (8 East, 242. And see S. C. 6 Esp. N. P. C. 89), *Philips v. Astling* (2 Taunt. 206), *Swinyard v. Bowes* (5 M. & S. 62), *Holbrow v. Wilkins* (1 B. & C. 10, 2 D. & R. 59), and *Van Wart v. Woolley* (3 B. & C. 439, 5 D. & R. 374).

Bompas Serjt., at the same time, applied for a cross rule nisi to arrest the judgment, upon the ground that the guarantee declared upon was not a continuing guarantee, and that the declaration shewed no default in the defendant ; and liberty was reserved to him to argue these points upon the rule obtained by the plaintiff.

The case was now argued by

Bompas Serjt., for the defendant. The plaintiff was bound to prove the presentment and the notice, which he had alleged in his declaration, and which were put in issue by the fifth and sixth pleas. The only default that is averred is, that the principal debtor did not pay the bill when presented. It is clear that no action would lie against the defendant, who is only a surety, without a default on the part of the principal ; the averment of presentment is therefore material. [Coltman J. The general rule is, that the debtor must seek out his creditor (vide Bro. Abr. Tender, pl. 20, Litt. a. 340, Co. Litt. 210 b.).] That does not apply to the case of a bill in circulation. The rule there is, that the acceptor must pay when the bill is presented. *Philips v. Astling* is in favour of the defendant. It was there held, that upon a guarantee of the price of goods to be paid by a bill, due notice of the non-payment must be given both [564] to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due. All the cases assume that to be the rule unless some excuse for non-presentment be shewn. [Cresswell J. *Philips v. Astling* was decided upon the peculiar grounds of the case. The party who gave the guarantee was liable only in case the bill was neither paid by the acceptor nor by the drawer. It was necessary to shew the liability of the drawer by notice to him of the non-payment. Besides, it appeared in that case, that the bill probably would have been paid if it had been properly presented. Erskine J. This is a guarantee, not of payment of the bill, but of payment for the goods. Cresswell J. It amounts in effect to this :—“If you will trust my son for three months, from time to time, I will guarantee the payment of the goods.”] It is clear that the plaintiffs were to draw on the son. And this is an action for the non-payment of the bill. The declaration contains no averment of non-payment for the goods. The only question is, whether the bill was paid on presentment. The terms of the breach are, that the said T. H. “did not pay the amount thereof,” that is, of the bill, “although the said bill was presented to him when it became due.” *Philips v. Astling* is therefore in point. The agreement there was to guarantee the payment of money as well as of a bill. [Erskine J. In that case the original debtor was the drawer of the bill. Tindal C. J. How is the present case distinguishable from *Warrington v. Furber* ?] In that case there was no mention of any bill in the guarantee. [Cresswell J. The declaration in this case sets out both the guarantees. In the first there is no mention of any bill. The second is to extend the credit given by the first. I should construe the payment

mentioned in the second, to mean the same as that in the first. It amounts to a promise by the defendant to pay for the goods if the principal [565] debtor makes default. If the breach is for non-payment of the bill, then the declaration does not aver that any thing remains due for the goods.] That would be a ground for arresting judgment. [Coltman J. The breach is, that the defendant did not pay, on request, "the amount of the said bill, to wit, the said sum of 35l. 18s. 6d." That is the usual allegation in an action on a bill. [Coltman J. If the words "although the said bill was presented to him" were struck out of the declaration, the averment would then be, that the said T. H. did not pay the amount of the bill when it became due. Would not that be sufficient?] It is submitted that it would not. The plaintiff was bound to allege, and to prove, a presentment. In *Swinyard v. Bowes* the true question was, whether the transaction amounted to a payment. In *Holbrow v. Wilkins* it was decided that presentment and notice were not necessary, inasmuch as the parties guaranteeing had distinct notice of the insolvency of the principal debtor. *Van Wart v. Woolley* has no application to the present case. That was an action by a party against his own agents. In this case no demand of payment is shewn; and the bringing of the action will not have the effect of such demand.

As to the arrest of judgment, this was not a continuing guarantee. [Coltman J. How do you understand the words "extending the credit?"] The credit may have been extended as to the period of payment, without being extended as to the amount. [Cresswell J. Surely the amount of the credit was extended as well as the period. Erskine J. If it had been intended as a limited guarantee as to the period, would not the plaintiffs have said, "in consideration of your extending the credit up to the 1st of August." It was unnecessary to say that, as the bill was to be drawn on the 1st of May at three months. The meaning of the instrument is, that the [566] defendant's son was to have three months' credit from the 1st of May for goods supplied up to the 20th of April, and that the defendant would guarantee the payment of goods supplied within that period. If the terms of the guarantee are not clear, the plaintiff cannot recover upon it; *Cole v. Dyer* (1 C. & J. 461). It is consistent with every thing that appears upon the declaration, that the son may have paid for the goods at the time the second guarantee was given. [Cresswell J. He would hardly have accepted the bill in that case.]

Channell Serjt. (with whom was Sir J. Bayley), for the plaintiffs. The first question is, whether the facts stated in the fifth and sixth pleas, taken alone, constitute any defence to the action. And it is submitted they do not. The necessity of presentment in such a case as the present is not to be regulated by the law merchant, but by the rules applicable to the law of principal and surety. *Warrington v. Furbor* decides that where goods are sold, the payment of which is guaranteed by another party, and a bill is given by the purchaser for the price of the goods, which is dishonoured, it is not necessary to give notice to the surety. That case is precisely in point. Upon the statement in the declaration it must be assumed that the bill was not paid. The defence of non-presentment would have been valid if the defendant had been the drawer of the bill. In *Philips v. Astling* the vendee was the drawer of the bill, and the guarantee was for payment of that bill by the drawer; but he was not liable to pay unless he received due notice of default by the acceptor. *Swinyard v. Bowes*, *Murray v. King* (5 B. & A. 165), *Holbrow v. Wilkins*, and *Van Wart v. Woolley* are strong authorities for the plaintiffs. In the last-mentioned case [567] Abbott C. J. said "If a person deliver a bill to another without indorsing his own name upon it, he does not subject himself to the obligations of the law-merchant; he cannot be sued on the bill either by the person to whom he delivers it or by any other." That position reconciles all the cases.

(He was then proceeding to argue the question as to the arrest of judgment, but he was stopped by the court.)

TINDAL C. J. The application made on behalf of the defendant to arrest the judgment in this case, depends upon two objections: first, that the second guarantee given by him is not a continuing guarantee; and, secondly, that there is no sufficient allegation in the declaration of any default in payment.

As to the first point, upon comparing the two guarantees as set out in the declaration, I think there is no doubt that the latter was a continuing guarantee. It appears that on the 5th of March the defendant guaranteed the payment of any sum owing to the plaintiffs, that should be due from Thomas Humfrey, the younger, upon the

1st of July. The parties seem to have met again on the 9th of April, when, in consideration of the plaintiffs' extending the credit already given to T. Humfrey, and agreeing to draw upon him at three months from the 1st of the following month, for all goods purchased up to the 20th of the preceding month, the defendant guarantees the payment, and agrees to pay the plaintiffs any sum that shall be due and owing to them upon their account for goods supplied. I cannot but think that if it had been intended that this second guarantee should only extend to one transaction of supplying goods, it would not have been couched in such general terms as "the following month," and "the preceding month," but would have followed the form [568] of the first guarantee, which was limited to the payment of any sum due at a particular date, namely, the 1st of July.

As to the next objection, that no sufficient ground of action is shewn by non-payment, I think that this is a guarantee, for the payment not of the bill, but of the price of the goods. It is not a condition, that a bill shall be drawn, and that the principal shall have credit for three months. And if so, there is on the face of the declaration a sufficient allegation of non-payment. We might strike out all that part which relates to the demand on the acceptor, and the non-payment of the bill; and there would still remain sufficient to shew that the price of the goods was not paid. And although it has been urged that there ought to have been a specific demand for payment, and that bringing this action is not sufficient to obviate the necessity for such formal demand, still we cannot help seeing that there has been a demand. It is the same as in an action against an acceptor of a bill, in which case it is not necessary to aver or prove any demand upon him prior to the action. It is however, I think, sufficient to say that this is substantially a guarantee for the payment of the price of goods.

The next question, whether the verdict for the defendant is sufficient to bar the plaintiffs' judgment, or whether they are entitled to judgment non obstante veredicto, turns on the single point, whether a person who guarantees the payment of a bill drawn by the vendor of goods on the vendee for their price, puts himself in the same situation as the drawer of the bill. Because if so, then by the law-merchant he is entitled to insist that the bill should be duly presented to the acceptor, and that he should have notice of its dishonour. But I find no case by which a party so guaranteeing is put upon that footing. On the contrary *Warrington v. Furber* and *Swinyard v. Bowes* shew the true distinction between [569] the case of a drawer and that of a party giving such a guarantee. The latter merely undertakes that the acceptor shall pay the bill; and he can only have a right to insist on notice of dishonour, when some damage would result to him from the want of it. No such damage is suggested in these pleas; and for these grounds I am of opinion that they contain no answer to the action, and that the plaintiff is entitled to judgment non obstante veredicto.

COLTMAN J. I agree that this is a continuing guarantee, and that the terms "the following month," and "the preceding month," have a general application, and cannot be limited to any particular period.

Upon the second question, I am also of opinion in favour of the plaintiffs. The facts appear to be as alleged in the fifth and sixth pleas, and they falsify the allegations in the declaration as to the presentment of the bill, and notice of dishonour. The declaration, therefore, cannot stand unless these allegations may be struck out. If they can, and there is still sufficient to charge the defendant, the plaintiffs are entitled to judgment. The promise alleged is, not to pay the bill, but to pay any sum that shall be due and owing to the plaintiffs upon his (the defendant's) son's account for goods supplied; although part of the consideration for the promise was, the plaintiffs' agreeing to draw a bill or bills upon the defendant's son. It appears from the declaration, that a bill was drawn pursuant to the guarantee. And it is put as though the want of presentment of the bill at maturity, is equivalent, in law, to a payment, as far as regards the defendant. But as he is not a party to the bill, he is not entitled to the benefit of the law-merchant in this respect. He is a mere surety; and in order to discharge him from his liability, there must be, not only a failure of presentment and notice of dishonour, but some damage resulting to him there [570] from. No such damage is alleged in this case. The bill was not paid by the principal, and the defendant has not performed his promise.

It is further said, that the declaration contains no allegation that the goods were

not paid for; but there is, in substance, such an allegation. There is a statement that the bill was drawn "for and on account of the goods" which had been supplied by the plaintiffs to the defendant's son, that this bill was accepted, and that the amount thereof was unpaid; and that is, by implication, an averment that the goods were not paid for. I think, therefore, that the declaration, after striking out the allegations which are traversed by the fifth and sixth pleas, contains a sufficient statement of a cause of action, and, consequently, that the plaintiffs are entitled to judgment upon the issues raised by these pleas, non obstante veredicto.

ERSKINE J. Upon the point as to the arrest of judgment, it has been argued that the goods were not supplied within the period covered by the guarantee; and that raises the question whether it was a limited or continuing guarantee. And I think that the terms shew that it was intended for a continuing guarantee. Taking the first and last sentences of the document, it is clear that they can only bear this construction. For the guarantee would then stand thus: "In consideration of your extending the credit already given my son, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you upon his account for goods supplied." Then the question is, whether the intervening sentence as to drawing at three months, was intended to limit the operation of the guarantee. If that had been the intention of the parties, nothing would have been easier than to have named the time up to which the goods were to be supplied. I am [571] of opinion, therefore, that this is a general running guarantee.

It was then said that the declaration contains no distinct allegation of any default in the payment of the price of the goods on the part of the principal debtor. But it is alleged that the goods were supplied, and that a bill was drawn for and on account of them; that the bill was not paid, and that the amount still remains due. The non-payment, at the expiration of the period of credit, is a default in the payment of the price of the goods; and I think that such non-payment is sufficiently, though not directly, alleged.

Then there is the further question as to entering judgment for the plaintiffs on the fifth and sixth pleas, non obstante veredicto. I do not consider it necessary to go through the cases that have been cited upon this point. The effect of them amounts to this, and no more, that it is not necessary that a person who guarantees the payment of a bill, not being a party to it, should have notice of its dishonour, unless, by reason of non-presentment or of want of notice, he has suffered some loss or damage. The pleas under consideration contain no statement of any damage to the defendant, and therefore they present no sufficient defence to the action.

CRESSWELL J. I am of the same opinion. The document in question is clearly a continuing guarantee. Its terms admit of no reasonable doubt; and we are not to examine such an instrument minutely in order to put upon it a fanciful construction. The guarantee given in April, speaks of the first of the following month and the 20th of the preceding month; if that sentence is to bear the strict interpretation which the defendant contends for, the term "preceding month" would mean March; but the payment of supplies in that month had been already guaranteed by the previous instrument; and [572] the parties were agreeing to extend the credit. It could not mean April, for that was the month in which the document was given, and the parties would then have said—not the "preceding"—but the "present" or the "current" month. The guarantee was clearly intended to extend to all future months, it being agreed that on the first of each month the plaintiffs were to draw upon the principal debtor for all goods supplied up to the 20th of the then preceding month.

The next question is, whether the default in the payment for the goods is sufficiently alleged. The declaration is certainly not framed with any great accuracy. The pleader rather seems to have thought that it was a guarantee to pay the bill. But I think that the declaration does, substantially, contain an averment that the price of the goods remains due.

Then, how does the defendant seek to discharge himself by the fifth and sixth pleas? The fifth,—which is the material one,—traverses the allegation in the declaration that the bill was presented to the acceptor when due. But had the plaintiffs taken upon themselves the duty to present the bills to the acceptor in order to have an action against the guarantee? According to the current of authorities, the omission of such a presentment is immaterial unless the party who has given the guarantee

sustains some damage by the laches. It is for him to set up that as a defence; and the defendant has not done so here.

Rule absolute (a)¹.

[573] CHALK v. WALTON. May 1, 1843.

Where an old warrant of attorney had been given to secure a debt and interest, the sum for which judgment was to be confessed being for the amount of the debt only, the court granted a rule to enter up judgment for the debt, and so much for interest as the master should find to be due thereon.

The defendant having given a warrant of attorney to secure a debt of 50l. with interest, the sum for which judgment was to be confessed being only 50l., Dowling Serjt. now moved for liberty to enter up judgment as of this term for the sum of 50l., together with such further sum as one of the masters of this court should find to be due for interest thereon, pursuant to the warrant of attorney. He referred to an unreported case of *Page v. Jadis*, where, it was said, this court had, under similar circumstances, granted a like rule on a former occasion.

The court (after conferring with the masters) granted a rule, which, although the warrant of attorney was under twenty years old, was a rule nisi.

GOFF v. HARRIS. May 1, 1843.

[S. C. 12 L. J. C. P. 273.]

The acceptance of a demise of a house containing fixtures, does not raise an implied contract to pay for such fixtures.—In debt for rent on a demise for years, with a count for fixtures sold, the plaintiff claimed by his particulars 5l. 5s. for rent, and 12l. for fixtures. The defendant paid 11l. 5s. into court. Held, no admission of the defendant's liability in respect of fixtures, to a greater amount than had been paid into court.

Debt. The first count of the declaration was upon a demise, for a quarter's rent; the second, for fixtures sold and delivered; and the third, upon an account stated.

The plaintiff, by his particulars, claimed 5l. 5s. for a [574] quarter's rent to Christmas 1842, and 12l. for "fixtures, as per valuation."

Plea: to the whole declaration, payment into court of 11l. 5s., and nunquam indebitatus ultra.

At the trial, before the under-sheriff, the only question was, as to the defendant's liability to pay for the fixtures. It was proved that there were fixtures on the premises at the date of the demise mentioned in the declaration; but there was no proof of any contract by the defendant to pay for them. A letter from the defendant, dated the 15th of January 1843, was read, in which he said, "Though I do not think myself liable for the fixtures, I will send an appraiser in a few days." There was no evidence that an appraiser had been sent by the defendant, though it was proved that the fixtures were valued at the amount claimed, by two brokers, in the following February. On the part of the plaintiff it was contended that the fact of the defendant having taken to the fixtures raised an implied promise to pay for them; and that by the payment into court of a larger sum than was claimed for rent, a contract to that effect was admitted. The plaintiff had a verdict, leave being reserved to the defendant to move to set it aside and enter a nonsuit.

Channell Serjt., on a former day in this term, obtained a rule nisi accordingly, citing *Kingham v. Robins* (a)².

Byles Serjt. now shewed cause. The 6l. paid into court over and above the plaintiff's claim for rent must have been paid on account of the fixtures. *Kingham v. Robins* is distinguishable from the present case. In that case there was not only no evidence of an agreement to take the fixtures, but there was none to shew that they had ever come into the defendant's possession. In the [575] case of a chattel, a contract to pay may

(a)¹ See *Allnutt v. Ashenden*, ante, 392.

(a)² 5 M. & W. 24. S. C. nom. *Hingham v. Robins*, 7 Dowl. P. C. 352.

be implied from the change of possession. [Cresswell J. There may be this distinction. If a fixture is delivered as a chattel by the owner to another person, there may be an implied contract of sale. But if a house is let containing fixtures, it will be a question whether they are let as part of the house or delivered upon a separate contract of sale.] The defendant's letter, though it must be admitted it is rather more in accordance with the ground which he now takes, was still some evidence, however slight, for the plaintiff; and the question upon the present motion is, not whether the verdict was right, but whether there was any evidence to go to the jury on behalf of the plaintiff. The courts appear to be at issue as to the effect of an admission on the record. In *Edmunds v. Groves* (2 M. & W. 642) it was said by Alderson B. that the admission of a fact on the record amounts merely to a waiver of requiring proof of that fact; but that if the other party seek to have any inference drawn by the jury from the fact so admitted, he must prove it like any other fact. But in *Bingham v. Stanley* (2 Q. B. 117, 1 G. & D. 237) that doctrine was, after consideration, dissented from by the court of Queen's Bench. In the present case there is clearly an admission as to some contract relating to fixtures; and there is no evidence of any other fixtures than those in question. Payment of money in court is like a judgment by default. If the present question had arisen upon a motion to set aside a writ of inquiry, the court would not have interfered.

Channell Serjt., in support of the rule. *Edmunds v. Groves* and *Bingham v. Stanley* were both cases of special contracts. And whichever may be the right decision, it cannot affect the present case, which is upon [576] an indebitatus count, where the contract is divisible. It may be conceded that the case stands upon the same footing as if there had been a judgment by default; but that would only admit the plaintiff's right to a verdict to some amount. So here, the 6l. paid into court may be an admission that so much was due for fixtures; but it goes no further. There was no evidence of any contract as to the fixtures, and the presumption would be that they were demised with the house; *Colegrave v. Dias Santos* (2 B. & C. 76, 3 D. & R. 255), *Longstaff v. Meagoe* (2 A. & E. 167, 4 N. & M. 211). There was not even any evidence that the defendant entered into possession. The allegation of entry in the declaration was not traversable; *Bird v. Higginson* (2 A. & E. 696, 4 N. & M. 506, Affirm. in Cam. Scacc. 6 A. & E. 824), *Parkinson v. Whitehead* (2 M. & G. 329); and therefore it was not admitted. But supposing the allegation were traversable, the plea would only admit the demise and the entry under it, and would not shew any contract as to the fixtures. The defendant's letter amounts to a repudiation of any contract.

TINDAL C. J. I think the safer way to deal with this case will be to look at it as if no money had been paid into court; in which case the question would have been, whether there was any evidence of a sale of fixtures. The plaintiff would have put in the demise to prove his first count. But a demise is not evidence of a contract to pay for fixtures. Then there is the defendant's letter; but that does not help the plaintiff, for the defendant there says that he does not think himself liable for the fixtures. That is no evidence of a contract. He says, however, that he will send an appraiser; but there is no proof that he did so. Upon the whole, I think there is no [577] evidence to support the claim for fixtures, and that the rule for entering a nonsuit must be made absolute.

COLTMAN J. I am of opinion that there is no admission on the pleadings even of an entry by the defendant into possession of the premises. The action is brought upon a demise for years; on which debt will lie without any entry. And I also think that the payment into court is no admission of a contract in respect of the fixtures, at least not as to their value. I form this opinion, looking at the case independently of the defendant's letter. There is no former letter in evidence to which the defendant's may have been an answer. If there had been, it might possibly have explained the defendant's letter. But, taking that as it stands alone, he says, in express terms, that he does not consider himself liable for the fixtures. The plaintiff has therefore, I think, failed to make out any case in respect of them.

ERSKINE J. I am of the same opinion. The payment into court admits the contract declared upon in the first count, and also that the defendant owed the sum of 6l. in respect of some contract for some fixtures somewhere or other. But what evidence is there of any contract as to these particular fixtures? The demise does not prove a contract to pay for them. The fact of their having been valued does

not prove it; as it is not shewn that they were valued by the defendant's authority. The letter, so far from proving a contract, denies the defendant's liability. There is therefore no evidence of any contract in respect of the fixtures.

CRESSWELL J. I am of the same opinion. A party, by accepting a lease, and taking possession, of a house, does not contract to pay for fixtures. The defendant's [578] letter was clearly no admission. What is said about sending an appraiser may be ambiguous; but it was not shewn that any was sent.

Rule absolute.

CHILVERS v. GREAVES. May 1, 1843.

Where the judge who tries a cause recommends a verdict for the plaintiff with nominal damages, but the jury give substantial damages, such verdict cannot be treated as perverse.

Trespass, quare domum fregit, and for expelling the plaintiff from his dwelling-house.

At the trial before Maule J. at the sittings during this term, it appeared that the defendant, an attorney, had agreed to let the house in question, and had delivered the keys thereof to the plaintiff; but the defendant afterwards obtained the keys back by stratagem, and refused to let the plaintiff into possession of the house. The learned judge told the jury that the plaintiff must have a verdict; but that as no special damage was alleged or proved, they would probably think that nominal damages would be sufficient. The jury inquired what sum would carry costs, but his lordship declined to inform them. They returned a verdict for the plaintiff, damages 5l.

Murphy Serjt. now applied for a new trial, upon the ground that the verdict was perverse, or to reduce the damages. [Tindal C. J. In such a case the defendant would have acted wisely in paying money into court. The verdict can hardly be said to have been perverse, as it must have been given for the plaintiff. As to the reduction of damages, an application can be made to the learned judge who tried the cause.]

Per curiam. Rule refused.

[579] OUCHTERLONY v. GIBSON. May 3, 1843.

A. was appointed official assignee, under a fiat in bankruptcy against B., which on the 10th of Dec. 1841 was annulled. On the 4th of Jan. 1842 an action of trover was brought by B. for his books, &c. against A. On the 25th a second fiat was issued against B. On the 22d of Feb. the action was tried, and B. had a verdict for 1000l., to be reduced to 40s. upon A.'s giving up the books, &c. On the 12th of May B. was adjudged a bankrupt, and on the 25th A. was again appointed official assignee. B. did not surrender under the second fiat, and notice was given by the assignees to the attorney who had brought the action, not to take any further proceedings against B. The attorney, however, on the 8th of July entered an incipitur in the master's book, and gave notice of taxation. The court, on the application of A. stayed all proceedings upon payment of the attorney's costs up to the date of the second fiat.—Where, upon enlarging a rule, it is made a term that any further affidavits shall be filed before a certain day, a party is not precluded from using an affidavit which had been sworn before the day fixed, but which was resworn after that day for the purpose of rectifying a mistake in the jurat.

This was an action of trover for certain books and papers of the plaintiff, which had originally come to the hands of the defendant as the official assignee under a fiat in bankruptcy issued against the plaintiff in the year 1840. This fiat was afterwards, with the consent of all the creditors who had proved their debts under it, annulled, by order of the Lord Chancellor, bearing date the 10th of December 1841; and immediately afterwards the books and papers were demanded from the defendant, who refused to deliver them up to the plaintiff; and thereupon this action was commenced on the 4th of January 1842 (vide S. C. ante, vol. iv. 461).

On the 25th of January 1842, a second fiat was issued against the plaintiff upon

the petition of John Vickery Broughton, who had not come in under the former fiat; and on the 12th of the following May the plaintiff was adjudged a bankrupt, and on the 25th of May the defendant was again appointed official assignee. But, in the mean time, namely, on the 22d of February, this action had been tried; and in consequence of the delay [580] in opening the fiat, occasioned by circumstances not material to the present inquiry, the defendant was not in a condition to plead the plaintiff's bankruptcy, and a verdict was therefore taken for the plaintiff, by consent, for 1000*l.*, the damages laid in the declaration, subject to be reduced to 40*s.* on the delivery up to the plaintiff of the books and papers. The bankrupt having omitted to surrender himself under the second fiat, and having gone abroad, notice was given by the assignees to the attorney who had commenced and carried on the suit for the bankrupt, not to take any further proceedings in the action against the defendant Gibson, notwithstanding which notice the attorney afterwards on the 8th of July 1842, entered an incipitur of the judgment in the master's book, and gave notice of taxing the plaintiff's costs, and thereupon the attorney for the defendant procured a judge's order for staying all proceedings in the cause till the fifth day of Michaelmas term, with leave to the parties to apply to the court.

Bompas Serjt. in last Michaelmas term (7th of November) upon affidavits of the facts above stated (a)¹ had [581] obtained a rule calling upon the plaintiff to shew cause why all proceedings on the *postea* should not be stayed, on payment to the plaintiff's attorney, of the costs of the action up to the date of the second fiat, or why the taxation of costs should not be stayed on the judgment, the same not having been revived, and the assignees made parties thereto.

This rule was enlarged on the tenth day of Michaelmas term (25th of November) to the fifth day of Hilary term last, upon the usual terms that all further affidavits which the plaintiff intended to use at the time of shewing cause, should be filed one week before the first day of Hilary term. And it was further enlarged on the last day of Hilary term (31st of January) upon the terms that no further affidavits should be filed.

Sir T. Wilde and Channell Serjts. upon proceeding to shew cause, on a former day in this term (1st of May) proposed to read an affidavit of the plaintiff's attorney which had been sworn before the date when the rule was first enlarged (namely on the 24th of November); but which, in consequence of a mistake in the jurat (a)², had been re-sworn after the time limited (namely on the 19th of January). They submitted that the limitation, as to the filing of further affidavits, only applied to affidavits to the merits; and that they might be considered as applying for leave to file the affidavit in question now notwithstanding the time had elapsed which was limited by the rule.

Bompas and Manning Serjts. *contra*, objected upon the ground that the court would now allow further affi-[582]-davits to be filed by the plaintiff, without giving the same advantage to the defendant.

(a)¹ The above summary contains all the material facts as stated by Tindal C. J. in delivering the judgment of the court.

It also appeared that upon the 26th of Jan. the following notice was served upon the defendant.

"In the matter of Thomas Ouchterlony.

"We, the undersigned, solicitors for and on behalf of John Vickery Broughton, of, &c., do hereby give you notice that a docket hath be struck, and a fiat issued, against the said T. O. at the instance of the said J. V. B., and the said fiat is intended to be forthwith prosecuted. And we do further as aforesaid, give you notice, and require you, not to part with any books of account, letters, documents, deeds, papers, moneys, property or effects of any kind, which may be in your hands, power, or custody, now or late belonging to the said T. O. or his creditors or estate, or to you as official assignee with any other assignee or assignees appointed under a fiat in bankruptcy, lately in force against the said T. O., but to retain and keep the same, and every of them, for the benefit of the creditors under the said fiat now issued, or to be disposed of thereunder as may be lawful."

(Signed, &c.)

(a)² The jurat was originally in this form:—

"Sworn, &c. the 25th day of Nov. 1842. Before, &c." The figures "25th," had been erased, and "24th" interlined by the officer of the court.

Per curiam. The meaning of the rule was that no further affidavit should be filed by the plaintiff as to the merits; but this is not a further affidavit; it is in effect the same affidavit that was sworn before the rule was enlarged and which was re-sworn owing to a mistake of the officer of the court (a)¹.

Sir T. Wilde and Channell Serjts. then shewed cause. The court of bankruptcy was the proper tribunal to apply to in this case, and not this court where the question cannot be properly discussed. The action was brought before the second fiat was issued; and it was tried before the adjudication of bankruptcy under that fiat. The plaintiff, therefore, had a good right of action at the time he obtained the verdict, and the court has no power to interfere now to deprive him or his attorney of the costs. [Tindal C. J. If a sum of money were to be given to the plaintiff as costs, it would be the property of his assignees under the second fiat.] Still the plaintiff has a right to have the judgment perfected, even for the benefit of the estate. [Erskine J. May not the defendant say that he has done what was required of him, and given up the books, &c. to the assignees?] That was certainly not the meaning of the arrangement at nisi prius. And even then, the plaintiff would be entitled to his judgment and costs. The object of the present application is not to secure the benefit of any fund to the creditors. It is made to obviate the necessity, either of a scire facias or of an *auditâ querelâ*. But in the former case it is made too soon, and in the latter, [583] too late. If it be in lieu of a scire facias, it must be for the purpose of reviving a judgment, or of introducing additional parties to the record; and, in the latter case, it must suppose the existence of a valid and completed judgment. In 2 Wms. Saund. 72 k. it is said, "If a man recover final judgment, upon which the defendant brings a writ of error, and the plaintiff become a bankrupt pending the writ of error, his assignees ought to proceed to an affirmance of the judgment in the bankrupt's name, and then sue out a scire facias in their own names upon the judgment, to have execution" (a)². But in this case the assignees could not have a scire facias upon the judgment, as no judgment has in fact been signed. [Coltman J. If the court sees that no fruit can come to the plaintiff from the judgment or the taxation, why should they not interfere to stay the proceedings?] The court will not administer equitable relief upon summary application except where the party applying has some legal right; which the defendants has not in this case. Nor can the application be supported upon the ground of its being made in lieu of an *auditâ querelâ*. In 2 Tidd's Prac. p. 1131 (9th ed.) it is said, "Where the case is clear, and the application recent, the courts will interpose in a summary way, and relieve the party upon motion, without putting him to an *auditâ querelâ*. But they will never do it when the fact is disputed, or there has been a long acquiescence, and several steps have been taken subsequent to the award of execution, or the ground of relief is such matter of fact as may be proper to be tried by a jury." In this case, the ground of relief, if any, is the bankruptcy of the plaintiff; and that is a matter of fact which ought not to be removed from [584] the consideration of a jury. But in whatever light the application is considered, the lien of the attorney for his costs ought to be taken into account. They cited also *Bibbins v. Mantell* (2 Wils. 358), *Hewit v. Mantell* (ib. 374), *Kinnear v. Tarrant* (15 East, 622), *Barnes v. Maton* (cit. ib. 631).

Bompas and Manning Serjts. in support of the rule. The plaintiff's attorney has no claim, legal or equitable, for his costs beyond the date of the second fiat, up to which time it is proposed to give them to him. It may perhaps be doubted whether he is entitled to them even up to that time. The present application is made for the purpose of relieving the defendant from the necessity of resorting to his *auditâ querelâ*, to which remedy he is clearly entitled. In Bac. Abr. tit. *Audita Querela* (B.) it is said, "If A. as administrator recover damages in trover against B., and after his administration is repealed and granted to another, upon a surmise that A. intends and endeavours to sue execution, B. may have an *auditâ querelâ*; for by the repeal of the administration, the power of A. is absolutely determined." So here, by the adjudication of bankruptcy, the power of the plaintiff to proceed with the judgment, is absolutely determined, and is vested in his assignees under the second fiat; so that

(a)¹ The affidavit in question merely stated the dates of some intermediate proceedings connected with the cause, which are not material to the point decided.

(a)² Citing *Kretschman v. Beyer*, 1 T. R. 463; *Winter v. Kretschman*, 2 T. R. 45; *Monke v. Morris*, 1 Mod. 93, 1 Vent. 193; *Hewit v. Mantell*, 2 Wils. 372, 378.

neither the plaintiff nor his attorney can have any right to take further proceedings without the consent of the assignees. It is argued that there is no final judgment here; but judgment is sufficiently entered up, when it is signed in the master's book; *Fisher v. Dudding* (ante, vol. iii. 238). [Sir T. Wilde Serjt. The entry in the master's book amounts to nothing till the costs are taxed. Coltman J. In that case they were taxed.] It is further said that by granting this application the question as to the bankruptcy [585] would be withdrawn from the consideration of a jury; but by the 5 & 6 Vict. c. 122, s. 24 (a), the plaintiff is now precluded from disputing the bankruptcy. [Cresswell J. Would not this case come within the exception in that section? The right to the books accrued to the plaintiff before that act passed (b).] The court in considering this question will look at the rights of the parties when the application was made. The defendant was bound to keep the books in question, which had been placed in his hands as official assignee. The court certainly would not order him to give them up in the present state of things; yet that will be the effect of the failure of the present application, unless the defendant pays the 1000*l.*, the amount of the verdict. [Tindal C. J. The real question in the case is, with respect to the costs. The only point is, whether the defendant has offered [586] enough in offering the costs up to the issuing of the second fiat. He certainly should offer enough to cover the attorney's lien.] When the fiat issued the defendant received a notice from the petitioning creditor not to deliver the books to the plaintiff; if he had delivered them up after that notice, he would have been liable to an action. From that time he was justified in keeping them. Up to that time he may be considered as a wrong-doer, and therefore, up to that time, he proposes to pay costs. [Tindal C. J. Could he not have applied to the court of Review, or to the court of Chancery, to stay the action?] It is submitted that no such application would have been entertained before the adjudication; which was not till after the trial. Besides, the defendant would probably have been told that a court of common law would do ample justice in the case. The second fiat being issued before the trial, it was a wanton expenditure of money on the part of the plaintiff's attorney, to proceed with the action; and such an experiment ought not to be a source of profit to him. As to the latter part of the rule, it is submitted that the bankrupt is now proceeding in the action without the consent of his assignees; which he cannot effectually do. [Cresswell J. In that case the defendant cannot be hurt.] He has a right to apply to the court, quia timet, though not actually damnified (see Co. Litt. 100 a.). [Cresswell J. Is there any case in which an *auditâ querelâ* has been held to lie, where the party to the record was not entitled to execution?] Several such cases are mentioned in 2 Wms. Saund. 148, n.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. After stating the facts of the case, (ut supra, p. 579) his lordship proceeded as follows:—

[587] In Michaelmas term the defendant applied to this court, and obtained a

(a) Which enacts, "that if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of Europe at the date of the adjudication), within three months after such advertisement, or (if he were elsewhere at the date of the adjudication), within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence—in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit, had he not been adjudged a bankrupt,—that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date, saving all rights which shall have accrued to any such person as aforesaid previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act, which shall be adjudged and determined as if this act had not been passed."

(b) The 5 & 6 Vict. c. 122, received the royal assent on the 12th of August, but came into operation 11th of Nov. 1842.

rule calling upon the plaintiff to shew cause why all proceedings on the *postea* should not be stayed, on payment, to the plaintiff's attorney, of the costs of this action, up to the date of the second fiat in bankruptcy against the said plaintiff, or why the taxation of costs should not be stayed on the present judgment against the defendant, the same not having been revived and the assignees made parties to such judgment. This rule having been enlarged, cause was shewn against it on Monday last, when it was insisted on the part of the defendant, that, as all the bankrupt's title to, and interest in, the verdict and cause of action, had become vested in his assignees under the second fiat, neither the bankrupt nor his attorney could take any further proceedings in the suit without the consent and concurrence of the assignees, and that, as the title of the assignees had not been completed till after the verdict, the defendant had had no opportunity of pleading their title in bar to the plaintiff's further proceedings in the action; and therefore, that, he was, by law entitled to his remedy by writ of *audita querelâ*, and, consequently, to the more summary relief, by staying the proceedings on motion; which modern practice has substituted, in all cases, where the defendant's title to the writ of *audita querelâ* is clear.

The question was ably argued at the bar on both sides; and we delayed our decision that we might ascertain from the affidavits upon what terms it would be right, under all the circumstances of the case, to grant the summary relief applied for.

Upon examination it appears, as was indeed admitted at the bar, that there is no statement of any act of bankruptcy that would carry back the title of the assignees beyond the date of the fiat. There is nothing, therefore, to shew that the plaintiff had not originally a good cause of action, by the refusal of the defendant to deliver up [588] the books and papers, in which, even by relation, it does not now appear that he had at that time any property or interest, as assignee. The verdict, therefore, stands unimpeached by the subsequent proceedings. But, as, upon the 25th of May, when the assignees were appointed, the bankrupt's interest in that verdict became vested in his assignees, and as no judgment had been then signed in the cause, and as the plaintiff's attorney was expressly warned by the assignees against taking any further steps in the cause, we think that the attempt by the attorney to proceed to tax the costs and sign judgment was a sufficient ground for the present application: and the only doubt that we have entertained has been as to the extent of costs which the defendant should be called upon to pay. He has, by his rule, offered to pay the costs up to the date of the fiat, which is more than the attorney would be able to recover so long as the fiat remains in force; for, independently of any claim on the part of the defendant to the writ of *audita querelâ*, as to which it is not necessary to give any opinion, all control over the proceedings in the actions being now vested in the assignees, unless the attorney could compel him to proceed to judgment and execution, he could never make his lien available, even to the amount now offered by the defendant; and his only remedy would be, by proof under the fiat, for the costs incurred before the date of the fiat, and by action against the bankrupt, for subsequent costs, if they were incurred by his authority.

If, indeed, the creditors could, by the removal of the defendant Gibson, and the substitution of another assignee, be placed in a position to insist upon the assignees proceeding to judgment and execution for the 1000*l.* for the benefit of the estate, the attorney might be able to work out his lien through the rights and interests of the creditors. But we think the assignees could not, under the circumstances of this case, be permitted to enter up [589] judgment for more than the 40*s.*: and, as the attorney could have no claim upon the estate for costs incurred after the date of the fiat, the creditors would have no interest in proceeding to judgment and execution for the 40*s.*, except for the purpose of securing the estate from the proof of the bankrupt's debt to the attorney for the costs incurred prior to the date of the fiat: and we think also, that neither the bankrupt nor his attorney has any equitable claim to indemnity for the costs incurred by them in forcing on the trial of the cause after the fiat was issued, and whilst its validity was under discussion.

As the assignees, therefore, could not be called upon, for the benefit of the estate, to proceed to execution, except for the purpose of securing to the bankrupt's attorney the payment of his costs up to the date of the fiat from some other fund than the bankrupt's estate; and, as the defendant proposes to afford that security by paying those costs; and, as we consider the prosecution of the action after the date of the fiat as an experiment of which the attorney voluntarily incurred the hazard, we think

ample justice will be done to all parties by making the rule absolute for staying all further proceedings, upon payment by the defendant to the plaintiff's attorney of the costs incurred up to the date of the fiat, to be taxed by the master.

Rule absolute.

[590] TODD v. CROSBY. May 6, 1843.

Semble, that where service of the writ of summons is upon the defendant's wife, the plaintiff should not enter an appearance, but should move for a distringas.

Channell Serjt. applied for a distringas. The appointments and calls had been regular and there had been a service of the writ of summons on the wife. [Cresswell J. Why cannot the plaintiff enter an appearance?] He must shew a personal service on the defendant. [Tindal C. J. The present motion seems to be the safer course.]

Per curiam. Rule granted.

WILKINSON v. WHALLEY. May 6, 1843.

[S. C. 6 Scott, N. R. 631; 1 D. & L. 9; 12 L. J. C. P. 270; 7 Jur. 468.]

A., to whom B. was indebted, received a bill from B. "to get discounted or return on demand." A. sent the bill to C. with directions to place it to A.'s account with C.; which C. did, minus the discount.—Held, in trover for the bill by B. against A., that this was substantially a discounting of the bill by A., and that A. was entitled to a verdict under a plea of not possessed.—Semble (per Coltman and Cresswell JJ.) that A. was also entitled to the verdict under not guilty.—The plaintiff's counsel at the trial interrupted the summing up, conceiving that there was a misdirection in law, and elected to be nonsuited. The court allowed him to move to set aside the nonsuit.—Query (per Cresswell J.) whether a plaintiff is strictly entitled to do so.

Trover, for a bill of exchange. Pleas: not guilty, and not possessed.

At the trial before Tindal C. J. at the sittings for London after Hilary term last, the following facts appeared in evidence. The plaintiff had handed over the bill in question, drawn by himself on Webber and Co. for 170l., to the defendant, in order that the latter might get [591] it discounted, when the defendant gave the following memorandum to the plaintiff:—

"Received of William Wilkinson, a bill for 170l., three months from the 12th March 1840, for discounting or return on demand.

"Leeds, March 12, 1840.

"(Signed) JOSEPH WHALLEY."

The defendant immediately sent the bill to Messrs. Gaudell and Higgs, bill-brokers in London, with the following letter:—

"Gentlemen,—We inclose you a bill of James Webber and Co., which we shall feel obliged by your getting accepted, for 170l. As it is probable we may have other bills from the same party, we shall be glad if you will give us your opinion of the house. If you are satisfied of the respectability of the party, perhaps you will have no objection to put it to our account. We understand they stand well in London.—Yours, &c.

"(Signed) JOSEPH WHALLEY."

The amount of the bill, less the discount, was placed by Gaudell and Higgs, to the credit of the defendant's account with them; and upon being applied to by the plaintiff to return the bill in question, they refused to do so. An action of trover was thereupon brought against them by the plaintiff; at the trial of which, the present defendant Whalley was called as a witness for the plaintiff to prove the above mentioned documents, when he swore that the bill had been given to him by the plaintiff in part payment of a debt of 300l. and that he was to retain the amount of the bill if he could get it discounted; and that the then defendants were ignorant that the bill had ever

belonged to the plaintiff. A verdict was thereupon found for the then defendants. The [592] present action was brought after a demand and refusal of the bill; and in order to prove the defendant's signature to the documents in question it became necessary, on the part of the plaintiff, to put in the defendant's evidence given on the former trial. No evidence was given on the part of the defendant; but it was urged on his behalf that the action was wrongly conceived and ought to have been a special action on the case.

The Lord Chief Justice, in summing up, told the jury that the question in the case was, whether the defendant had wrongfully passed the bill, or whether he had authority for so doing; and he left it to them to say whether or not there had been a wrongful conversion, stating that if the defendant had dealt with the bill in the manner he had done, with the assent of the plaintiff, the latter had no right to recover. The plaintiff's counsel thereupon interrupting the Lord Chief Justice, elected to be nonsuited.

Channell Serjt. on a former day in this term (21st of April), moved to set aside the nonsuit and have a new trial, upon the ground of misdirection. He submitted that although where a plaintiff elected to be nonsuited in consequence of misdirection as to the weight and effect of the evidence, he could not move to set aside the nonsuit, he might do so where the misdirection was as to the law or the effect of the pleadings; *Simpson v. Clayton* (2 New Ca. 467, 2 Scott, 691. See also *Austin v. Evans*, ante, vol. ii. 430). There being no plea of leave and licence upon the record, the only question for the jury was whether there had been a conversion in fact, and not whether the conversion was wrongful; *Stanchiffe v. Hardwick* (2 C. M. & R. 1), *Vernon v. Shipton* (2 M. & W. 9). [Coltman J. Your argument would be the same if the defendant had actually discounted the [593] bill.] Even then, the defendant must have pleaded leave and licence. [Tindal C. J. What evidence is there here, of actual conversion, but the demand and refusal? This is the case of a bailment. You give a thing to a man to do something with it, and you say he has not done it.] The actual conversion consisted in paying away to Gaudell and Co., on his own account, a bill which the defendant had received to get discounted or to return. Instead of which he paid it away. [Tindal C. J. At the trial my brother Bompas objected that trover was not the proper form of action, but that it should have been a special action on the case. I think he should have liberty to raise that objection upon the argument of this rule, which may go; though at present I give no opinion as to the plaintiff's right to have the nonsuit set aside.]

A rule nisi having been granted,

Bompas Serjt. (with whom was G. S. Wilson) now shewed cause. The direction was correct, and the nonsuit cannot be set aside. It appeared from the memorandum, that the bill had been delivered to the defendant, to be discounted or returned; and it was in fact discounted (vide post, 594 (a)) by him. The plaintiff could have no right to it, unless his right of possession reverted in consequence of a wrongful conversion by breach of trust. The real question was, whether the defendant had substantially pursued the course pointed out by the memorandum, or whether he was precluded by the terms thereof from discounting the bill for his own use. And, under the circumstances of the case, the nonsuit cannot now be set aside. In *Butler v. Dorant* (3 Taunt. 229) Lawrence J. said, "I believe this has never been done, that a counsel shall lie by until he hears the [594] opinion of the judge at nisi prius, and that, if he thereupon chooses to be nonsuited, he shall come to the court to set aside his own act." The modern cases do not go quite so far. [Erskine J. The distinction seems now to be, that upon a misdirection in point of law, the plaintiff may elect to be nonsuited and afterwards move to set aside the nonsuit; but he cannot do so if the misdirection be upon the facts, such as the expression of a strong opinion on the part of the judge.] In the present case the direction complained of is as to the facts; for if there was not a wrongful conversion, there was no misdirection.

Channell Serjt. (with whom was Lush) in support of the rule. No objection is made to the direction upon the facts. The defendant may have had a good defence upon a plea of leave and licence; but he has none upon the present state of the record. The memorandum undoubtedly may mean that the defendant was to have a right to apply the proceeds of the bill to his own use (a). If the plaintiff had

(a) This was the construction given to the memorandum by the defendant upon his examination at the former trial. But if the case had stood upon the memorandum

demanding the bill of the defendant, he might perhaps have shewn that he had discounted it; but so long as it remained in his hands the property therein remained in the plaintiff, and he might recall it. So, if the defendant did not discount the bill, but converted it to his own use, the right of possession reverted to the plaintiff. The question then is, was there such a conversion here? The defendant applied to Gaudell and Co. not to discount the bill, but to get it accepted, and to place it to his account. [Tindal C. J. Does not that mean getting it discounted?] [595] It is submitted that it does not. If it does, the defendant should have pleaded leave and licence. If this application to Gaudell and Co. did not amount to a discounting of the bill, there was a wrongful conversion.

TINDAL C. J. When I summed up the case to the jury, I did not look at the precise form of the issues, but I put the case to them in the same manner as it had been put by the counsel, namely, whether there had been a wrongful conversion of the bill by the defendant. It appeared to me then, as it appears to me now, that there had been no conversion at all. The bill was handed to the defendant for the purpose of getting it discounted; and if he could not do so, he was to return it on demand. No demand was made so as to divest the trust reposed in the defendant, till after the bill had been, at least virtually, discounted by him. I am at a loss therefore to see how he can be said to be a wrongdoer. Supposing upon the issue of not guilty, the verdict must have been for the plaintiff, and that a further plea was necessary to let in the evidence, a plea of not possessed, was upon the record. Before I came to the consideration of that plea, I was stopped by the act of the plaintiff in electing to be nonsuited. I meant to have put it to the jury—one way or the other—upon that plea. And I cannot see how the plaintiff could be said to be lawfully possessed of the bill, when he had given it to the defendant to get it discounted, and had not demanded it till after it had been discounted. I think, therefore, it would not be justice to the defendant to set aside the nonsuit, when he must have had a verdict upon the plea of not possessed.

COLTMAN J. It has been argued that the plaintiff was entitled to a verdict upon the plea of not possessed, if the bill was not discounted by the defendant according [596] to the terms of the memorandum. But I think what took place between him and the Messrs. Gaudell, did substantially amount to discounting of the bill by them. At any rate it was evidence for the jury; and this was in substance being left to them by my lord, when the plaintiff elected to be nonsuited. I quite agree that upon the second issue, the defendant ought to have had a verdict. It is not necessary to say how it might be upon the plea of not guilty; but, where a party receives a bill to get it discounted, and does get it discounted accordingly, I am not prepared to say, that that would be even a conversion in fact.

ERSKINE J. I also am of opinion that the point raised by the motion has been answered. It is said that the question left to the jury ought to have been, whether or not there had been a conversion in fact. And if there had been no other plea upon the record than that of not guilty, perhaps the way in which it was put to the jury would not have been quite correct. But there is also the plea of not possessed, which put in issue the plaintiff's right to the bill. Now it appears that the bill had been placed in the hands of the defendant to discount it for his own use. He sends it to a bill-broker with directions to place it to his account. What is the fair meaning of this? In substance it is nothing more or less than a discounting of the bill. The plaintiff could have no right to the possession of the bill unless the defendant had dealt with it improperly. If the defendant had been directed to discount it for the plaintiff, and had in fact paid it away upon his own account, that might have been a conversion in fact; and the same act which proved the conversion by the defendant might revest the right of possession in the plaintiff. But in this case there was no wrongful dealing with the bill. If the defendant dealt [597] with it in the way he did with the assent of the plaintiff, the latter has no right to recover. It was so left in terms by the Lord Chief Justice; and I entirely agree in the view taken by him. I think the plaintiff has no right to have the nonsuit set aside.

CRESWELL J. I also am of opinion that this rule must be discharged. The Lord Chief Justice left it as a direction to the jury to find a verdict for the defendant,

alone, that document would probably have been understood to mean a discounting by obtaining the amount in cash, minus the discount, for the benefit of the plaintiff.

if they thought he had dealt with the bill in the manner he was authorised to do by the plaintiff; and I think, looking at the state of the record, that the direction was perfectly proper. The plaintiff had parted with the possession of the bill to the defendant for a specific purpose, and had thereby given him a revocable property therein. That put an end to the plaintiff's right of possession to the bill, unless it were used by the defendant in a different way from that in which he was authorised to use it. It appears from the defendant's own statement, made upon oath on the former trial, and which the plaintiff has adopted as his evidence upon this occasion, that the defendant had a demand upon the plaintiff, and that the plaintiff gave him the bill in question, saying in effect, "If you can use this in reduction of your demand, you may;" and the defendant did so. I confess I entertain some doubt, notwithstanding the case of *Stancliffe v. Hardwick*, whether in such a state of facts the plaintiff would have been entitled to a verdict even upon the plea of not guilty. Suppose a party delivered a horse to his servant, and directed him to take it to A. B. in satisfaction of a demand, and the servant did so; this would be no conversion. The act of the servant would in such a case be consistent with the original right of his master. So here, the disposition of the bill by the defendant was not inconsistent with the plaintiff's previous [598] ownership. And it makes no difference whether he was to apply the proceeds to his own debt or to that of a third person.

I wish to add one word as to setting aside nonsuits. The doctrine has perhaps been carried a little too far. I do not accede to the rule, in its broad terms, that, wherever a judge misdirects the jury upon a point of law, and the plaintiff thereupon elects to be nonsuited, he can afterwards move to set aside the nonsuit.

Rule discharged.

WATTS v. JUDD. May 6, 1843.

The rule as to not granting a new trial on payment of costs, where the trial is by writ of trial, and the verdict is under 5l., applies to a case in which the amount claimed by the plaintiff, by his particulars, exceeds 5l., but is reduced by payment into court, below that sum; although the verdict be for the defendant.

Debt, for goods sold and delivered, and upon an account stated. The plaintiff, by his particulars, claimed a balance of 6l. 10s.

Pleas: first, except as to 2l. 10s., *nunquam indebitatus*; secondly, payment into court of 2l. 10s.

The cause was tried before the undersheriff of Middlesex, when a verdict was returned for the defendant.

Dowling Serjt., on a former day in this term, obtained a rule nisi for a new trial, on the ground of the verdict being against the evidence.

Channell Serjt. now shewed cause. The amount in dispute between the parties was only 4l.; for, to that sum, the plaintiff's original claim for 6l. 10s. was cut down by the payment into court of 2l. 10s. The defendant therefore cannot have a new trial; as the rule that the courts will not grant a new trial, on the ground of the verdict being against evidence, where the verdict is for less than 20l., and the trial has been before a judge [599] of the superior courts (a), is applied to cases under 5l. upon writs of trial; *Lyddon v. Coombes* (5 Dowl. P. C. 560), *Fleetwood v. Taylor* (c). This rule extends to cases in which the demand has been reduced by a tender; — *v. Phillips* (1 C. & M. 26, S. C. per nom. *Bryan v. Phillips*, 3 Tyrwh. 181); and must be equally applicable where the demand, as in this case, has been reduced by a plea of payment into court. It also applies where the verdict is for the defendant; *Young v. Harris* (2 C. & J. 14, 2 Tyrwh. 167, Price, P. C. 136), *Lyddon v. Coombes*.

Dowling Serjt. in support of the rule. *Young v. Harris* is the strongest authority in favour of the defendant; but it is submitted, that where the verdict is for the defendant, the court has no datum to guide it, as in cases where the verdict is for the plaintiff, when the sum assessed by the jury must be taken as the limit of the plaintiff's demand. In *Lyddon v. Coombes*, the sum claimed by the plaintiff in his particulars was

(a) See *Sewell v. Champion*, 2 R. & P. 627.

(c) 6 Dowl. P. C. 796. See also *Packham v. Newman*, 1 C. M. & R. 584, 5 Tyrwh. 215, 3 Dowl. P. C. 165; *Williams v. Evans*, 2 M. & W. 220.

under 5l. ; here, it is above that sum, and it cannot therefore be said that the sum in dispute was below 5l. [Cresswell J. Can you shew any authority for the position, that where the sum claimed by the particulars is cut down by payments below 5l., there can be a new trial on payment of costs? Coltman J. You must contend that, notwithstanding the payment of 2l. 10s. into court, the plaintiff could still proceed to recover 6l. 10s. Tindal C. J. Is any more than 4l. in dispute between the parties? The plaintiff's particulars shew that he goes for 6l. 10s. only. The defendant pays 2l. 10s. into court, and says, go on for the rest if you dare. How could the plaintiff re-[600]cover more than 4l.? Erskine J. If you could have shewn that by any possibility the plaintiff could have recovered more than 5l., there might have been something in the argument. But you have shewn the contrary.] Then in a case where the plaintiff was going for 5000l., and the defendant had, by payments, cut down the claim to a sum below 5l., the plaintiff could not have a new trial if the verdict was against evidence.

TINDAL C. J. That the rule of practice as to refusing a new trial, upon the ground of the verdict being against evidence, where the sum in dispute is of a trifling nature, applies equally to cases where the verdict is for the defendant, as where it is for the plaintiff, is shewn by *Young v. Harris* and *Haine v. Davey* (4 A. & E. 892, 6 N. & M. 356). In writs of trial, the amount is limited to a sum below 5l. It is insisted, that in this case a larger sum was in dispute between the parties ; but I think there was not ; and that the rule must be discharged.

COLTMAN J. concurred.

ERSKINE J. Where the verdict is for the plaintiff, the damages are to be taken as the amount of the sum in dispute between the parties. Where the verdict is for the defendant, the amount is to be ascertained by what the plaintiff could have recovered. It is clear, that in this case, he could not have recovered 5l. The case, therefore, falls within the rule.

CRESWELL J. concurred.

Rule discharged.

[601] HUNTER v. RUSSELL. May 6, 1843.

If a plaintiff's attorney receives less than the sum indorsed for costs on the writ of summons, the defendant has nevertheless a right to have the sum so received referred to taxation under R. H. 2 W. 4, r. ii.

On the 6th of March the defendant was served with a copy of a writ of summons, indorsed with a claim for 7l. 7s. debt, and 2l. for costs. On the 9th he paid (according to his own statement), to a clerk of the plaintiff's attorney the sum of 9l. 7s., when the clerk offered to return and tendered to him the sum of 2s. 6d., on account of the costs ; which the defendant refused to accept ; and on the same day he took out a summons to have the costs indorsed by the writ of summons taxed. On the 16th of March this summons was heard before Lord Abinger C. B. at chambers, when some doubt being raised by contradictory statements, whether the plaintiff's attorney had received more than 1l. 17s. 6d. for costs, the summons was dismissed with costs, his lordship intimating, that unless the whole amount claimed for costs in the indorsement on the writ were paid, the defendant could not have the costs taxed under R. H. 2 W. 4, r. II.(a). On the 17th the plaintiff gave notice to tax the costs of the summons ; on the 20th the Lord Chief Baron's order was made a rule of court ; and on the 22d the costs thereof were taxed at [602] 6l. 9s. 6d., which was afterwards paid by the defendant, under protest.

Channell Serjt. on a former day in this term (28th of April), upon an affidavit

(a) By which it is ordered, "that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy, and service and attendance to receive debt and costs ; and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty notwithstanding such payment, to have the costs taxed ; and, if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

of the above facts, obtained a rule calling upon the plaintiff to shew cause why the order of Lord Abinger C. B., and the rule of court and the taxation of costs thereon should not be set aside, and the sum of 6l. 9s. 6d. the amount of the costs paid by the defendant to the plaintiff's attorney should not be refunded; and why the costs indorsed upon the writ of summons should not be referred to be taxed; and why, in the event of a sixth being taken off on such taxation, the plaintiff's attorney should not pay the costs of such taxation, and refund to the defendant or his attorney what should appear, upon such taxation, to have been overpaid.

Byles Serjt. now shewed cause, upon an affidavit by the plaintiff's attorney, stating positively that he did not receive more than 9l. 4s. 6d. from the defendant, being only 1l. 17s. 6d. for costs. The application before Lord Abinger C. B. was to refer to taxation—not the sum actually paid—but the costs indorsed on the writ, viz. the sum of 2l. which had not been paid. The summons therefore was properly dismissed.

Besides the present rule is defective; for it calls upon the plaintiff alone to shew cause why his attorney should not pay the costs of taxation in the event of a sixth being taken off. So that in the event of the rule being made absolute, the attorney might be attached without having been heard.

Channell Serjt. in support of the rule. The object of the general rule is, to enable a defendant to pay the debt and costs within a given time, without incurring [603] further expense. The payment must be made within the time limited, or the defendant will not have benefit of it; *Bowdidge v. Slaney* (2 New Ca. 142, 2 Scott, 197, 4 Dowl. P. C. 140). The plaintiff's attorney has no right to demand more costs than he is entitled to. Great mischief would ensue if an attorney might indorse any sum for costs he pleased, and then, by taking 6d. less than the sum indorsed, prevent the defendant from taxing either the costs claimed or the costs actually paid. But this would follow from the construction of the general rule contended for on the other side. [Erskine J. The argument on the other side seems to be, that the defendant ought to have applied to tax the sum of 1l. 17s. 6d. being the sum actually paid. Cresswell J. If an attorney delivers a bill to his client under the 2 G. 2, c. 23, and takes less than the amount thereof, which is the client to have taxed, the sum claimed, or the sum paid?] The indorsement on the writ is in the nature of a demand, and the tender by the defendant of the sum indorsed, is equivalent to a payment; and so the case would fall within the express words of the general rule. Or the conduct of the plaintiff's attorney may be considered as tantamount to his having altered the indorsement from 2l. to 1l. 17s. 6d.; and if he had done so in fact, then the summons would have been correct, as the defendant had a right to have that sum taxed. At all events the summons ought not to have been dismissed altogether, even if the order prayed might have been so in part. Then it is said that the present rule asks too much, in calling upon the plaintiff to shew cause why the attorney should pay the costs of taxation; but notice of the rule must have been given to the attorney, as he has made an affidavit in the matter.

TINDAL C. J. I think it clear upon the affidavits now before the court, that 1l. 17s. 6d. was all that was really [604] paid to the plaintiff's attorney. When the case was before Lord Abinger, his lordship appears to have conceived a doubt as to the amount actually paid; and to have thought that he had no authority to send the matter to the master to inquire into that fact. The defendant having paid 1l. 17s. 6d. for costs had a right to have that sum taxed, and I think that Lord Abinger's order should be rescinded so far, and that the rule should be made absolute for taxing the sum of 1l. 17s. 6d. the amount of costs paid by the defendant.

Per curiam. Rule absolute accordingly (a).

(a) The rule was afterwards drawn up as follows:—

"Upon reading, &c. it is ordered, that the rule made in this cause on Monday the 20th day of March last, and the order of the Right Hon. Lord Abinger in the said rule mentioned, and the taxation of costs thereon respectively, be and the same are hereby set aside, and that the sum of 6l. 9s. 6d., the amount of such costs paid by the said defendant to the plaintiff's attorney, be refunded. And it is further ordered, that the said defendant shall be at liberty, if he shall think fit, to have the costs, amounting to 1l. 17s. 6d., paid by him to the plaintiff's attorney in this cause, taxed, &c. and in the event of a sixth part being disallowed," &c.

[605] FRYER AND ANOTHER v. SMITH. May 9, 1843.

[S. C. 6 Scott, N. R. 658; 12 L. J. C. P. 223; 7 Jur. 973.]

A writ of summons in assumpsit was indorsed with a claim for "19l. 4s. 7d., with interest thereon at 5 per cent. till paid." The damages in the declaration were laid at 50l. After various pleadings the plaintiffs signed judgment by default for 21l. 8s. 8d. Issues in fact were joined upon some of the pleadings, and an issue in law upon part, as to which last the plaintiffs recovered judgment. A writ of trial was issued, directing the sheriff as well to try the issues joined, as to assess damages in respect of the judgment by nil dicit and the judgment on the demurrer. The plaintiffs obtained a verdict for 23l. 15s. 1d., and having entered a remittitur for 3l. 15s. 1d., signed judgment for 20l. and costs.—Held, upon an application to set aside the execution of the writ of trial and all subsequent proceedings for irregularity, that the writ of trial and execution thereof were regular; as it did not appear that the sum sought to be recovered by the plaintiffs exceeded 20l.—Held also, that it was no objection to such writ that the sheriff was directed to assess the damages as well as to try the issues.—Held also, that the entry of the remittitur cured any irregularity in the verdict.—Semble, that the indorsement on the writ of summons was irregular, and might have been taken advantage of in the first instance.

The writ of summons in this case was issued on the 16th of February 1838, and was indorsed with a claim for "19l. 4s. 7d. debt, with interest thereon at 5l. per cent. per annum till paid."

The declaration filed the 19th of April following was in assumpsit, and the first count was upon a bill of exchange for 19l. 4s. 7d., drawn by the plaintiffs upon, and accepted by, the defendant, payable fourteen days after date. There was also a count upon an account stated, for 50l. Damages 50l.

Pleas: first, to the first count, as to 7l. 0s. 6d., parcel, &c., that at the time of the making and accepting of the bill, the defendant was indebted to the plaintiffs in 12l. 4s. 1d., and no more, and the defendant had then bought of and from the plaintiffs certain goods for the price of 7l. 0s. 6d. on credit for six months, and which had not then expired: and the defendant, at the request, and for the accommodation, of the plaintiffs, then accepted the bill for 19l. 4s. 7d., being the aggregate amount of the said two sums of 12l. 4s. 1d. and [606] 7l. 0s. 6d.; and so, that so far as related to the said sum of 7l. 0s. 6d. parcel, &c., the defendant had not received nor had the plaintiffs given any consideration, &c. Verification.

Secondly, to the first count, as to 5l., further parcel, &c., payment of that sum.

Thirdly, to the last count, as to 30l. 15s. 5d. &c. non assumpsit.

Fourthly, to the last count, as to 19l. 4s. 7d., residue, &c., the acceptance of a bill drawn by the plaintiffs for that sum, at fourteen days.

Replication to the first plea, that the plaintiffs did not give consideration for the bill.

To the second plea, a traverse of the payment. And judgment by nil dicit as to the sum of 7l. 4s. 1d. in the first count mentioned.

To the third plea similiter: and to the fourth plea, non-payment of the bill therein mentioned, upon presentment thereof to the defendant when due.

Rejoinder: to the replications to the first and second pleas, similiter: and to the replication to the fourth plea, that the last-mentioned bill was not presented to the defendant for payment thereof on the day on which it became due, &c. And, after the said bill became due, payment of 5l. parcel of the money for which the said bill was given, &c.

Surrejoinder, traversing the payment of 5l. parcel of the sum in the second count mentioned. And judgment taken by nil dicit as to the 14l. 4s. 7d. other parcel, &c.

Demurrer to the surrejoinder, assigning for causes; that the rejoinder professed to be, and was, pleaded in bar of the whole cause of action comprehended in the said last count; whereas the surrejoinder treated the rejoinder as being in bar only as to the sum of 5l., parcel, &c., and as if the rejoinder had left the last plea unsupported, and without answer to the replication as [607] to the residue of the moneys in the last count mentioned; whereas the rejoinder was an entire answer to the replication, and totally supported the last plea; that the surrejoinder had thereby worked a discontinuance; and that the same was in other respects informal, &c. Joinder.

In Michaelmas term 1838, judgment was given upon their demurrer for the plaintiffs; who on the 8th of February 1839, obtained an order for a writ of trial. The issue was delivered; and notice of trial was given on the 17th of May 1842. The writ of trial, which was tested the 14th of June following and made returnable on the 16th of June, directed the sheriff of Middlesex to summon a jury "as well to try the said issues joined between the parties, &c., as to inquire what damages the said plaintiffs have sustained on occasion of the defendant's not performing his promise in the said first count mentioned, as to the said sum of 7l. 4s. 1d., and in respect of which the said defendant says nothing," &c.; and also as to the 14l. 4s. 7d., in respect of which judgment by nil dicit had been signed; "and also to inquire what damages the plaintiffs have sustained on occasion of the premises, whereof the said parties have put themselves upon the judgment of the court," &c.

The trial and assessment of damages took place before the undersheriff on the 16th of June, when the jury returned a verdict for the plaintiffs, damages 23l. 5s. 1d. The defendant, on the 24th of June, took out a summons to set aside the trial, and all subsequent proceedings, for irregularity. The alleged grounds of its irregularity were, that the issue was made up in the body thereof as a nisi prius issue, with the entry of an award of *unica taxatio*; which, it was said, was not applicable to writs of trial, or authorised by the 3 & [608] 4 W. 4, c. 42, s. 17 (a); that the writ of trial did not correspond with the form prescribed by R. H. 4 W. 4, r. 5, in which there is no mention of assessment of damages; that the 3 & 4 W. 4, c. 42, s. 17, did not extend to authorise the assessment of damages, either contingently or otherwise; nor did the judge's order, in this case, which directed the issuing of the writ of trial in the usual form, authorise the issuing of a writ, both to try the issues and to assess the damages on the judgment. The summons was heard and dismissed by Coltman J. on the 29th of June. The plaintiffs' costs were taxed on the 26th of January 1843 at 33l. 17s. 6d.; on which day (a remittitur having been entered for 3l. 5s. 1d.), judgment was signed for 20l. damages, and 33l. 17s. 6d. costs.

Bompas Serjt. in last Hilary term (January 30th), obtained a rule nisi to set aside the execution of the writ of trial, the verdict and the judgment, for irregularity, upon the grounds previously urged.

Channell Serjt. (with whom was Hindmarsh), now shewed cause. The application, at any rate, is too late as [609] regards the execution of the writ of trial and the verdict. If there was any error in the verdict in being for a larger sum than 20l. it is cured by the remittitur; *Burleigh v. Kingdom* (2 Dowl. P. C. 351). The present rule will not open the inquiry, as intended; for it is not sought to set aside the writ of trial. It must be taken therefore as admitted that that was properly issued; and if the writ is correct there is no error or irregularity in the proceedings. The writ of trial was in point of fact perfectly regular. It will probably be contended on the other side, that the plaintiffs sought to recover more than 20l., and therefore that the case is not within the statute. The writ of summons was indorsed for 19l. 4s. 7d. "with interest thereon at 5 per cent. till paid;" but no date being stated from which the interest was to run, non constat that it might have amounted to sufficient to raise the claim to 20l. [Cresswell J. I think the indorsement must be taken as a claim for interest from the issuing of the writ of summons to the time of payment.] It will also be contended, that although the court, under the statute, may order the issue joined to be tried, no power is thereby given them, to order the assessment of

(a) Which enacts "that in any action depending in any of the said superior courts, for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed 20l. it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county; and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues."

damages. But it was not necessary to give them that power, as it existed by the old practice, whenever there was judgment by default. It would be very inconvenient to send two writs to the sheriff in the same cause, one to try the issues, and the other to assess the damages. In Tidd's Pract. Forms (page 295, 8th ed.), there is a form of a writ of trial, directing the sheriff also to assess damages upon issues in law. And if they may be assessed contingently where judgment has not been given, they may be assessed absolutely where judgment has been given. If the matter is at all doubtful, the court will not interfere, but will leave the defendant to his writ of error. [610] In *Walker v. Needham* (ante, vol. iii. 557), where an application was made to set aside a writ of trial in detinue, upon the ground that that action was not within the statute, Tindal C. J. said "This is, in substance, a motion, in arrest of judgment; and we think that we ought not to be called upon to arrest the judgment where the question is one of nicety and difficulty, and appears on the record. Still less should we be so called upon, where the defendant, who now complains that the writ has been improperly issued, was himself a consenting party to the case going before the sheriff." Those reasons apply strongly to this case.

Sir T. Wilde and Bompas Serjts. in support of the rule. The objection taken is not to the writ of trial itself, but to its improper execution. In *Jacquet v. Boura* (5 M. & W. 155. S. C. nom. *Jacquet v. Bower*, 7 Dowl. P. C. 331), which was an action for wages, the amount indorsed upon the writ was 12l. 19s.; but it appearing that the plaintiff had been engaged at a yearly salary and dismissed without notice, it was held that the case was not triable before the sheriff. Parke B. in delivering the judgment observed that "the amount to be recovered might be limited to 20l.; but, on the other hand, it might not; it would depend on the circumstances proved in the case: therefore it is a claim for unliquidated damages and not within the act. It might as well be said that an action against a carrier for negligence was within the act, where the damages are under 20l., because they could not be more. The probable limit of the damages on one side does not prevent its being a claim for unliquidated damages." Here there is a claim for interest, which may raise the sum to be recovered to more than 20l. It is submitted that the claim would be for interest from the time when the bill was due up to final judgment. It makes no difference in principle whether the excess was for 3l. or for 300l. The court may surmise how much was given for interest, but they cannot judicially know it. Even assuming, therefore, that the writ of trial was properly issued it has been improperly executed. The remittitur cannot have the effect of giving jurisdiction if there was none originally. [Cresswell J. Do you mean to argue that if the writ of trial was sufficient to give jurisdiction, and the jury found a verdict for more than 20l. that would make the writ wrong?] The execution of the writ would be wrong. But here, the writ of trial itself did not follow the writ of summons. The forms inserted in the appendix to the rules of court Hil. 4 W. 4 are of the same validity and effect as if they were given by statute; the form of the writ of trial (No. 5) is confined to the trial of issues. Any supposed inconvenience as to sending two writs to the sheriff at the same time, is no sufficient reason for departing from the form, and framing a writ, as here, in a new manner. The form in Tidd referred to, has never been judicially recognised.

TINDAL C. J. Two objections have been raised in this case, to neither of which do I feel disposed to yield. The claim indorsed on the writ of summons was for a debt of 19l. 4s. 7d. with interest thereon, not stating from what period the interest was to be calculated. I agree that if the defendant had come in the first instance to complain of this uncertainty and had asked us to set aside the writ for irregularity, we might have acceded to his application. But I do not see why we are called upon now to say that the plaintiffs sought to recover more than 20l. At any rate the ground of objection is on the record. The second objection is [612] that the entry of *unica taxatio* should not have been added to the writ of trial. But it would be very inconvenient if it might not be so added, and I am not aware of any positive rule of law that forbids it. However, this objection also is on the record. The forms promulgated with the new rules are headed with a direction that "the issues, &c. shall be in the several forms in the schedule hereunto annexed, or to the like effect, *mutatis mutandis*." And I think the effect of the form has not been so departed from in this case as to vitiate the writ of trial. It is a great convenience to both parties that the trial of the issues and the assessment of damages should take place at the same time. For these reasons I think this rule must be discharged.

COLTMAN J. I also think that the indorsement on the writ of summons was at most a mere irregularity which should have been taken advantage of in the first instance. The question now is, can we see that more than 20l. was sought to be recovered by the plaintiffs? The only certain sum that is sought to be recovered is 19l. 4s. 7d.; there are no particulars of demand before us to shew that more than 20l. was demanded; and the writ of trial recites "that the sum sought to be recovered, and indorsed in the writ of summons herein does not exceed the sum of 20l." I cannot see therefore that this was a case in which the court were not justified in issuing a writ of trial in the usual way. Upon the second point I agree with my lord that there is no objection, in principle, to uniting in one writ a direction to the sheriff to try the issues and to assess the damages. It seems to me that the forms appended to the new rules are not peremptory, but are to be adapted to the exigencies of each case, *mutatis mutandis*.

ERSKINE J. I am of the same opinion. The indorsement upon the writ of summons does not shew that [613] a greater sum than 20l. is sought to be recovered. And there is nothing in the rules of Hil. 4 W. 4 that forbids the directing of an assessment of damages in a writ of trial. But these objections being on the record, the defendant can avail himself of them, if so advised, by writ of error. As to the objection that the jury have given a verdict for a larger sum than 20l., that is cured by the entry of the *remittitur damna* as to the excess.

CRESSWELL J. concurred.

Rule discharged.

ROSE v. GROVES AND ANOTHER. May 10, 1843.

[S. C. 6 Scott, N. R. 645; 1 D. & L. 61; 12 L. J. C. P. 251; 7 Jur. 951. Discussed, *Lyon v. Fishmongers' Company*, 1875-76, L. R. 10 Ch. 690; 1 App. Cas. 674. Followed, *Fritz v. Hobson*, 1880, 14 Ch. D. 542. Referred to, *Ratcliffe v. Evans*, [1892] 2 Q. B. 529. Distinguished, *Smith v. Wilson*, [1903] 2 Ir. R. 71.]

Case. The declaration stated that the plaintiff was possessed of a public-house abutting upon a navigable river, and that the defendant wrongfully and maliciously placed upon the said river, and kept there for a long space of time, to wit, from thence hitherto, certain timbers, so as to drift opposite to the plaintiff's house; whereby the access thereto was obstructed, and divers persons who would otherwise have come to the house and taken refreshments there, were prevented from so doing. Plea, not guilty.—Held, upon motion for a new trial for misdirection, that it was not a question for the jury whether the plaintiff had sustained any special damage.—Semble, upon motion in arrest of judgment, that the declaration did not allege any public nuisance; and—Held, that, at any rate, it disclosed a private injury to the plaintiff.—Held also, that the allegation that the grievance had continued hitherto was immaterial.

Case. The first count of the declaration stated, that, before and at the time, &c. the plaintiff was and lawfully carried on the business of an innkeeper and licensed victualler in a certain house commonly called, &c., and therefrom derived great gains and profits by supplying refreshments to persons coming to and frequenting the said house, which said house abutted on one side thereof upon a certain navigable river, to wit, the river Thames, and was and of right ought to have [614] been during all the time aforesaid accessible from the said river to persons navigating thereon in boats and other craft; all which the defendants at the time, &c. well knew: yet the defendants, contriving and intending to injure the plaintiff, and to hinder and prevent persons from coming by way of the said river to the plaintiff's said house for the purpose of taking refreshments there; theretofore, to wit, on, &c. and on divers other days, &c., wrongfully and maliciously put and placed in and upon divers parts of the said river near to the plaintiff's said house, and wrongfully and maliciously kept and continued there for a long space of time, to wit, from thence hitherto, divers large beams, spars and other materials, in order that the same might, and the same during all the time aforesaid did, at certain states of the tide, to wit, at high-water, for a long space of time, to wit, for two hours next before and after high-water, drift and float opposite to and against, and at the several times last aforesaid continued floating

opposite to and against the said house of the defendant, and thereby the way and access from the said river thereto was, during all the time aforesaid, hindered and obstructed, and divers persons who would otherwise have come to the said house of the plaintiff and taken refreshments there, were thereby during the time aforesaid, hindered and prevented from so doing.

The second count was for stopping up and obstructing a footway leading to the plaintiff's public-house. And the third count stated that the defendants wrongfully and maliciously placed themselves in a certain highway near to the said house of the plaintiff, and intercepted divers persons on their way to the plaintiff's house for the purpose of taking refreshments there, and by falsely representing that the plaintiff's house was disreputable, and that nothing good was sold at or to be obtained there, persuaded the said persons and they [615] then were thereby prevented, and did desist, from coming to the house of or dealing with the said plaintiff. This count concluded with an allegation of special damages in the refusal of certain persons to continue their dealings with the plaintiff.

Plea: not guilty.

At the trial before Maule J. at the second sittings for London in this term, the following facts appeared in evidence:—The plaintiff was the occupier of the public house in question, which was situated at Bermondsey, and communicated to the river Thames by a passage and steps, where persons frequenting the plaintiff's house were accustomed to land from boats. The defendants, who were mast and block makers, occupied the adjoining premises, and evidence was adduced to shew that they had placed certain timbers and spars in the river in such a manner that at high-water the access to the plaintiff's house was obstructed. It was shewn that the plaintiff's business had fallen off since the alleged obstruction. No evidence was given in support of the second and third count.

The learned judge left it to the jury to say whether the access to the plaintiff's house had been obstructed in fact; and if so, whether the obstruction had been caused by the accidental floating of the timber across the plaintiff's landing-place; and directed them in that case to find a verdict for the defendants; the plaintiff's counsel having disclaimed damages if the jury should think the obstruction were accidental.

The jury found a verdict for the plaintiff, damages 20l.

Bompas Serjt. now moved to arrest the judgment, or for a new trial upon the ground of misdirection. [Cresswell J. You must take the question as to the new trial first in order; for a motion in arrest of judgment as-[616]-sumes the verdict to be good. Tindal C. J. A motion for a new trial cannot be made after a motion in arrest of judgment; *Tubervil v. Stamp* (a). You must shape your rule for a new trial or for arrest of judgment.]

The ground of misdirection is, that the learned judge omitted to leave it to the jury to say whether any special damage had been proved. [Maule J. No special damage is alleged. If the plaintiff had alleged that J. Smith was prevented from coming to the public-house, that would have been special damage. But a statement that every body was prevented from coming is a statement of general damage. Cresswell J. It is not necessary to prove special damage in this action. It is sufficient to prove particular damage. In *Iveson v. Moore* (1 Ld. Raym. 486, 1 Salk. 15, Lord Holt, 10, Carth. 451, 12 Mod. 262, Com. 58, Comb. 480) it was held that the preventing of colliers from coming to a colliery by obstructing a public highway, per quod the benefit of the colliery was lost, was such a damage as would enable a man to maintain an action for the nuisance.] A party complaining of the obstruction of a public highway—and a public navigable river is the same thing—must shew some special damage; for the inconvenience in such a case is general; *Hubert v. Groves* (1 Esp. N. P. C. 148), *Fineux v. Hovenden* (Cro. Eliz. 664). [Maule J. This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house.] There is no allegation of injury to the plaintiff's house. [Tindal C. J. There is an allegation of injury to the plaintiff.] The damages as laid in the declaration is rather a damage to the individual customers, who might have a fancy for the particular beer sold at the plaintiff's house, or who might have been able to get credit there. Possibly they might have [617] maintained an action; *Russell v. The Men of Devon* (2 T. R. 667); but the plaintiff, unless he has sustained some special damage, is not entitled to

(a) 2 Salk. 647. See also *Philpot v. Page*, 4 B. & C. 160, 4 D. & R. 281.

bring an action for that which, if an offence at all, amounts to a public nuisance. [Tindal C. J. There is nothing on the face of this declaration that at all shews a nuisance to the river. Erskine J. The defendants had a right to float their timber on a navigable river. Maule J. The only plea is not guilty; which denies the alleged obstruction of the way from the river to the plaintiff's house.] It is stated in the declaration that the defendants wrongfully and maliciously placed the spars, &c. upon the river. The doctrine that an action will not lie at the suit of an individual for an obstruction in a public highway unless he sustain a special damage, is supported by *Chichester v. Lethbridge* (Willes, 71). [Tindal C. J. This question was fully discussed in *Wilkes v. The Hungerford Market Company* (2 New Ca. 281, 2 Scott, 446). One objection taken in that case was that the injury of which the plaintiff complained, in stopping up a street, was an injury to the public at large, and was therefore the subject of an indictment, and not of an action; but this court thought otherwise, as a distinct injury was shewn to have been done to the plaintiff. Erskine J. In a note to *Chichester v. Lethbridge* (Willes, 74 a.), the reasons of the judgment in *Iveson v. Moore* are given from a MS. note of Willes C. J. as follows:—"The reason the judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the king's subjects by the obstruction of this way; because it was set forth that the only way to come to the coal pits from one part of the county was through this [618] way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiff's wrong." In that case special damage to the plaintiff was alleged. [Erskine J. Particular damage was alleged, and that is alleged here.] But it is not set out with sufficient particularity; nor is the injury of which the plaintiff complains, direct and immediate, as in *Greasley v. Codling* (2 Bing. 263, 9 J. B. Moore, 489). *Malachy v. Soper* (3 New Ca. 371, 3 Scott, 723) is an authority to shew that special damage must be particularly alleged. That was an action for slander of title (which in respect of alleging damage, stands upon the same footing as the present action), and it was held not to be maintainable without an allegation of special damage. The declaration there alleged that by the publication of a paragraph in a newspaper relating to shares in a certain mine, "the plaintiff was injured in his rights, and the shares possessed by him and in which he was interested, had been and were much depreciated and lessened in value; and divers persons had believed and still did believe that he had little or no right to the shares, and that the mine could not be lawfully worked or used for his benefit; and that he had been hindered and prevented from selling or disposing of his said shares in the mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done, and was prevented from gaining divers profits which would otherwise have accrued to him;" and this was held not to be a sufficient allegation of special damage. That case shews also that particular damage and special damage are used synonymously. [Cresswell J. In an action for slandering a man in his trade, where the declaration alleges that he thereby lost his trade, he may shew a general damage done to his trade; though he [619] cannot give evidence of particular instances. So here, may not the plaintiff shew a general damage to his trade?] That general damage may be considered as special or particular to him, as being ultra to that suffered by the rest of the world. In *Iveson v. Moore* it appeared there was only one way to the coalpit. [Cresswell J. That is from one part of the county. Tindal C. J. So here, the house was only accessible from the Thames by the passage which the defendants obstructed.] No unlawful act is stated in this declaration, unless it is taken to contain an allegation that the act was done with an intention to injure the plaintiff. In *Wilkes v. The Hungerford Market Company* an unlawful act was stated; for it was alleged that the defendants kept the way stopped up for an unreasonable time; there is no such allegation here. [Cresswell J. There is an allegation that the defendants put the spars upon the river in order that the same might drift and float opposite to and against the house of the plaintiff.] That is an averment of intentional damage to the plaintiff, which is the only cause of action laid in the declaration; and that question was not left directly to the jury. The only question substantially left was whether the way was obstructed in fact. [Maule J. There was evidence that customers could not get to the house.] But there was no evidence of any intentional injury to the plaintiff.

There is another objection to the declaration. It states that the defendants kept the beams and spars upon the river "for a long space of time, to wit, from thence

hitherto" that is, up to the time of the declaration; and up to that time therefore the damages must be presumed to be given. [Maule J. It is laid under a videlicet. If it had said that the obstruction had been continued "for a long space of time, to wit, for three centuries," there could have been no objection to it.]

[620] TINDAL C. J. I think the declaration in this case is free from the objections that have been urged against it. A private right is set up on the part of the plaintiff; and to that he complains an injury has been done. The declaration states that the plaintiff carried on the business of an innkeeper in a house which abutted upon a certain navigable river, and was and of right ought to have been accessible from the said river to persons navigating thereon in boats and other craft. There is no traverse of the right so alleged on the part of the plaintiff. The declaration goes on to say that the defendants wrongfully and maliciously put and placed in and upon divers parts of the said river near to the plaintiff's house, and wrongfully and maliciously kept and continued there for a long space of time, divers large beams, spars and other materials, in order that the same might, and the same during all the time aforesaid did, drift and float opposite to and against the plaintiff's house, and thereby the way and access from the river thereto was, during all the time aforesaid, hindered and obstructed. But it is not stated that the place where the beams and spars were placed or drifted was part of a public highway or of the navigable river. They might drift close to a bank where the water was so shallow that no boat could go there; and that would not be a public nuisance. It appears to me, therefore, that the plaintiff is not complaining of any public injury. But even if he were, I think, after the cases that have been cited, that he discloses a sufficient cause of action. I cannot distinguish the present case from *Iveson v. Moore and Wilkes v. The Hungerford Market Company*; nor from *Rose v. Miles* (4 M. & S. 101), where the declaration stated that before and at the time of committing the grievance, the plaintiff was navigating his barges laden with goods along a [621] navigable creek, and that the defendants wrongfully moored a barge across and kept the same so moored, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden; per quod the plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and the expense of the carriage of his goods over land. The same objection was taken there as in this case, namely, that the obstruction was in the nature of a common nuisance, and was not a particular injury to the plaintiff; and that he had not shewn any special damage resulting to him from the alleged grievance. But this court held that there was such a special damage shewn for which an action would lie; and their judgment was confirmed by a court of error. After these cases I do not see here how we can arrest the judgment upon that ground. The other point has received a sufficient answer. And they are both upon the record; so that the defendants, if so minded, may have their writ of error.

With regard to the new trial, I think that the defendants, if they meant to make any point as to the only question for the jury being whether the act were done intentionally, ought to have raised it when the judge was summing up.

ERSKINE J. I am of the same opinion. It is said that the learned judge ought to have left the question, whether the plaintiff had sustained any special damage. But the count under consideration does not contain any allegation of special damage in the usual sense of the term. The only question in the case was, whether there was any injury to the plaintiff by the obstruction of the access to his house; and that must have been the measure of damages, which the jury took into their consideration. There is no ground therefore for a new trial.

[622] As to the arrest of judgment the declaration shews, in the language of *Iveson v. Moore*, that the plaintiff had sustained a damage more than the rest of the Queen's subjects; and that may, in one sense, be termed a damage special or peculiar to the plaintiff. To support that allegation it was not necessary to aver the loss of any particular customers. Upon both grounds, therefore, the application fails.

MAULE J. I think the declaration is perfectly good. It states in substance that the defendant had placed timber upon the river in such a manner as to prevent customers coming to the plaintiff's house. That is an injury to the plaintiff with which the public have nothing whatever to do. And supposing that the declaration did allege a nuisance to a public highway, still there is a clear statement of a private injury to the individual complaining; but I think no public injury is alleged. There is not much probability of a writ of error being brought, if the rule now moved for is

refused; but a great certainty of it if the rule were granted. The defendants by pleading not guilty only, have merely denied that they stopped the way in question; but it was proved that they had done so. With regard to the amount of damages, the plaintiff shewed that he had lost his custom by reason of the obstruction. I told the jury not to find for the plaintiff if they were of opinion that the timber had broken loose and drifted before the plaintiff's house by accident—the plaintiff not asking for damages if the obstruction were accidental—though perhaps even if the obstruction had been of that character, he might have been entitled to a verdict.

CRESSWELL J. I am of the same opinion. The question in issue was, I think, properly left to the jury; and, therefore, there is no ground for disturbing the verdict.

[623] As to the arrest of judgment, it seems to me the declaration discloses a sufficient cause of action in the plaintiff, whether the obstruction complained of was a nuisance to the highway or not. *Iveson v. Moore* is hardly distinguishable from the present case, except that there an objection was taken to the declaration which does not exist here. In that case Holt C. J. observes, "Though it is laid that the plaintiff lost his customers, &c., that is not special enough; but it ought to be shewn that customers, were coming to buy and were obstructed, whereby," &c. The declaration was nevertheless held sufficient. In the present case the declaration expressly alleges that divers persons, who would otherwise have come to the plaintiff's house and taken refreshments there, were by reason of the obstruction caused by the defendants prevented from so doing. *Iveson v. Moore* is therefore a direct authority in favour of the present plaintiff.

Rule refused.

[624] EDWARDS v. TOWELS. May 10, 1843.

[S. C. 6 Scott, N. R. 641; 12 L. J. C. P. 239.]

In an action for boarding and lodging the defendant's wife, it appeared, they were living apart, but the circumstances of their separation were not explained. A letter from the plaintiff's attorney to the defendant, written during the time the wife was living in the plaintiff's house, was put in evidence, informing the defendant that she was getting into debt and was anxious to return to him. To this the defendant returned no answer. The jury were directed to say whether the defendant thereby authorised the wife to contract for necessaries. Held, a misdirection.

Assumpsit for the use and occupation of certain rooms by the defendant's wife, and for goods sold and delivered; with a count upon an account stated. Plea: non assumpsit.

The cause was tried before the under-sheriff of Middlesex, when the following facts appeared in evidence. The defendant was married in May 1839. On the 28th of December 1840, his wife went to the house of the plaintiff (whose wife was her aunt) to board and lodge, and remained there till the 28th of February 1841. During this time she was living apart from her husband; but the cause or circumstances of the separation did not appear. In January 1841, the plaintiff's attorney sent to the defendant the following letter:—

"30th December 1840.

"Sir,—I have this morning had communication with the friends of your wife; and my instructions are, to apprise you that she has been endeavouring to support herself, but that for some time past she has not been able to do so; consequently she is now getting fast into debt. You must be aware that you are liable for all debts for necessaries that she may contract. I am further instructed to inform you that she is willing and anxious to return to you. Should you decline her doing so, I am authorised to negotiate with you for an allowance to her for support. I am sure that, as a man, you will see the necessity of this. You were the means of depriving her of a comfortable situation, which I understand she had before marriage with you. Unless, there-[625]-fore, I hear from you satisfactorily by Friday next, I must adopt those measures which will compel the same, and put you to considerable expense in the end.

"Signed," &c.

Addressed to the defendant "at Mrs. Whiting's, Lark Hall Lane, Clapham."

The letter was received and read by the defendant in the presence of Mrs. Whiting, who said at the time—"It is no use Mrs. Towels sending a lawyer's letter to him, as she will get nothing out of him." The defendant himself said nothing, and returned no answer to the letter.

The defendant's counsel applied for a nonsuit, upon the ground that, in the absence of any proof of the circumstances under which the defendant and his wife were separated, the latter had no implied authority to bind her husband. Leave being reserved to the defendant to move upon this point, the undersheriff left it to the jury to say whether the defendant, by not taking notice of the letter, had impliedly authorised his wife to charge him with necessities. The jury returned a verdict for the plaintiff, damages 4l. 16s.

Byles Serjt., on a former day in this term (April 25th), obtained a rule nisi to enter a nonsuit pursuant to the leave reserved, or for a new trial, on the ground of misdirection. Upon the former point he cited *Mainwaring v. Leslie* (Moo. & Malk. 18, 2 C. & P. 507), and *Clifford v. Laton* (Moo. & Malk. 101).

Bompas Serjt. (with whom was Wordsworth) now shewed cause. There was some evidence in the case to support the verdict; for the letter sent to the defendant, contained an offer on the part of his wife to return to him, [626] which the defendant, by his conduct, must be taken to have declined. And if a husband refuses to receive his wife into his house, it is the same as if he turns her out of doors; in which case she must have credit for her reasonable expenses; *Rawlyn v. Vandyke* (3 Esp. N. P. C. 250). It was not necessary that the wife should make a formal tender of herself to her husband; it was sufficient that she was "willing and anxious" to return to him. The defendant, though it does not appear that he made any statement himself, did not repudiate that made by Mrs. Whiting in his presence—that his wife would get nothing out of him. [Cresswell J. That is hardly evidence that he refused to take her back.] At any rate, he did not take her back in fact. And it will not be assumed that the separation was owing to any misconduct on her part. The real question in the case was, whether the defendant had, by his conduct, authorised his wife to contract for necessities; and that was the question which was substantially left to the jury.

Byles Serjt. (with whom was Udall), in support of the rule. Independently of the letter the case would have been simply that of a husband and wife living apart, the cause of their separation being unknown. In *Mainwaring v. Leslie*, Abbott C. J. distinctly lays down the rule that "when the wife is not living with her husband, there is no presumption that she has authority to bind him even for necessities suitable to her degree in life: it is for the plaintiff to shew that, under the circumstances of the separation, or from the conduct of the husband, she had such authority." The plaintiff, therefore, was in this case bound to shew the circumstances of the separation. [Tindal C. J. Not the particular circumstances; no tradesman could [627] know them.] He ought, at any rate, to have shewn some of them. Then the question is, what is the effect of the letter. It does not purport to be written by the wife's authority; but appears to have been written in consequence of communications with her friends. There is no offer to return made by her. Even suppose there had been, the defendant might have had grounds for refusing to receive her. It is said that misconduct is not to be presumed against the wife; neither is it to be presumed against the husband. There is to be no presumption either way. But if a married woman choose to leave her husband and live apart from him, he is not bound to maintain her. There is no evidence that the defendant refused to receive her back. What was said by Mrs. Whiting appears to have reference to the demand for an allowance, and not to her return. [Tindal C. J. The defendant does not answer the letter. Surely he would have said something if he had meant his wife to come back. I think his silence speaks more loudly than what the woman said. It is very slight evidence certainly; but it is some.] The contract, if any existed, had begun before the letter was written.

TINDAL C. J. I think that the direction of the undersheriff was, perhaps, not pointed enough for the jury to understand its bearing; and that the case should go down for a new trial upon the ground of misdirection.

Per curiam. Rule absolute.

[628] GREENWOOD v. ROTHWELL. May 10, 1843.

[S. C. 6 Scott, N. R. 670 ; 12 L. J. C. P. 259. In Chancery, 6 Beav. 492. Referred to, *Montgomery v. Montgomery*, 1845, 8 Ir. Eq. R. 750. Discussed, *Woodhouse v. Herrick*, 1855, 1 K. & J. 364.]

Devise of realty to A. "for and during the natural life of the said A. ; and from and after his decease unto all and every the issue of the body of A., share and share alike, as tenants in common, and the heirs of such issue :"—Held, that A. took an estate for life only.

The following case was, by order of Lord Langdale Master of the Rolls, bearing date the 22d of November, 1842, submitted for the opinion of this court :—

John Mitchell, late of Clayton, in the parish of Bradford, in the county of York, yeoman, deceased, being at the date and execution of his will hereinafter mentioned, and thence until and at the time of his decease, seised of certain lands and hereditaments situate at Clayton, in fee-simple, made and published his last will and testament in writing, duly executed and attested as then by law required for the devise of freehold estates, and bearing date the 6th of September, 1811, whereby, after certain other devises and bequests, he gave and devised the said hereditaments in the words following :—

"And I also give and devise unto Jonas Greenwood, the son of my late brother-in-law Joseph Greenwood, all my lands and hereditaments situate in Clayton aforesaid, and now in the occupation of John Mortimer, and also all other my messuages, cottages, lands and tenements situate in Clayton aforesaid, for and during the natural life of the said Jonas Greenwood ; and from and after his decease, I give and devise the same premises, unto all and every the issue of the body of the said Jonas Greenwood share and share alike, as tenants in common, and the heirs of such issue."

The testator died without having revoked or altered his said will.

The said Jonas Greenwood thereupon became seised of the said devised premises as devisee thereof under the said will ; and by indentures of lease and release, bearing [629] date the 13th and 14th of March, 1823, conveyed these premises to Abraham Tempest, his heirs and assigns, and, in pursuance of a covenant for the purpose contained in the said indenture of release, levied a fine sur conusance de droit come ceo, &c., with proclamations, to the said Abraham Tempest and his heirs, of the said premises.

The defendants claimed under the said Abraham Tempest.

The said Jonas Greenwood died leaving children.

The plaintiffs, as the surviving children, and as the heir-at-law of one of them deceased, claimed the premises under the will.

The question for the opinion of the court is, what estate did Jonas Greenwood take in the devised premises under the will ?

The court and parties to be at liberty to refer to any other parts of the will on the argument of the case (a).

The case was argued on Wednesday, the 10th of May.

Byles Serjt. (with whom was J. Turner) for the plaintiffs. Jonas Greenwood, the devisee, took an estate for life only. The words "issue of the body" in the devise are words of purchase and not of limitation ; and the plaintiffs, as the children of the tenant for life, take the fee as tenants in common in remainder. This construction, which there is no rule of law to defeat, effectuates the plain intention of the testator who expressly devises the estate to Jonas, for and during his natural life. This shews the termination of his estate, and the following word : "from and after his decease" shew the commencement of another estate. The defendants will contend that the devisee took an estate tail, and applying [630] the rule in *Shelley's case* (1 Co. Rep. 88, 93), they will make the words, "for and during the natural life of the said Jonas Greenwood" of no avail ; they must also expunge the words, "share and share alike as tenants in common, and the heirs of such issue." The latter words would be superfluous or repugnant if an estate tail had been previously given. They were intended to dispose of the whole estate, which it was the manifest intention of the testator to do ; but the construction contended for on the other side would leave the

(a) The other parts of the will threw no light on the devise in question.

fee undisposed of. In order to give a meaning to the words, "all and every the issue," the defendants must adopt the doctrine of cy pres, and contend that they must mean "all and every the issue successively." There is no case in which the word "issue" has been held to be a word of limitation; where, as in this case, there were also words of division and distribution—such as, "share and share alike, as tenants in common"—or superadded words of limitation—as "heirs of such issue" or, where there was no limitation over. The devise over is to the "issue of the body" of J. G., not to the "heirs of the body," which *prima facie* are words of limitation; nor to the "children," which is a word of purchase. "Issue of the body" is an intermediate expression which may be interpreted either way, so as best to carry out the intention of the testator. *Lees v. Mosley* (1 Younge & Col. 589), and the cases there cited of *Hockley v. Mawbey* (1 Ves. jun. 143, 3 Bro. C. C. 82), *Doe dem. Cole v. Goldsmith* (7 Taunt. 209, 2 Marsh. 517), and *Loddington v. Kime* (1 Salk. 224, 1 Lord Raym. 203), are distinct authorities to shew this flexible quality of the word "issue." Even if the words had been "heirs" (instead of issue) "of the body" still the devisee would have taken only an estate for [631] life, according to *Doe dem. Long v. Laming* (2 Burr. 1100); which has never been overruled, though its authority is certainly doubted in Jarman on Wills (page 287). But the present case is much stronger. *Jesson v. Wright* (2 Bligh, 1, overruling *Doe dem. Wright v. Jesson*, 5 M. & S. 95), and *Doe dem. Bosnall v. Harvey* (4 B. & C. 610, per nom. *Bagnall v. Harvey*, 7 D. & R. 78), will be relied upon for the defendants, as shewing that words of distribution are not sufficient to defeat the rule in *Shelley's case*; but in the former case the devise over was to the "heirs of the body" of the first devisee; and in both cases there were no words of superadded limitation, and there were limitations over. The presence or absence of a limitation over has always been considered material as assisting in the construction of a will. And it is reasonable that it should be so. If the testator limits over, it is strong to shew that he intended to give only an estate-tail. If he does not it is equally strong to shew that he intended to give the whole estate. If the words at the end of the present devise had been "the heirs of the body of such issue," instead of simply "the heirs of such issue," some difficulty might have arisen, as the plaintiffs then must have asked the court to imply cross remainders.

Channell Serjt. (with whom was W. Rogers) for the defendants. The first devisee took an estate-tail. It is impossible to give effect to all the words in the devise. Some are repugnant and others inoperative. The words "issue of the body" must be taken as nomen collectivum. *Prima facie* they import an estate tail; and, as observed by Thurlow C. in *Hockley v. Mawbey*, they are perhaps the aptest which can be used to introduce such estate. The testator here does not devise to his relations by [632] blood. His object is to benefit Jonas Greenwood, and his issue, and that the estate should revert to his own right heirs, but not till the failure of such issue. The word "issue" is to be taken in an indefinite sense, as a word of limitation; for if Jonas Greenwood took only an estate for life, and had children, who had issue, and the children died during the life of the testator, the grandchildren would take nothing, as they could only take by way of remainder, and the estate would have lapsed; but according to the construction contended for on the part of the defendants, the grandchildren would take an estate-tail. [Maule J. According to your view, the same construction would follow if Jonas Greenwood died, living the testator, when the whole estate would lapse.] The argument is only intended to shew that the object of the testator was, to benefit the issue indefinitely, and not the children merely. The ground of the decision in *Hockley v. Mawbey* was, that there was a power of appointment to distribute the shares, shewing that the objects of his bounty were not intended to take as tenants in tail, but in fee. *Doe dem. Cole v. Goldsmith* turned upon a similar point. *Doe dem. Long v. Laming* is inconsistent with the more recent authorities of *Doe dem. Bosnall v. Harvey*, and *Jesson v. Wright*. But even assuming it not to be so, the peculiar language of the will in that case will prevent the application of the decision as a general principle. *Goodright dem. Lisle v. Pullyn* (2 Ld. Raym. 1437, 2 Stra. 729), *Wright v. Pearson* (1 Eden, 119, Ambl. 358), *Denn dem. Geering v. Shenton* (Cowp. 410), *Roe dem. Dodson v. Grew* (2 Wils. 322, Wilmot, 272), *Doe dem. Blandford v. Applin* (4 T. R. 82), *Denn dem. Webb v. Puckey* (5 T. R. 299), *Frank v. Stovin* (3 East, 548), *Mogg v. Mogg* (1 Meriv. 654), *Ward v. Bevil* (1 Y. & J. 512), [633] and more particularly *Tate v. Clark* (1 Beav. 100), are authorities for the defendants. *Loddington v. Kime* is not reconcilable with *King v. Burchell* (1 Eden, 424, Amb. 379).

Byles Serjt. in reply. *Tate v. Clark* is hardly an authority upon this point. *Doe dem. Bosnall v. Harvey* (which was decided after *Jesson v. Wright*), expressly recognises *Doe dem. Long v. Lamington*; where the words "heirs of the body," were held to be words of limitation, upon the ground that if they were construed to be words of purchase, many objects of the testator's bounty would be deprived thereof. The defendants, in this case, have failed to shew that "issue" must of necessity be a word of limitation. They ask, in effect, that the whole estate shall be given to the eldest son by striking out the words of distribution.

The following certificate was afterwards sent:—

"This case has been argued before us; and we are of opinion that Jonas Greenwood took an estate for life in the devised premises under the will of John Mitchell.

"N. C. TINDAL. W. H. MAULE.
"T. ERSKINE. C. CRESSWELL."

[634] HAIGH v. JONES. May 11, 1843.

[S. C. 6 Scott, N. R. 696; 1 D. & L. 81.]

In January 1836 the defendant was charged in execution for 61l. 14s. On the 1st of October 1838 the 1 & 2 Vict. c. 110, came into operation. The plaintiff having afterwards died, and his widow having taken out administration, A., who had acted as attorney for the plaintiff, commenced proceedings in the insolvent court to obtain a vesting order upon the defendant's estate, under sect. 36. The defendant sent B. (an attorney) to A. to endeavour to effect a compromise. A. claimed 85l. 5s. 2d. including a claim for interest at 4 per cent. upon the judgment, from the time it was entered up, under sect. 17. It was ultimately agreed between A. and B., that the defendant should be discharged upon payment of 80l., which agreement was carried into effect. The court refused to compel A. to refund the sum of 18l. 6s., the excess beyond the sum for which the defendant was taken in execution, it having been paid under a compromise.—Query, if the defendant was strictly liable to pay any interest on the judgment?—Sembles (per Coltman J.) if the administratrix had revived the judgment by sci. fa. she would have been entitled to interest from the commencement of the act.—The rule called upon A., "as the attorney for the said plaintiff," to refund the money: Held sufficient, notwithstanding the plaintiff had died before A. received the money.

On the 15th of June 1835, the plaintiff obtained judgment against the defendant for 61l. 14s. In January 1836 the defendant was taken in execution thereon. In January 1843 the defendant endeavoured, through a friend, an attorney, to effect a compromise with Mr. Hewson, the plaintiff's attorney, who not only refused to receive less than the full amount for which the defendant was charged in execution, but also claimed to be entitled, under the 1 & 2 Vict. c. 110, s. 17 (a), to 4 per cent. interest on the judgment, from the time of entering it up; and he threatened that, unless his demand were complied with, he would take proceedings in the insolvent debtors' court for the purpose of obtaining a vesting [635] order against the defendant under sect. 36 of the same statute. The amount so claimed by the plaintiff's attorney for debt, costs and interest was 85l. 5s. 2d.; and it was ultimately arranged between the attorneys who acted for the parties that the defendant should be discharged from custody upon payment of 80l.; which arrangement was carried into effect on the 18th of February. On the 8th of March following a summons was taken out on the part of the defendant, calling upon "Mr. Hewson, the attorney for the said plaintiff," to shew cause why he should not refund the sum of 18l. 6s., being the excess over the sum for which judgment had been obtained, together with costs. On the 11th the

(a) The act received the royal assent on the 1st October 1838.

Sect. 17 enacts "that every judgment debt shall carry interest at the rate of 4l. per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act, in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

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summons was heard before Lord Abinger C. B., and dismissed; but time was given to enable the defendant to apply to the court.

Bompas Serjt., on a former day in this term, obtained a rule nisi to the same effect as the summons.

Byles Serjt. now shewed cause, upon an affidavit by Mr. Hewson, which stated that, having discovered that the defendant had become entitled to certain property by the death of a sister, the deponent had commenced proceedings in the insolvent debtors' court to obtain a vesting order, which was suspended in consequence of the negotiation for a compromise; and that the payment of the 80l. was the result of an agreement between the deponent and the attorney acting on the part of the defendant, which was entered into after a full discussion upon the facts and law of the case, and after reference to the statute and Tidd's Practice on the subject. It was also stated that the plaintiff had died, and letters of administration had been granted to his widow before the arrangement in question was carried into effect.

The learned serjeant took a preliminary objection [636] that Mr. Hewson, at the time the negotiation was entered into, was not the attorney for the plaintiff Haigh, who was then dead, and therefore that the rule which was founded upon affidavits entitled in the cause, and which called upon Mr. Hewson, as the plaintiff's attorney, to refund the money, could not be enforced. [Coltman J. Does the fact of describing him as the plaintiff's attorney render him not liable, if the affidavits shew that he is so?] He did not receive the money as Haigh's attorney. [Tindal C. J. He has received the proceeds of the action as an attorney of this court. Unless he is so bound up with the misdescription that we cannot see our way, surely we ought to go into the merits of the question.] The widow might have had a *scire facias* to revive the judgment. (He was then stopped by the court.)

Bompas Serjt., *contra*. The rule calls upon Mr. Hewson, by name, to refund the money which it is alleged he has improperly received. [Erskine J. He has received it under an agreement between Mrs. Haigh and the defendant. Tindal C. J. The objection is, that the money was paid to him as the attorney for Mrs. Haigh.] It is, at best, a mere technical objection. [Tindal C. J. No; it goes to the substance. The defendant or his agent must have known that Haigh was dead, and that Hewson was acting for the widow.] He must have given the defendant a discharge in this cause. [Byles Serjt. That does not appear from the affidavits. Tindal C. J. The question is, whether the rule should not have brought Mrs. Haigh here, as the proper party.] It does not appear that Hewson has paid over the money to her. The defendant might have brought an action against him alone. [Tindal C. J. Would that be so, if the money was paid under an agreement, as here, for the use of another?] It is submitted that the action would lie before the money was actually paid over. As [637] if money were paid under duress of imprisonment to a party authorised to receive it for another. [Tindal C. J. referred to *Stephens v. Badcock* (3 B. & Ad. 354), where it was held that an attorney's clerk who had received money on account of his master was not liable to the party who paid it for money had and received; inasmuch as the clerk was accountable for the money to his master.] An attorney stands in a different relation to his client from that of a clerk.

Byles Serjt. was then called upon to shew cause upon the merits. Both sides were in error as to the claim for interest. The defendant was liable to pay it—not from the time of entering up the judgment—but from the commencement of the act. But, in point of fact, the 18l. 6s. was not paid in respect of interest, but as a compromise in respect of the proceedings in the insolvent court, and for other expenses; and that was the ground of the dismissal of the summons by Lord Abinger.

Bompas Serjt. The money was paid under duress, and therefore the agreement was not binding. Mr. Hewson had no right to charge for any expenses. Even assuming that the defendant was liable to pay interest upon the judgment from the passing of the act, Mr. Hewson has received something more than that sum would amount to. But no interest at all was due. The judgment was satisfied when the defendant was taken in execution. He was in custody for a judgment which did not bear interest at the time the statute was passed. Its provisions apply only to cases where a judgment is outstanding and unsatisfied. If the debt had been paid originally upon the judgment, it clearly would not have borne interest. [Maule J. There could not have been a *scire facias* to revive the judgment if the debts had [638] been paid; if it had, there might have been.] At all events, the defendant ought not to

pay the costs of this application. It is not in the nature of an appeal from Lord Abinger's decision, as his lordship gave the defendant time to apply to the court.

TINDAL C. J. It does not appear to me that any undue advantage has been taken of the defendant in this case. Each party was represented by an attorney. They consult books; put their own construction upon the statute; and come to a specific agreement. I do not think it at all clear that an action for money had and received would lie under such circumstances. It may have been a great object to the defendant to avoid the process of the insolvent debtors' court. I cannot see any reason why we should set aside the agreement. The rule therefore must be discharged with costs.

COLTMAN J. I am of the same opinion. The money was paid under an arrangement which was the result of full deliberation. It is not necessary, therefore, to inquire whether the defendant was strictly liable to pay interest upon the judgment; though I am not prepared to say, if the administratrix had issued a scire facias to revive the judgment, that she would not have been entitled to interest from the time of the commencement of the 1 & 2 Vict. c. 100. The defendant might have paid the money under protest, if he had wished to raise the question as to his liability.

ERSKINE J. I am of the same opinion. I think there was no duress or fraud in the case. The defendant may have thought himself bound in conscience to pay the interest on a sum of money which had been justly due to the plaintiff's estate for so long a time. At all events, the defendant had entrusted the arrangement to a friend, a professional man, who, after mature [639] deliberation with the party who had been the plaintiff's attorney, and with full knowledge of all the facts, came to the agreement under which the money was paid.

MAULE J. I quite agree that this was a reasonable agreement and compromise between the parties; and that the dismissal of the summons by Lord Abinger was correct.

Rule discharged, with costs.

ABRAHAM BORRADAILE, Executor, &c., v. SIR CLAUDIUS STEPHEN HUNTER, BART.
May 11, 1843.

[S. C. 5 Scott, N. R. 418; 12 L. J. C. P. 225; 7 Jur. 443. Referred to, *Taubman v. Pacific Steam Navigation Company*, 1872, 26 L. T. 704.]

A life policy of insurance contained a proviso (inter alia) that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel, "the policy should be void." The assured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but that at the time of committing the act he was not capable of judging between right and wrong:"—Held (Tindal C. J. dissentiente), that the policy was avoided, as the proviso included all acts of voluntary self destruction, and was not limited by the accompanying provisos to acts of felonious suicide.

Covenant by the executor of the Rev. William Borradaile, upon a policy of insurance effected by the London Life Association (of which society the defendant and George Dorrien, since deceased, were two of the trustees) upon the life of the deceased W. B. for the payment of 1000l. within three months after proof of his death. Averment: of regular payment of the premium and performance of all covenants and conditions on the part of the deceased; that he died on the 16th of February 1838, of which notice was given to the society. Breach, non-payment. Profert of letters testamentary.

Plea, craving oyer of the policy, which was dated 30th of May 1828, and witnessed that, whereas the Rev. [640] W. B., jun., vicar of Wandsworth, had agreed to become a member of the society called, &c., according to a deed of settlement bearing date, &c.; and whereas the said society had agreed to assure to W. B. the sum of 1000l., to be paid to his executors, &c., after his decease, at the annual premium of 33l. 15s.: it then stated the payment of the first premium by W. B. and his agreement to pay the annual premium in every succeeding year. The trustees then covenanted that if

the assured should continue to pay the premium, and should well and truly perform and keep all covenants, conditions, &c. contained in the said deed of settlement, and all orders, rules, &c., made at any general court of the society, they, or the trustees for the time being, covenanted, within three calendar months after proof of the death of the assured, to pay to his executors, &c., the sum of 1000l. :—"provided, and it is hereby declared to be the true intent and meaning of this policy of assurance, and the same is accepted by the said assured upon these express conditions,—that in case the assured shall die upon the seas (except in such passages as are allowed by the rules of the society), or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever, unless licence be obtained from a court of directors of the said society, or shall die by his own hands, or by the hands of justice, or in consequence of a duel, or if the age of the said assured does now exceed thirty-six years, or if the said assured be now afflicted with any disorder which tends to the shortening of life, or if a certain declaration bearing date the 28th day of May instant, made and signed by or on behalf of the assured, and forming the basis of the contract between the said assured and the society contains any untrue averment,—this policy shall be void." Signed by George Dorrien, and the defendant. The plea then continued thus :—"that true it is that the said W. B. died as [641] in the said declaration mentioned ; but that the said W. B., after the making of the said instrument or policy of assurance, to wit, on the 16th day of February A.D. 1838, so died by his own hands, whereby the said instrument or policy of assurance became void." Verification.

Replication, that the said W. B. did not die by his own hands, *modo et formâ*; upon which issue was joined.

The cause was tried before Erskine J. at the London sittings after Michaelmas term, 1841 ; when it was proved on the part of the defendant, that on the night of the 16th February the deceased threw himself from Vauxhall Bridge and was drowned ; and it was contended that it was not competent to the plaintiff to go into any question as to the insanity of the deceased, inasmuch as if his death was in fact occasioned by his own hand or act the policy was void, and that it was immaterial whether he was sane or insane. On the part of the plaintiff it was argued that the real question to be tried was, whether the deceased had committed suicide, such being the sense of the words "shall die by his own hands ;" and that the question to be considered was, whether the assured was or was not in a sane state of mind at the time he committed the act ; or, in other words, that it must have been the intentional act of a sane man having the control of his will, to bring it within the condition in the policy.

The learned judge expressed his opinion that if the deceased's mind was so far gone that he did not know the consequences of the act and the mind was not moving to the act, it was not within the proviso ; but his lordship said that in case this might not be the true construction of the proviso, the question had better be submitted to the jury in both points of view so as to avoid the expense of another trial ; and he suggested the following mode of leaving the questions :—

"First: Did the deceased wilfully cast himself into [642] the water with the intention of destroying his life, knowing it at the time.

"Secondly : Whether at the time he was in such a state of mind that he was not a morally responsible or accountable being."

This arrangement having been assented to by the counsel on both sides, the cause proceeded ; and a great deal of evidence was produced to shew the insanity of the deceased.

The learned judge in summing up told the jury that the question they had to decide was, whether, according to the meaning of this policy, the Rev. Mr. Borradaile had died by his own hands. In his (the judge's) opinion the true construction of the instrument was,—that if the assured by his own act intentionally destroyed his own life, and that he was not only conscious of the probable consequences of the act, but did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his own life—the case would be brought within the condition of the policy. But if he was not in a state of mind to know the consequences of the act, then it would not come within the condition. The jury would first say, therefore, whether according to the evidence, they were satisfied, that the deceased came to his death by his own voluntary act, knowing at the time what the consequence of it would be—that is, whether he threw himself into the water for the purpose of destroying his life, being in a state of mind to will to do so : and next,

whether, at the time of destroying his life, he was capable of distinguishing between right and wrong, so as to be a morally responsible agent.

The jury, after retiring, returned the following verdict: "That Mr. Borradaile threw himself from the bridge into the water with the intention of destroying life; and, previous to the said act, there is no evidence of insanity." [643] This finding not being considered satisfactory by the learned judge as not indicating the state of the assured's mind at the time he committed the act in question, the jury again retired, and then returned their verdict in these words:—"That Mr. Borradaile voluntarily threw himself from the bridge with the intention of destroying life; but at the time of committing the act, he was not capable of judging between right and wrong."

It was submitted by the plaintiff's counsel, that this was in substance a verdict for the plaintiff. The judge, however, thought the verdict had better be entered pro forma for the defendant; with liberty for the plaintiff to move that it be entered for him, with 1177l. damages, which were assessed by the jury; being the 1000l. insured by the policy with interest thereon at 5 per cent. from the 1st of July 1838, when the money became payable according to the stipulation of the policy.

In Hilary term, 1842, Sir Thomas Wilde Serjt. obtained a rule nisi to set aside the verdict for the defendant, and enter a verdict for the plaintiff accordingly. He referred to the unreported cases of *Garrett v. Barclay (a)*, *Kinnear v. Borradaile (b)*, and *Kinnear v. Nicholson (c)*.

(a) *Garrett v. Barclay*.—This case was tried before Alexander C. B. at the London sitting after Easter term 1826.

It was an action on a policy of assurance granted by the Rock Life Assurance Office on the life of Daniel Rainier for 3000l. The policy was effected in 1812. The words in the condition of the policy were—

"In case the said D. R. should commit suicide, or die by duelling or the hands of justice, or upon the High Seas, &c., the policy to be void."

The defendant pleaded that Daniel Rainier had committed suicide, and the policy had become forfeited. The replication denied that he had committed suicide. Issue joined.

It was contended by Mr. Jervis, the plaintiff's counsel, that the object of the proviso was to guard against frauds by persons insuring their lives, and shortly afterwards preferring death to benefit their families; and that Rainier being insane did not commit suicide.

It appeared that the assured Daniel Rainier had for some time laboured under insanity, and that on the morning of the 17th of March 1825, he was found drowned in a pond of water; it further appeared that in the night he had undressed himself, and folded and laid his clothes on the butting of a haystack, and had walked near 100 yards naked to the pond in which he was found; the water was shallow, not three feet deep at that spot; and he was found in the morning, his back quite out of the water and his head under the water, quite dead; the finding of the coroner's jury was, that he destroyed or drowned himself in a fit of insanity. At the trial a question was raised, whether the assured had not gone to the pond to bathe,—it being shewn that he was accustomed to bathe,—and died from apoplexy.

The Lord Chief Baron told the jury that the question was, whether under the circumstances they were satisfied that Rainier died by taking measures intending to kill himself, or whether he died by taking measures without any such intention; that beyond all doubt he was insane; that it was suggested that he had gone to the pond to bathe; and that was a question for them.

The jury found a verdict for the plaintiff; *being of opinion that Rainier did not commit suicide* *.

(b) *Kinnear v. Borradaile*.—This was an action upon a policy for 2000l. effected upon the life of Thomas Kinnear with the Rock Life Assurance Company, containing a similar

(c) *Kinnear v. Nicholson*.—This case arose upon a policy for 4000l. effected upon the life of the same gentleman (Mr. Kinnear) with the National Life Assurance Society,

* These words in italics are taken from the indorsement on the brief of one of the counsel in the cause. It may be doubtful whether they imply that the assured came to his death by natural causes, such as apoplexy, as was suggested; or that, being in a state of insanity, he could not commit the crime of suicide.

[644] Channell Serjt. (with whom was W. H. Watson) shewed cause in last Trinity term (a).

The question in this case is as to the meaning of the [645] term "dying by his own hands." The defendant submits that if the deceased, by his own personal agency, destroyed his life, intending to do so, the policy is avoided. The plaintiff, on the other hand, insists that, although the deceased may have destroyed his life in the manner stated, still if he was insane at the time or incapable of distinguishing right from wrong, the policy is not avoided.

It is not contended on the part of the defendant that the policy would be avoided by a mere accidental destruction of life by the party himself; but it would be if the act was done intentionally, even though circumstances might exist which would exempt the party from all moral culpability. The expression must receive a reasonable construction, and must be taken to mean, if the party shall die by his own act. The effect of the verdict is, that the deceased threw himself off the bridge, knowing that he should thereby destroy life, and intending so to do; but it relieves him from all imputation of crime, inasmuch as he could not at the time distinguish between right and wrong. The verdict shews a consciousness of the act and its consequences, but no culpability. But all inquiry as to criminality is besides the present question. If, under similar circumstances, Mr. Borradaile had destroyed the life of another person, and the [646] issue had been whether such person had died by the hands of Mr. Borradaile, it would surely not have been necessary in order to support the issue to shew that the act by which the party came to his death was criminal. Nor is it necessary for the defendant to argue, that, if an assured had come to an accidental death by his own hands—as if a man, having been blooded, should in a state of delirium tear off the bandages and bleed to death, or should by mistake take a wrong medicine and die in consequence—in such case the policy would be avoided. [Tindal C. J. If it were so indeed no policy would be worth much.] But here, there is a voluntary act producing death, with a knowledge and intention that it should do so. The contract which the defendant has entered into is to pay a sum of money on the death of a certain party, provided it does not happen in a particular way. It may be argued on the other side that the self destruction of the deceased was occasioned by disease, and that disease is a peril insured against. But that is not so. Death is the only event that is insured against—an event which is certain, though the time at which it may occur is not so. It is not necessary to contend that, if mental disease accelerated or even conduced to death, the policy would be avoided, provided the death were not caused by the personal agency of the assured. It is clearly no part of the contract that he should accelerate death by his own act. But here, the assured by his own personal act, consciously produced his own death, which is the very event insured against. It will be urged on the part of the plaintiff that from the whole of the policy it is clear that the intention of the party must be taken into consideration; that the other conditions with which the one in question is associated, namely "dying by the hands of justice or in consequence of a duel," imply criminality, and therefore that "dying by his own hands" [647] must have the same meaning. But there is no necessary connection between the clauses. In *Kinnear v. Borradaile* the issue was in direct terms whether the assured had "committed suicide."

proviso with that in the case of *Garrett v. Barclay* (supra, p. 643, n.). The defendants pleaded that the assured "did commit suicide."

The cause was tried before Lord Tenterden C. J. at the sittings in London, after Hilary term 1832. The defence set up was, that Mr. Kinnear, who was found dead in his bed on the morning of the 21st of October 1830, had caused his own death by taking poison. An inquest had been held upon the body, and a verdict returned of "died by the visitation of God." The jury returned a verdict for the plaintiffs.

which was also subject to a proviso or condition, "that assurances would be void if the parties whose lives had been assured, should go beyond the limits of Europe, &c.; and that assurances made by persons on their lives would become void if they should die by duelling by their own hands, or by the hands of justice." The cause was not tried, it having been agreed between the parties, that it should abide the event of *Kinnear v. Borradaile*.

(a) 6th June. Before Tindal C. J., Coltman, Erskine and Maule JJ.

The other case of *Kinnear v. Nicholson*, where by the terms of the policy as in this case it was to be void if the party died "by his own hands" was not tried. In *Garrett v. Barclay* there was a general verdict for the plaintiffs which was acquiesced in. That case is strongly in favour of the defendant. If the death of the assured there was unintentional, produced by apoplexy or accident, the policy would attach: but it would not if the party had intended to produce death, although his insanity was clearly proved. The jury therefore must have negatived the intention. The argument on the other side amounts to this; that there can be no voluntary death where a party is not of sane mind.

Sir T. Wilde Serjt. and R. V. Richards, in support of the rule. It is obvious that the words of the policy are not to be taken in their strictly literal sense; otherwise Mr. Borradaile could not be said to have died by his own hands. The term is equivocal and requires explanation. The insurance company might have worded the condition thus—"If he die by his own hands, whether sane or insane;" and then the meaning of the contract would have been clear. The expression, being ambiguous, is to be taken most strongly against the party using it, namely, the insurer. It is admitted on the other side that the policy would attach where death had been produced by the personal act of the assured, if such act were by mistake or accident. The plaintiff submits that the intent of the party is also to be taken into consideration. The terms "suicide" and "dying by one's own hands" are generally used "synonymously"; and the former term is the one adopted by many of the in-[648]-surance offices (a). The contract of insurance is based upon certain calculations.

(a) The following are the provisos avoiding the policies issued by some of the principal London Insurance Companies, which bear upon this question.

The Alfred.—"Policies effected on their own lives by persons who shall die by suicide or duelling, will remain in force to the extent of such bonâ fide interest as any other person shall have acquired therein."

The Argus.—"Every policy effected by a person on his or her own life shall be void, if such person commit suicide, or die by duelling or the hands of justice: but if any policy effected by a person on his or her own life, shall afterwards be actually assigned to any person or persons by way of mortgage, or for the benefit of any creditor or creditors, or charged with any sum or sums for the benefit of any mortgagee or mortgagees or creditor or creditors, and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling or by the hands of justice, then the policy so assigned or charged shall not be void to the extent of the principal sum or sums, and interest secured by the assignment or charge; or if any policy effected by any person on his or her own life shall afterwards be absolutely assigned to a purchaser for valuable consideration in any transaction (except that of settlement upon or after marriage, or any other occasion), and the person on whose life the assurance shall have been effected, shall commit suicide, or die by duelling or by the hands of justice, then the policy so assigned shall continue in full force, notwithstanding such suicide or death."

The Atlas.—"Assurances made by persons on their own lives will be void if they die by the hands of justice, by duelling or by suicide."

The Eagle.—"By the death of the said, &c., by suicide, by duelling or by the hands of justice."

The Globe.—"Should the assured die by duelling, suicide or the hand of justice."

The London Assurance.—"If the assured shall die by suicide or by duelling or by the hands of justice."

The Pelican.—"Should the said assured die by duelling, suicide or the hand of justice."

The Rock.—"In case the said, &c., shall commit suicide, or die by duelling or the hands of justice." (The cases of *Garrett v. Barclay*, supra, p. 643, n., and *Kinnear v. Borradaile*, supra, p. 644, n., arose on this form of policy.)

The Equitable.—"In case the assured shall die by his own hands or the hands of justice, &c. (This company paid a policy of 3000l. to the executors of Mr. Borradaile.)

The Guardian.—"Or if the said A. B. shall die by his own hands or by duelling or by the hands of justice."

The Hand in Hand.—"The policies of persons insuring their own lives will also

Death produced by disease, whether directly or indirectly, may be the subject of cal-[649]culation; but a voluntary death produced by the act of a sane man is an event that cannot be calculated upon, and of which every prudent insurer would refuse the [650] risk. [Maule J. The insurance offices do not do so in all cases. If a policy is effected on the life of a third person, it is not usual to insert a clause avoiding the [651] policy in the event of his suicide.] The death in this case was the result of disease producing madness. It is argued on the other side, that as the deceased intended self-destruction, his death must be considered as his own act. But intention almost always exists, even in the strongest cases of insanity, or of somnam-

become void if the insured shall die by his own hands or by the hands of justice or in consequence of a duel, but shall remain in force so far as any other person or persons shall then have a bonâ fide interest therein, which shall have been previously acquired or transferred for a valuable consideration."

The Hope.—"If the assured shall die by his own hands or by duelling or by the hands of justice."

The Imperial.—"Insurances made by persons on their own lives shall become void, if such persons die by their own hands, by duelling or by the hands of justice; but as much distress may be produced by the forfeiture of all recovery in such cases, the directors have power in their discretion to make such allowance to the representatives of the deceased as they may deem just and reasonable, not exceeding in any case the value of the policy at the time of the decease."

The Law Life.—"Assurances made by persons on their own lives who shall die by duelling or by their own hands or by the hands of justice, will become void so far as respects such persons; but shall remain in force so far as any other person or persons shall then have a bonâ fide interest therein, acquired by assignment or by legal or equitable lien, upon due proof of the extent of such interest being made to the directors. And if any person assured upon his own life, and who shall have been so for at least five years, shall die by his own hands, and not *felo de se*, the directors shall be at liberty, if they shall think proper, to pay, for the benefit of his family, any sum, not exceeding what the society would have paid for the purchase of his interest in the policy, if it had been surrendered to the society the day previous to his decease; provided that the interest in such assurance shall be in the assured, or in any trustee or trustees, for him or for his wife or children, at the time of his decease."

The National.—"Assurances made by persons on their own lives, will become void if they die by duelling by their own hands or by the hands of justice." (The case of *Kinnear v. Nicholson*, supra, p. 645, n. arose upon this form of policy.)

The North British.—"Assurances made by persons on their own lives who shall die by duelling or their own hands or by the hands of justice, will be cancelled so far as respects such persons; but shall remain in force so far as any other person or persons shall then have acquired a bonâ fide interest therein by assignment, or by legal or equitable lien; and if any person assured upon his own life shall so die, the directors or managers shall be at liberty, if they shall think proper, to pay for the benefit of his family any sum not exceeding what the corporation would have paid for the purchase of his interest in the policy if it had been surrendered to the corporation the day previous to his decease; provided that the interest in such assurance shall be in the assured, or in any trustee or trustees for him or for his wife or children at the time of his decease."

The West of England.—"Policies effected by persons on their own lives, who shall die by duelling, by their own hands or by the hands of justice, will, so far as regards the assured, become void; but notwithstanding this provision, such assurance will be held valid so far as extends to any bonâ fide interest acquired by any other person under an actual assignment, by deed for a valuable consideration in money, or by virtue of any legal or equitable lien as a security for money, upon proof of such a subsisting interest being given to the directors to their satisfaction; and if any person assured upon his own life, and having been so assured for five years at least, shall die by his own hands, and not *felo de se*, the directors will be at liberty, if they shall think proper, to pay for the benefit of his family, any sum not exceeding what the company would have paid for the purchase of his interest in the policy, if it had been surrendered on the day previous to his decease, provided the interest in such assurance

bulism; but that is not the legal meaning of intention; it means an intention that is subject to reasonable control. It is admitted that if this were a question of crime, the deceased must be held free from all culpability. The reason given by Lord Coke (3 Inst. 6), and adopted by Lord Hale (Hale, P. C. Ch. 4), why a lunatic cannot commit high treason is because he is "totally deprived of all compassings and imaginings." The same rule is laid down by Serjt. Hawkins (Hawk. P. C. B. 1, Ch. 1). So that if a madman were with his own hand to kill the Queen, he would not be guilty of high treason, because he could not be said to have "imagined" Her Majesty's death. Neither can he be said, in a legal sense, to intend his own. The intention meant is not that of a madman or a brute animal, or that which may even be said to exist to a certain extent in some vegetables. Self-destruction, to be free from moral culpability, must be the result either of disease or of delusion, such as occurs in the calenture, which is defined by Johnson to be a distemper peculiar to hot climates, under the influence of which sailors imagine the sea to be green fields, and throw themselves into it. A man might wake from a state of somnambulism and find himself on the brink of a precipice, and under an irresistible impulse [652] might throw himself down. But in either case how does a death so produced differ from one occasioned by accident? A diseased brain may produce a paralysed limb which is utterly beyond the control of the party; or it may produce a state of mind and intention equally beyond his control. The legal result of the verdict in this case amounts to a finding that Mr. Borradaile was non compos mentis at the time he made away with himself; it excludes therefore the existence of any sane intention on the part of the deceased at the time of his death; and it never could have been intended that the policy was to be void in case of death occasioned by insanity. [Coltman J. The policy is to be void in case the assured goes beyond the limits of Europe. Suppose an assured in a state of insanity were to go to America, would not the policy be avoided?] The terms in that case are quite unambiguous; though even then perhaps the question might be arguable (a); but here the expression is clearly figurative.

Cur. adv. vult.

The learned judges, not being unanimous, now delivered their judgments seriatim, as follows:—

MAULE J. In the judgment I am about to deliver, I have not stated the facts, not having adverted to the circumstance of my opinion being delivered the first; they will, however, no doubt be fully stated by the learned judge before whom the cause was tried.

I have had much doubt in this case, but the conclusion at which I have at last arrived, is, that the verdict for the defendant was right. The question is, what is the

shall be in the assured or in a trustee for him, or for his wife or children at the time of his decease."

One of the rules of The London Life Association (which was not given in evidence) is as follows:—

"The policies of persons on their own lives also become void if the assured die by his own hands, or by the hands of justice, or in consequence of a duel. But the court of directors in cases of suicide not *felo de se*, are authorised to pay the legal holder of the policy any sum they may think fit, not exceeding the value of the policy on the day preceding the decease of the assured."

And the following is the order of the general court (dated 13th January 1830) relating to policies effected with the association; (also not in evidence).

"That in all cases where any policy or policies of assurance shall have been granted by this society to any person or persons upon their own lives, and where the assured shall die by their own hands, and not *felo de se*, the directors be authorised and empowered to pay, if they shall think fit, upon an examination of all the circumstances of the case, to the person or persons legally entitled to the policy at the time of the decease, any sum or sums of money not exceeding in amount the value of the policy on the day preceding the decease of the life assured, computed in the manner adopted by the society in cases of policies purchased by them."

The company had in fact offered before the trial of this case to pay the plaintiff the sum of 182l. 11s. as the value of the policy at the time of the death of Mr. Borradaile; but the offer was declined.

(a) Suppose he was carried there as a prisoner of war.

meaning, in the policy on the testator's life, of the words "in case the assured shall die by his own hands."

[653] In construing these words, it is proper to consider, first, what is their meaning in the largest sense, which, according to the common use of language belongs to them; and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, secondly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense, in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule which requires that effect should be given to such intention of the parties as they have used fit words to express.

The words in question in their largest ordinary sense comprehend all cases of self destruction, and certainly include the case of the present testator; but, as it is admitted that in their largest sense they comprehend many cases not within their meaning, as used on the present occasion, it is to be considered whether the case of the testator falls within the object for which they are used in this policy. A policy by which the sum insured is payable on the death of the assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers therefore a temptation to self-destruction to this extent. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted. It ought, therefore, to be so construed as to include those cases of self-destruction in which, but for the condition, the act might have been committed in order to accelerate the claim on the policy, and to exclude those in which the circumstances, supposing the policy to have been unconditional, would shew that [654] the act could not have been committed with a view to pecuniary interest. This principle of construction requires and accounts for the exclusion from the operation of the condition of those cases falling within the general sense of its words, to which it is admitted not to apply—such as those of accident and delirium. To apply it to the present case: it appears by the finding of the jury, that the testator voluntarily threw himself into the water, intending to destroy his life, but that at the time he did so he was not capable of judging between right and wrong; and, as a man who drowns himself voluntarily may do it to found a claim on a policy, though he may not think it wrong to do so, or though his mind may be so diseased that he does not know right from wrong—which, as I understand the finding of the jury, was the case with the testator—it seems to me that the object of the condition would not be effected unless it comprehended such a case of self-destruction.

For these reasons, I think the defendant ought to retain the verdict, though I cannot but distrust my opinion when it differs from the judgment of the Lord Chief Justice. It is also impossible not to feel that the condition in question is, in respect of the amount of forfeiture, a hard one, as it goes beyond what is necessary to remove the temptation to suicide arising out of the claim acquired by the death of the party. That object would be effected by reducing the claim in case of suicide, to the amount for which the policy could have been sold immediately before the death of the assured, as completely as by a forfeiture of the whole.

ERSKINE J. The only issue in this cause was raised upon a traverse by the plaintiff of an averment in the plea that the assured, William Borradaile, died by his own hands. Upon the trial of that issue before me at [655] the London sittings after Michaelmas term, 1841, it appeared in evidence that the testator had thrown himself from the parapet of Vauxhall Bridge into the river Thames, and was drowned; and the defence was, that this act of self-destruction avoided the policy, under the proviso which declared that the policy should be void if the assured should die by his own hands. To this it was replied, that the testator was insane at the time, and, therefore, that the case did not fall within the true meaning of the proviso—first, because under such circumstances it could not properly be said to have been the act of the assured at all; and, secondly, because, from the context it was obvious that criminal acts of self-destruction alone were contemplated by the parties to the contract; and that, as it would be proved that the deceased was not in a state of mind to be morally responsible for his acts, the proviso did not apply to his case. This made it necessary for me to decide, first, whether the proviso extended to all acts of self-

destruction by the assured, or only to acts resulting from a criminal intention, and also in what way the question of insanity ought to be left to the jury. On the part of the defendant it was contended that the terms of the proviso, in their fair and ordinary meaning, were large enough to include, and were evidently intended to include, all acts of self-destruction whether accompanied by a criminal purpose or not; while, on the part of the plaintiff, it was argued, that, if it could be shewn that Mr. Borradaile was in such a state of mind at the time as to be morally and legally irresponsible for his acts, the proviso would not apply to this case: and, as a test of his responsibility, the jury were invited to consider whether, as a coroner's jury, they could have returned a verdict of *felo de se*; or if, sitting as a petty jury on the trial of Mr. Borradaile for the destruction of the life of another man, they could have found him guilty of felony. I [656] thought, that, as the words of the proviso, according to their ordinary acceptation, were large enough to include all intentional acts of self-destruction, whether criminal or not, if the deceased was labouring under no delusion as to the physical consequences of the act he was committing—if he knew that it was water into which he was about to throw himself, and that the consequence of his leaping from the bridge would be his death—and if he voluntarily threw himself from the bridge into the river, intending by so doing to drown himself—the question, whether he had been thereby guilty of a crime, as *felo de se*, or whether, if he had at that time destroyed the life of another instead of his own, he was in a state of mind to be morally and legally responsible for his acts, was irrelevant to the question before the jury—that the state of the mind of the assured was only material for the purpose of ascertaining whether the act of self-destruction was a voluntary and wilful act, for the purpose of destroying his life. And I so directed the jury: but, in order to save the parties from the expense of a second trial if the court should think that the terms of the proviso included only criminal self-destruction, I left it to the jury, in the terms usually adopted in criminal trials, to find whether at the time of throwing himself from the bridge, Mr. Borradaile was so far deprived of his reason as to be incapable of judging between right and wrong—reserving, by consent, to the plaintiff leave, if necessary, to move to enter a verdict for him upon the whole finding of the jury.

The jury found that Mr. Borradaile voluntarily threw himself into the river, knowing, at the time, that he should thereby destroy his life, and intending thereby to do so; but that, at the time of committing the act, he was not capable of judging between right and wrong.

Upon this finding, the verdict, according to the opinion I had expressed, was entered for the defendant, [657] subject to the leave reserved. The point was argued in Trinity term last, and the court took time to consider its judgment: and, after the most attentive and anxious consideration, I continue to think that the defendant ought to retain the verdict as entered for him. The language adopted by the society is certainly not well selected; because, if taken literally, this case, and all other cases in which the work of self-destruction might be effected otherwise than by the hands of the assured, would be excluded from the operation of the proviso; while all cases of unintentional self-destruction by the hands of the assured, would be included in it. But it was very properly conceded by the counsel for the plaintiff, that the clause must receive a reasonable construction, according to the plain and obvious intention of the parties, as collected from the whole of the instrument, and, therefore, that the proviso might be construed as if the words had been, "if the assured shall die by his own act." But then it was claimed on the part of the plaintiff, that the same liberal principle of construction should be carried out further, and that such acts only should be considered to be within the terms of the proviso, as were the result of the free and intelligent will and purpose of the assured while his conduct was under the control of his reason and judgment; and that the finding of the jury shewed that such was not the case with Mr. Borradaile.

In considering this question, I will examine it, first, as if that branch of the proviso upon which the issue was raised in the pleadings, had formed the only condition upon which the policy was declared void; and next, in connection with the context, which has been supposed to assist in giving the words in question a limited construction. Looking simply at that branch of the proviso upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words, with reference to the nature of the contract, requires, is, that

the act of self-destruction should be the voluntary and wilful act of a man, having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.

It has been argued, on the part of the plaintiff, that, as the very object of a life insurance is, to secure a provision for a surviving family against the fatal consequences of decease in the assured, if the act occasioning the death can be traced as the result of a diseased mind, the case comes within the main scope and object of the contract of insurance. This argument would have been unanswerable if the policy had been wholly silent on the subject, as in the case of *The Amicable Life Insurance Company v. Bolland* (Selw. N. P. 10th ed. 1033, 4 Bligh, N. S. 194, 2 Dow & Cl. 1); or if the proviso had been couched in terms pointed only to acts resulting from a criminal intention; but the very object of a proviso like the present, is to take out of the operation of the general terms of the policy, death resulting from causes which would otherwise fall within the general scope of the contract, although, *ex abundanti cautela*, it also includes cases which the law itself would except, as those of criminal suicide, and death by sentence of the law or duelling. As there is nothing, therefore, in the words now under examination, taken in their ordinary grammatical sense, either when considered alone [659] or with reference to the nature and object of the contract of insurance, that requires that they should be limited to acts resulting from criminal intention, I am of opinion that they ought not to be so confined, unless from the context it plainly appears that it was the intention of the parties so to limit and qualify them. The only case cited in which a policy couched in the same terms has come under legal discussion, is that of *Kinnear v. Borradaile*: but, as the point was not raised in that case, the result ought, I think, to have no weight as an authority to influence the court in this.

It appears, indeed, to me, that, excluding for the present the consideration of the immediate context of the words in question, the fair inference to be drawn from the nature of the contract would be, that the parties intended to include all wilful acts of self-destruction whatever might be the moral responsibility of the assured at the time: for, although the probable results of bodily disease producing death by physical means may be the fair subjects of calculation, the consequences of mental disorder, whether produced by bodily disease, by external circumstances, or by corrupted principle, are equally beyond the reach of any reasonable estimate. And reasons might be suggested why those who have the direction of insurance offices should not choose to undertake the risk of such consequences, even in cases of clear and undoubted insanity. It is well known that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds where fear of death or of personal suffering might have no influence: and insurers might well desire not to part with this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the continuance of the life of the assured, those on whose watchfulness its preservation might de-[660]-pend; and they might, further, most reasonably desire to exclude from all questions between themselves and the representatives of the assured, the topic of criminality so likely to excite the compassionate prejudices of a jury, which were most powerfully appealed to on the trial of this cause.

I trust that I shall not be understood as suggesting that any or all of these considerations would warrant the court in straining the language of the proviso beyond its fair grammatical import. I most fully assent to the proposition that we must ascertain the meaning of the assurers from the language they have employed. I am only desirous of explaining why I think that the more comprehensive and ordinary meaning of the words under consideration is in accordance with the probable intention of the parties, rather than the more qualified sense contended for on the part of the plaintiff. And, when I find the terms "shall commit suicide," that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context that the parties used them in a

more limited sense. And here the strongest part of the plaintiff's argument arises, and one upon which I express my opinion with the greatest distrust of its soundness, when I find it opposed to that of the Lord Chief Justice. But as I feel that the parties have a right to demand the expression of my own judgment upon the question in litigation, I will give my reasons for thinking that we are not warranted by the context in reading the words in question in any other than their general and ordinary sense. The proviso runs thus—"that, in case the assured shall die upon the seas (except in such passages as are allowed by the [661] rules of the society), or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever, unless license be obtained from a court of directors of the said society, or shall die by his own hands, or by the hands of justice, or in consequence of a duel, or if the age of the assured does not exceed thirty-six years, or if the assured be now afflicted with any disorder which tends to the shortening of life, or if the declaration bearing date, &c. contains any untrue averment, this policy shall be void." And it has been argued, that, as the other two cases included in that branch of the proviso at the head of which the words in question stand, necessarily involve the criminality of the act, the meaning of the whole clause may be fairly assumed to exclude all acts of which a criminal purpose does not form an ingredient.

The answer that suggests itself to this argument is, that other conditions precede and follow this clause which involve no criminality of intention, to some of which conditions no such intention could by any fair inference be possibly attached, and to others (which are also open to the inference arising from the context) the courts of law have decided that no such inference does attach.

If an inference of guilty intention was to be communicated from one branch of the proviso to another, no clause would seem so open to such an inference as the clause which excepts from the risks of the policy any disorder tending to shorten life, with which the assured was afflicted at the date of the policy. And it might surely with equal force at least be argued that this clause could only be intended to include disorders of which the assured was cognizant at the time; and yet by the case of *Duckett v. Williams* (2 C. & M. 348, 4 Tyrwh. 240), it has been decided that [662] the clause extends equally to all existing disorders tending to shorten life, whether the assured was aware of their existence or not. And, further, it may be asked, is it so very clear, that, in cases of death by duelling, the moral responsibility of the assured at the time would form any ingredient in the inquiry? Would not the question now under discussion be quite as open in that instance as in this? If so, the argument arising from the context is reduced to this, that, as the branch of the clause immediately following the words in question, and with which it is grammatically most closely connected (the same verb governing both branches), necessarily involves the existence of a criminal intention, therefore every branch of that clause must be considered as including a similar intention. It does not appear to me, that, when the whole of the context is considered, this argument affords a sufficient ground for departing from the ordinary sense of the words in question by giving them a limited meaning, and, one less consistent, as it strikes my mind, with the general scope and object of the contract than the larger and more obvious construction of the terms would convey. In my opinion, therefore, the rule ought to be discharged.

COLTMAN J. This was an action on a policy of insurance on the life of Mr. Borradaile. The policy contained an exception by which persons dying by their own hands, or by the hands of justice, or in consequence of a duel, are excluded from the benefits of the policy; and the question was, whether Mr. Borradaile died by his own hands within the meaning of the exception.

The death in this case was occasioned by Mr. Borradaile's throwing himself into the Thames. The jury returned a verdict for the defendant; and further they found that he (Mr. Borradaile) voluntarily threw himself into the water, knowing at the time that he should thereby [663] destroy his life, and intending thereby so to do, but that at the time he did so he was not capable of judging between right and wrong.

In the argument for the plaintiff, it was assumed that this was equivalent to a finding that Mr. Borradaile was so far disordered in his intellects as to be exempt from criminal responsibility; and, without any critical examination of the terms of the finding, I will suppose the assumption to be correct. Supposing, then, that such is the meaning of the finding, is the deceased on that account to be considered not to have died by his own hands? It cannot be denied that a party who voluntarily

throws himself into the water with intent to destroy himself, and is thereby destroyed, falls within the words of the exception of the policy. He certainly dies by his own hands, if the exception is to be construed according to the literal import of the words made use of.

In construing the meaning of contracting parties, we ought to conclude that they mean what they say, unless there is some strong ground for putting a different sense on their words from that which they naturally import. But it is urged, that, in this case, the words of the exception are not to be construed in a literal sense; for, many cases may be put which fall within the literal terms of the exception, which yet cannot reasonably be supposed to fall within the intention of the contracting parties; as, if in a state of delirium a man should remove bandages from a vein which had been opened, without being aware of the consequences, or should take poison by mistake. It may be true that there may be certain acts done by the hands of a party which occasion his death, where, such acts not having been done intentionally by the party, he might not be considered as having died by his own hands within the meaning of the policy. In such cases, a limitation not expressed might perhaps, though not without some violence to the [664] words, be introduced in construing the words of the exception, where such a limitation is necessary to give effect to what is assumed to be the clear intention of the contracting parties; yet it will not follow that a further limitation ought to be introduced in a case where there is no sufficient ground for inferring that such a construction is in accordance with the intention of the contracting parties.

Is there, then, in this case any sufficient ground for inferring the intention of the exception to have been, that, in a case like the present, the office should be responsible? In my humble judgment the reverse is to be inferred. The directors of this insurance company, as practical men, must be well aware that, if it is to be made a question before a jury between them and a plaintiff in the situation of this plaintiff, whether the party insured was of sane mind at the time of his decease, their chance of obtaining a verdict would be but small. The act of self-destruction would of itself be considered as a proof of insanity, and compassion for a distressed family struggling with a large and wealthy body would in most cases prevent any calm appreciation of the evidence. I cannot, therefore, think that it was the intention of the office, in framing this exception, to subject themselves to liability in any case of voluntary self-destruction. It may be said that it was incumbent on the directors of this company to express themselves in clear and unequivocal terms. I agree that this is so; but it appears to me that the words, as they stand in the policy, are of themselves plain and explicit, and that, when words are plain, it then becomes the duty of the person who seeks to depart from the literal terms made use of, and to introduce a limitation which the words themselves do not import, to shew some clear grounds on which he is entitled to introduce it.

It was further urged on behalf of the plaintiff, that, at [665] any rate, to bring a case within the meaning of the exception, there must be an intention in the party to die by his own hands; and it was urged that an insane person could not be considered as having any intention; that by an intention was meant a controllable intention: that it was like the case of a man who should find himself suddenly on the brink of a precipice and irresistibly impelled to throw himself down it. But the fact in this case does not bear out the argument; there is no ground for saying that Mr. Borradaile acted under any such uncontrollable impulse; on the contrary, the jury have found that he did the act voluntarily, which implies that he had power to do the act or to abstain from it.

On these grounds, though with that doubt which the difference of opinion in a high quarter makes me feel in the soundness of my own judgment, I think that the verdict for the defendant ought to stand.

TINDAL C. J. It appears to me, on the best consideration I can bring to this case, that the plaintiff is entitled to the judgment of the court.

The question is, whether the death of the assured has, by the finding of the jury, been brought within the proviso, whereby the policy is made void in the several cases therein enumerated; and it appears to me, upon the proper construction of the words of that proviso, the death of the assured has not been found by the jury to fall within any of the exceptions contained in the proviso, and consequently that it is a death covered by the policy itself.

It is to be observed, that the words of the proviso are the words, not of the assured, but of the insurers, introduced by themselves for the purpose of their own exemption and protection from liability; both in reason and good sense, therefore, no less than upon acknowledged principles of legal construction, they are to be [666] taken most strongly against those that speak the words, and most favourably for the other party; (see Shep. Touchst. 87). For, it is no more than just, that, if the words are ambiguous, he whose meaning they are intended to express, and not the other party, should suffer by the ambiguity. Indeed, the words "dying by his own hands," are words to themselves much wanting in certainty and precision; those words including, if taken literally, many cases of death by the hand of the party which are admitted to be without the meaning and intention of the proviso, and again excluding many cases which are admitted to fall clearly within it. Upon a strict construction, according to the very letter of the proviso, every death occasioned by the hand of the party would fall within their range, and would be excluded from the protection of the policy, whether the mind and intention of the assured accompanied the act, or whether it was death by misadventure only; as, death occasioned by falling on a sword or knife, or the discharge of a gun in the hand of the party; or death inflicted by the hand of the party when under the influence of sudden frenzy or delusion; and yet such cases are admitted, and justly admitted, not to be within the meaning of the proviso. And, on the other hand, under the same rigid construction, no death by the very act of the party himself, by drowning himself, or precipitating himself from a height, or suffocating himself, or in the innumerable instances that might be put, in which the hand of the party is not the immediate cause of the death, could, in strict propriety, be held to fall within the words, notwithstanding the act was done intentionally by the assured; and yet, in all these last-mentioned cases, no doubt can be entertained that they fall within the meaning of the proviso. Considerable latitude must consequently be given to the construction of these words, which are thus used in a metaphorical, not a literal, [667] sense, in order to arrive at, and give effect to the real intention of both the parties: and, as the result of the finding of the jury is, that the assured killed himself intentionally, but not feloniously, the short question before us becomes this, whether the defendant can make out (for it lies on him to establish the affirmative) that the death of the assured under those circumstances falls within the meaning of the words in the proviso "dying by his own hands." And it appears to me that he cannot; but that, looking at the words themselves, and the context and position in which they are found, a felonious killing of himself, and no other, was intended to be excepted from the policy. The words of the proviso are, "If the assured shall die by his own hands, or by the hands of justice, or in consequence of a duel." Three cases of death, therefore, are manifestly intended to be excepted from the protection of the policy—a dying by his own hands, a dying by the hands of justice, and a dying in consequence of a duel; the word "die" being prefixed to the first member of the sentence only, and over-riding and governing the three cases therein specified. Now, the dying in consequence of a duel is a dying in consequence of a felony then in the very act or course of being committed by the assured; the dying by the hands of justice is a dying in consequence of a felony previously committed by him (a); and it appears to me, upon the acknowledged rule of construction, viz. *noscitur a sociis*, that the dying by his own hands, the first member of the same sentence and the third excepted case, should, if left in doubt as to its meaning, be governed by the same condition as the other two, and [668] be taken to mean a felonious killing of himself, that is, self-murder. Upon what principle of construction shall the two latter cases be confined to a dying by, or in consequence of, a felonious act, and the former, viz. the dying by his own hands, be open to a double construction, and include not only the case of felonious suicide, which it undoubtedly would, but also suicide not felonious? The expression—"dying by his own hand,"—is, in fact, no more than the translation into English of the word of Latin origin—"suicide"—but, if the exception had run in the terms "shall die by suicide, or by the hands of

(a) Suppose the attainder to be reversed upon error brought by the heir or executor of the party executed, the party would still have died by the hands of justice; but it would hardly be contended that, though this wrongful act, in invitissimum, his family were also to be deprived of the benefit of a contract entered into by him for their behoof.

justice, or in consequence of a duel," surely no doubt could have arisen that a felonious suicide was intended thereby; and, if so, ought a different construction to prevail because the English term is found in the policy instead of the Latin?

Looking, therefore, to the words of the proviso, I think they should, in legal construction, be taken to except the case of felonious self-destruction of the life of the assured, and no other.

As to the finding of the jury, taking both parts of the finding together, perhaps we are not at liberty to draw any other conclusion from it than that the jury meant to say that there was no felonious killing of himself by the assured: it is not, perhaps, to be taken strictly as a verdict that the deceased was non compos mentis at the time the act was committed; for, if the latter is the meaning of the jury, the case would then clearly fall within that description which was admitted upon the argument to be without the reach of the proviso, viz. the case of death inflicted on himself by the party whilst under the influence of frenzy, delusion or insanity. But, although the jury inform the judge, in answer to his question, "that, at the time of committing the act, the assured was not capable of judging between right and wrong," which is the test that is frequently applied to the determination of the question, whether the party [669] charged was, at the time, compos mentis or not, it may be too much to say that such answer of the jury necessarily infers that they thought him insane; particularly when coupled also with their declaration that the act was committed voluntarily and intentionally. I draw, therefore, no other conclusion from the finding than that it expresses the opinion of the jury that the act was not feloniously done; and, unless this was the meaning of the jury by their answer, excluding as it does the *malus animus*, that is, the essential characteristic of felony, I am unable to discover what meaning they had.

I therefore found the opinion at which I have arrived in this case upon the consideration that the insurers intended by the proviso to confine their exemption from liability to the case of felonious suicide only; that, if they intended the exception to extend both to the case of felonious self-destruction and self-destruction not felonious, they ought so to have expressed it clearly in the policy: and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do.

It appears, therefore, to me that the judgment in this case ought to be given for the plaintiff: but, whilst I express this as my opinion, it is with a proper degree of distrust when I perceive it is at variance with that of my three brethren, for whose judgment I entertain a most sincere respect and deference. I am bound, however, to deliver my own judgment as I have formed it; and I have, at least, the satisfaction of knowing, that, in the present instance, if I have arrived at an erroneous conclusion, it can occasion no injury.

Rule discharged (a).

(a) No distinction appears to have been taken in this case between criminal and civil liability. If an insane person kills a man, he is not criminally liable; but if he slaughters his neighbour's sheep, he is liable in damages, to the owner. Quære, whether he would be liable for the consequential damage, to an insurance office which had paid the amount of a policy on the life of a person killed by him.

Although the heir of a person of non-sane memory may be relieved against the alienation of his insane ancestor; *Litt. s. 405, Co. Litt. 247 a.*; and the executor may avoid his contracts; *Faulder v. Silk*, 3 Campb. 126; it has frequently been held, that he himself cannot avoid acts done by him, or discharge himself from liability to perform his engagements, on the ground of mental imbecility, (see *Baxter v. The Earl of Portsmouth*, 5 Barn. & Cressw. 170. 7 Dowl. & Ry. 614, 2 Carr. & P. 180; *Sentance v. Poole*, 3 Carr. & P. 1; *Browne v. Jodrell*, Mood. & Malk. 105, 3 Carr. & P. 30.) except where a fraudulent advantage has been taken of his imbecility; *Lovv v. Baker*, Mood. & Malk. 106, n.

Upon indictments and other proceedings of a criminal nature, the intention with which the party accused committed the act proved against him, is the sole test of his amenability to criminal justice. But in an action of trespass and other civil proceedings, if the act be one which the law prohibits, the damage sustained by the party

[670] Sir T. Wilde Serjt. then prayed that the case might be turned into a special verdict, although no leave had [671] been given for such an application. He referred to *Collins v. Gwynne* (9 Bingh. 544; 2 Moo. & Scott, 540), where a special case was turned into a special verdict (*Gwynne v. Burnell*, 2 New Ca. 7; 2 Scott, 16) upon the application of the defendant, although opposed on the part of the plaintiffs (c).

injured, and not the intention of the party who does the injury, is the only proper subject of inquiry, with the exception perhaps of the few cases in which vindictive damages are allowed to be given. See *Mason v. Keeling*, 12 Mod. 332; Fonblanque's Treat. Eq., 5th ed., 47, 48. This distinction, which may perhaps be applicable to a case of injury to others resulting from self-destruction, appears to be well laid down in the case of *Weaver v. Ward*, Hob. 134, which is thus reported.

"Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff; and that they were skirmishing with their musquets with powder for their exercise in re militari, against another captain and his band; and as they were so skirmishing, the defendant casualiter et per infortunium, et contra voluntatem suam, in discharging of his piece, did hurt and wound the plaintiff; which is the same, &c.; absque hoc, that he was guilty aliter, sive alio modo. And upon demurrer by the plaintiff, judgment was given for him; for though it was agreed, that if a man tilt or turney in the presence of the king, or if two masters of defence playing their prizes, kill one another, that this shall be no felony; or if a lunatic kill a man or the like, because felony must be done animo felonico; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and, therefore, if a lunatic hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification prout ei bene licuit), except it may be judged utterly without his fault."

In *Cross v. Andrews*, Cro. El. 622, it was held that an innkeeper is not excused from his common law responsibility for the safe custody of the goods of a guest, by reason of his being of non-sane memory. And see *Dickenson v. Watson*, T. Jones, 205; *Underwood v. Hewson*, 1 Stra. 596; *Kernot v. Norman*, 2 T. R. 390; *Nutt v. Verney*, 4 T. R. 121.

(c) In *Collins v. Gwynne*, the special case, which had been settled by Alderson J., before whom the cause had been tried at the London sittings after Trinity term 1831, was argued in this court in Easter term, 2 W. 4 (1832). The court took time to consider of their judgment, and in Hilary term, 3 W. 4 (17th January 1833), judgment was pronounced for the plaintiff.

The verdict having been entered on record, and judgment signed, upon the special case, Wilde Serjt., in Easter term, 3 W. 4 (27th April 1833), moved for leave to set aside the judgment and verdict, and to turn the special case into a special verdict, in order to enable the defendant to take the opinion of a court of error.

The application was supported by the following affidavit of the defendant.

"Lawrence Gwynne of, &c. maketh oath, and saith that Richard Bigg was a collector of taxes for the parish of Bethnall Green, Middlesex, for the year ending the 5th of April 1828, and, at the expiration thereof, was a defaulter to the amount of 693l. And this deponent saith that notwithstanding such default, he was re-appointed collector for the following year; and this deponent then, for the first time, became one of his sureties; but no notice was given him of the deficiency in the former year. And this deponent further saith that he has been informed, and believes that the commissioners of the said district did not, during any part of the said years of collection, examine the said Richard Bigg, upon oath or otherwise, as to the state of his accounts, nor did they make any order for payment to the receiver general, nor did they sell his property, but allowed the same to be sold by public auction, notwithstanding, as this deponent has been informed by Thomas Botright, a collector of taxes for the parish of Shoreditch, that he, the said Thomas Botright, about a week before the sale by auction of the said Richard Bigg's goods, did attend the board of commissioners sitting in Osborn Street, and delivered to Mr. Charles Lush, the senior clerk to the said commissioners, who was sitting by Mr. Collins, the chairman, and one of the plaintiffs, a printed catalogue of such intended sale by auction, and recommended him to look out. And this deponent saith that at the trial of this cause, the learned judge submitted the

[672] A rule nisi was granted ; but the cause was ultimately compromised.

following questions to the jury, who returned their verdict thereon in writing as herein-after mentioned. First, whether Richard Bigg paid over to the receiver general the whole sum collected by him upon the accounts of the years 1828 and 1829. Secondly, whether he paid those sums all to the account of 1828 and 1829, or, if not, how much of these sums did he pay to the account of the preceding year or years. Thirdly, whether he had any lands or houses after the default made, which could have been seized and sold, and the value. Fourthly, goods in like manner, and value. Fifthly, whether the commissioners had notice that Bigg had these lands or goods. Sixthly, whether Bigg absconded. Seventhly, whether any fraudulent misrepresentation that Bigg had truly collected and paid over the sums assessed in former years, was made to Dr. Gwynne, whereby he was induced to enter into the bond.—We find, first, that Richard Bigg paid over to the receiver general all the sums received by him for the assessment of the years 1828 and 1829. Secondly, that he did not pay all these sums to the service of the years 1828 and 1829, and that the sum of 2430l. was paid to the service of that year, and 693l. to that of former years. Thirdly, that Richard Bigg had lands or houses after the default, of the value of 121l., which could have been seized and sold. Fourthly, that he had goods in like manner of the value of 200l. and upwards at the time of default, which could have been seized and sold. Fifthly, that the commissioners had not notice of the possession of houses or lands on the part of Richard Bigg, but they had reasonable grounds for believing that he possessed household goods at the time of the default. Sixthly, that he absconded. Seventhly, that no fraudulent misrepresentation was made to Dr. Gwynne by the commissioners to induce him to execute the bond. Whereupon the learned judge directed a verdict to be entered for the defendant, and stated [673] that the plaintiffs would be at liberty to move the court thereon, and also stating that the question would be open to the parties upon a special verdict, or to that effect, to which no objection was made. And this deponent further saith, that no entry was made upon the record of the proceedings at nisi prius. And this deponent further saith, that in the following Michaelmas term the plaintiffs' counsel moved to set aside the verdict, and enter a verdict for the plaintiffs, upon which the court directed a special case to be stated between the parties; upon which, after hearing counsel on both sides, the court pronounced judgment in last Hilary term, directing that judgment should be entered for the plaintiffs for the sum of 693l. on the third breach. And this deponent saith, that the record thereupon made up does not contain the special findings of the jury, but, on the contrary, all the issues are there found for the plaintiffs. And this deponent further saith, that he has sued out a writ of error in this cause, but he is advised, that, unless the judgment of the court be turned into a special verdict, he will not be enabled to prosecute his appeal. And, lastly, this deponent saith, that no re-assessment has taken place on account of the deficiency in question, notwithstanding the lapse of time that has taken place; and this deponent has good reason for believing that the accounts have passed the Tax Office, and are returned into the Treasury, and that it is not intended to re-assess the parish in question.

The court granted a rule nisi, which was drawn up in the following terms:—

In the Common Pleas.

Collins and Others v. Gwynne, Saturday, 27th of April. Upon reading the affidavit of Lawrence Gwynne, Esq., the defendant, It is ordered, that the plaintiffs, upon notice of this rule, to be given to them or their attorney, shall shew cause to this court, on Wednesday next, why the judgment and the entries of the verdicts upon the several issues in this cause, should not be set aside, and why, instead thereof, a special verdict should not be entered, or why the verdicts found upon the several issues, should not be entered according to the notes of the judge who tried this cause; and why the defendant should not have six days to transcribe the record after this rule shall have been disposed of.

In the same term after cause had been shewn by Taddy Serjt. for the plaintiffs, and Wilde Serjt. had been heard for the defendant, the rule was made absolute in the following terms:—

In the Common Pleas.

Collins and Others v. Gwynne, Wednesday, 8th of May. Upon reading a rule made

[675] MARSH v. WOOLLEY. May 11, 1843.

An interim order by a commissioner of bankrupt for the protection of an insolvent (under 5 & 6 Vict. c. 116, s. 1), if in the form prescribed in the rules promulgated by the judges and commissioners of the court of bankruptcy (under s. 13) is sufficient, and need not shew on the face of it the jurisdiction of the commissioner to make such order.—A defendant having been arrested after such an interim order had been in fact made (but before notice to the sheriff or the plaintiff), this court ordered his discharge, although the jurisdiction of the commissioner did not appear, either by the order itself or the affidavits upon which the application to this court was made; but they refused to give costs against the sheriff or against the plaintiff.

Bompas Serjt. on a former day in this term (3d May) obtained a rule calling upon the plaintiff and the sheriff of the county of Montgomery, respectively, to shew cause, why the defendant should not be discharged forthwith out of the custody of the said sheriff, and why the plaintiff and the said sheriff, or one of them, should not pay to the defendant or his attorney his costs of, and occasioned by, the application.

The application was made under the 5 & 6 Vict. c. 116 (a), upon the affidavits of the defendant, his attorney, and the agent of such attorney.

in this cause on Saturday, the 27th day of April last, and upon hearing counsel on both sides, it is ordered that the judgment signed upon the *postea* in this cause, be set aside, and the roll and *postea* amended, by entering thereon a special verdict, to be settled by the Honourable Mr. Justice Alderson; each [674] party to be at liberty to submit to the said Mr. Justice Alderson the form of the said verdict: and it is ordered that the time for the defendant to transcribe the record in this cause be hereby enlarged until six days after the same shall have been perfected by the entry of final judgment upon the special verdict hereinbefore mentioned.

It has been considered necessary to set out the rules and the affidavit upon which the rule nisi was obtained, because the arguments of counsel are not given by any contemporaneous reporter, and the decision appears to be of considerable importance, as shewing that the court has exercised the power of directing an entry upon the record of the finding of the jury, although that finding had originally taken the form of a special case; and also because in reporting the argument in the Exchequer Chamber upon the special verdict brought then by writ of error, one report states that the rule was made absolute by consent; 2 Scott, 332; while Mr. Bingham, in his report of the case in error, passes over in silence all the circumstances attending the alteration of the special case into a special verdict.

It was not likely that the plaintiffs' counsel would consent to reopen the case, after a decision by which his clients had obtained judgment for 693l. and their costs of suit. The necessity for the strenuous resistance made by Taddy Serjt. to the defendant's application, was evidenced by the circumstance that the decision which he had to support was contrary to the impression entertained by the learned judge who tried the cause, and that, although the judgment of the court of Common Pleas was affirmed by a majority of four judges against three in the Exchequer Chamber, it was finally reversed in the House of Lords; 1 West's Reports, in Dom. Prac. 342.

And see 7 Bingh. 423; 9 Bingh. 544; 2 New Cases, 7; 6 New Cases, 453; 5 Moore & P. 276; 2 Moore & Scott, 640, 775; 1 Scott, N. R. 711, ante, vol. i. 938, ante, vol. iii. p. 374, n.

(a) Sect. 1, after reciting that "it is expedient to protect from all process against the person such persons as have become indebted without any fraud or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors," enacts "that, if any person, not being a trader within the meaning of the statutes now in force relating to bankrupts, or if any person being such trader, but owing debts amounting in the whole to less than 300l., shall give notice, according to the schedule to this act annexed, to one-fourth in number and value of his creditors, and shall cause the same notice to be inserted twice in the *Gazette* and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process to the court of bankruptcy, if he has resided twelve calendar months in London or within the London district, or to the commissioner of bankrupt in the country within whose district he may have resided twelve calendar

[676] The affidavit of the defendant stated that he had duly petitioned the district court of bankruptcy at Liverpool that his estate might be administered and that he might [677] be protected from process pursuant to the statute; that he had duly obtained the interim order for protection, bearing date the 24th of April 1843; that he was on the 27th of April taken in execution under a ca. sa. at the suit of the plaintiff, and that he was then a prisoner in the custody of the sheriff of Montgomery.

The affidavit of the defendant's attorney stated that the defendant, having been resident twelve months within the jurisdiction of the Liverpool district court of bankruptcy, and having given the requisite notice of his intention to present his petition, and that the time when the petition should be heard was advertised in the *London Gazette* and in the newspapers in the notice mentioned, to one fourth in number and value of his creditors; and having caused the same notice to be inserted twice in the *London Gazette*, and twice in a newspaper circulating in the county in which the defendant resided; the deponent, as attorney for the defendant, on the 24th April attended the said district court with the defendant's petition and schedule; a copy of the notice, with affidavit of the due service thereof; two numbers of the *London Gazette*, and two numbers of the said newspaper, containing the insertion of the said notice respectively, and with an affidavit of the defendant's signature to the petition and schedule; whereupon the court examined the same, and being satisfied as to the correctness of the petition, and of the said several paper writings, and that the notices

months, which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the debts severally; the nature of the debt, and the security (if any) given for the same, and also of the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he may have for such debts, and which petition shall also set forth any proposal which he may have to make for the payment, in whole or in part, of his debts; and it shall thereupon be lawful for the judge or commission of the court of bankruptcy to whom, by any order of the court, as hereinafter provided, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force, and all process be stayed until the appearance of the petitioner in court, as hereinafter provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts."

Sect. 2 provides "that nothing herein contained shall be held or construed to hinder or prevent the said insolvent from being arrested or held to bail under the authority of any judge's order for that purpose, in like manner as may now by law be done, notwithstanding any protection which may be granted under the authority of this act."

Sect. 13 enacts, "that it shall be lawful for the judges and commissioners of the court of bankruptcy, or any four of them, to make such orders, rules and regulations as they shall think fit for the better carrying this act into execution, and particularly for regulating and appointing the duties of the official assignees and of the other assignees; the auditing of their accounts; the collecting the debts and the realising the estate and effects of the petitioner; and the notification of the time of hearing petitions or motions in the *Gazette* or otherwise; which orders, rules and regulations shall, upon being approved by the Lord Chancellor Lord Keeper or Lords Commissioners of the Great Seal, be laid before both houses of parliament within fourteen days from such approval, if parliament be then sitting, or if not, within fourteen days from the commencement of the next session of parliament, and shall in the mean time, and from the date of such approval, be binding upon the commissioners in the country, and upon all other persons whatever, until such time as either house of parliament shall make some resolution in whole or in part disapproving the same."

and advertisements had been given according to the statute, directed the said petition and [678] writings to be filed in the said district court; and the deputy registrar filed them accordingly; and the court thereupon nominated an official assignee, and appointed the 26th of May for the first examination of the defendant; and C. P. Esq., one of the commissioners for the said district court, thereupon granted and allowed an interim order for the defendant's protection; and that a true copy of the defendant's intention to present his petition to the said district court was, on the 17th April, delivered to the plaintiff.

A copy of the petition was annexed to this affidavit, as follows:—

“To the Liverpool District Court of Bankruptcy.

“The humble petition of Jeremiah Woolley, the younger, of Wigdwr, in the parish of Llandinam, in the county of Montgomery, farming bailiff, heretofore a farmer,

“Sheweth,

“That your petitioner is not a trader within the meaning of the statutes now in force (a)¹ relating to bankrupts:

[679] “That your petitioner has resided twelve months (a)² within the district of this honourable court, that is to say, at Wigdwr, in the parish of Llandinam, in the county of Montgomery:

“That your petitioner has become indebted, without any fraud or gross or culpable negligence, to divers creditors, whose names are inserted in the schedule marked, &c. to this his petition annexed:

“That your petitioner has given notice to one fourth in number and value of such creditors, that is to say, to the several creditors to whose names the word ‘notice’ is annexed in the said schedule, of his intention to present this petition, and has caused notice thereof to be inserted twice in the *London Gazette*, that is to say, on Friday the 14th day of April, and Tuesday the 18th day of April, instant, and twice in the *Shrewsbury Chronicle* newspaper, that is to say, on Friday the 14th day of April, and Friday the 21st day of April, instant; as by the said *Gazette* and newspapers will appear (b):

(a)¹ These are the words of the 5 & 6 Vict. c. 116, s. 1. But the word “now” in the statute would, in strictness, refer to the day on which the bill received the royal assent, viz. 12th of August, 1842; whereas the word “now” in the petition would apply to the laws in force at the time the petition was signed. The commissioners of bankruptcy have held that a party is entitled to the benefit of the act, who, although he does not carry on any trade which was within the former statutes of bankruptcy, does carry on a trade within the 5 & 6 Vict. c. 122, inasmuch as that statute, though it received the royal assent on the same day (the 12th of August 1842), did not come into operation until the 11th of November following. According to this construction of the statute, the language of the petition should not have been, “now in force,” but “which were in force at the time of the passing of a certain act of parliament, made, &c., and intituled, &c. But by the 7 & 8 Vict. c. 96, a form of petition is given containing the words “the statutes now in force; the truth of the allegations in which petition must, as before, be verified by the affidavit of the petitioner. This seems to be tantamount to an enactment that the party to be discharged under that act, must be a person who is not a trader within the meaning of the acts which are in operation at the time the petition is presented.

(a)² The petition here follows the words of the statute 5 & 6 Vict. c. 76, s. 1, but in the form of petition given in the schedule the words are “months past,” meaning probably, “months last past.” The statement in this petition would appear to be satisfied by a residence during the first twelve months of the petitioner's life, or, as it appears to have been held at Basinghall Street, by a residence of twelve months at various intervals.

(b) Notice is not required to be given to the detaining creditor; though it is required to be given to one fourth of the creditors in number and value, of the debtor's selection. That notice has been given to the creditors mentioned in the petition, rests, however, upon the assertion of the petitioner, the truth of which cannot be inquired into until after his discharge, nor then, unless he choose to appear, when the period mentioned in the interim order,—or, in other words, during which his person and goods are protected against all process,—has elapsed.

[680] "That the schedules marked respectively, &c., to this petition annexed, contain a full and true account of your petitioner's debts, with the names of his creditors, and the dates of contracting the debts severally, the nature of the debt, and the security (if any) given for the same, and also the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he has for such debts:

"That your petitioner, being unable to pay and satisfy such debts, is desirous that his estate should be administered under the protection and direction of this honourable court:

"That your petitioner is ready and willing to be examined from time to time touching his estate and effects, and to make a full and true disclosure and discovery of the same:

"Your petitioner therefore prays that your petitioner may be protected from all process whatever, either against his person or his property of every description, and that your petitioner may have such further and other relief as by the statute made in the parliament holden in the fifth and sixth years of the reign of Her present Majesty, intituled, &c., is provided, and this honourable court shall think fit:

"And your petitioner will ever pray, &c."

The affidavit of the agent stated that he did, on the 27th of April, after the defendant had been arrested, but before he was taken to prison, personally serve the sheriff's officer, or bailiff, making the arrest, and also the plaintiff, with true copies of the said interim order, at the same time producing the original; and that after such service he demanded the discharge of the defendant, but that the sheriff's officer refused to discharge him; and that he requested the plaintiff to give his authority [681] for such discharge, but that the plaintiff refused to do so, and said he would place every obstacle that he could, in the way of the defendant's obtaining the benefit of his petition under the act.

A copy of the interim order was annexed to this affidavit, as follows:—

"In the Liverpool District Court of Bankruptcy.

"At Liverpool, the 24th day of April 1843.

"In the matter of the petition of Jeremiah Woolley the younger, of Wigdwr, in the parish of Llandinam, in the county of Montgomery, farming bailiff, heretofore a farmer, an insolvent debtor.

"Be it remembered, that the above named Jeremiah Woolley having presented a petition to this honourable court, under the provisions of an act of parliament passed in the parliament holden in the fifth and sixth years of the reign of Her present Majesty, intituled 'An Act for the Relief of Insolvent Debtors,' and such petition having been this day filed in court, a protection is hereby given to the said J. W. from all process whatever, except as hereinafter mentioned, either against his person or his property of every description, which protection shall continue in force, and all process (except process for arresting or holding him to bail under the authority of a judge's order for that purpose) be stayed, until the 26th day of May, at 11 o'clock in the forenoon, being the time appointed for the appearance of the said J. W. at the Liverpool District Court of Bankruptcy at Liverpool, and for the first examination of the said J. W. according to the form of the said act.

"(Signed) C. P., Commissioner."

Manning Serjt., on a subsequent day (9th May) shewed cause, and Bompas Serjt. was heard in support of the rule.

[682] Their arguments are so fully stated and commented upon in the judgment of the court, that it is not necessary to repeat them here.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was a rule calling upon the plaintiff and the sheriff of the county of Montgomery to shew cause why the defendant should not be discharged out of custody, and why the plaintiff and the sheriff, or one of them, should not pay the costs of this application. The rule was obtained upon affidavits stating that the defendant had by petition (a copy of which is annexed to one of the affidavits) applied to the Liverpool District Court of Bankruptcy, praying that his estate might be administered, and that

he might be protected from all process, according to the provisions of the statute 5 & 6 Vict. c. 116; and that, upon filing his petition, he had duly obtained the interim order of protection, also annexed to the affidavit. This interim order, bearing date the 24th of April 1843, after reciting that the defendant had presented a petition to that court under the provisions of the statute, and that such petition had been filed, gives a protection to the defendant from all process whatsoever (except process to hold to bail under a judge's order), and directs that such protection shall continue in force, and that all process shall be stayed, until the 26th of May then next, being the time appointed for the defendant's appearance and examination at the District Court of Bankruptcy, according to the form of the act. The affidavit further states, that the defendant was afterwards, on the 27th of April, taken in execution by the sheriff of Montgomery, under a writ of *capias ad satisfaciendum*, at the suit of the plaintiff Marsh; and that the interim order of protection was afterwards [683] produced, and a copy of it served upon the sheriff's officer, who was thereupon required to release the defendant out of custody, but refused to do so; and that the plaintiff, upon application afterwards made to him for an order for the defendant's release, refused to interfere; and that the defendant still remained in the custody of the sheriff.

Upon these affidavits four questions have been raised for our decision:—first, whether the interim order of protection is good upon the face of it, without shewing the authority of the commissioner to issue it; secondly, whether the affidavits sufficiently disclosed the commissioner's jurisdiction; and, if not, thirdly, whether the court ought to order the defendant to be discharged without proof of the commissioner's authority; and, fourthly, upon what terms the defendant ought to be discharged.

Upon examining the order itself, we find in it no statement of those circumstances which, according to the provisions of the statute, are necessary to give the commissioner authority to grant any such protection. There is no statement that the defendant was not a trader; nor that, being a trader, his debts amounted to less than 300l.; nor that he had given any of the notices required by the statute; nor that he had resided twelve months within the Liverpool district: but the order merely recites that the defendant had presented a petition under the provisions of the statute, which had been filed in court, without any finding that the statements in the petition were true; and then proceeds to grant the protection, as already stated.

The petition does, indeed, allege all these circumstances; but the statute does not enact that if any person shall present a petition stating that he is not a trader, and so on, the commissioner may thereupon give an order of protection; but it confers the power on the commissioner only in cases where such petition shall be pre-[684]-sented by a person not a trader, or by a trader owing less than 300l., and where the petitioner has resided twelve months within the particular district, and has given the prescribed notice to his creditors.

As this, therefore, is an order under a special statutory power, it is essential to the validity of such order that every thing that is necessary to give jurisdiction should appear on the face of it, unless the legislature has given some more compendious form. See the cases of *Muskett v. Drummond* (10 B. & C. 153; 5 M. & R. 210), and *Christie v. Unwin* (11 A. & E. 373; 3 P. & D. 204.) And as there is nothing on the face of his order, either by way of direct allegation or of recital, to shew that the defendant was a person to whom the commissioner had authority to give any protection under the statute, the order would be clearly bad, unless some legislative provision could be pointed out which had sanctioned the adoption of this form.

It was argued for the defendant, that the order was in the form prescribed by certain rules and orders made under the thirteenth section of the statute by the late Sir John Cross, one of the judges, and four of the commissioners, of the court of Bankruptcy, and approved of by the Lord Chancellor; and that the legal effect of the rule prescribing this form, would be the same as if the form had been given in a schedule to the act itself.

By the thirteenth section of the statute, power is given to the judges and commissioners of the court of Bankruptcy, or any four of them, to make such rules as they shall think fit for the better carrying that act into execution. It then directs that such rules shall, upon being approved of by the Lord Chancellor, be laid before both houses of parliament, and enacts that such rules shall, in the mean time, and from the date of such [685] approval, be binding upon the commissioners in the country, and

upon all other persons whatsoever, until such time as either house of parliament shall make some resolution disapproving of the same.

It appears that certain rules were made by the judges and commissioners of the court of Bankruptcy, and were approved by the Lord Chancellor, and that, by the sixth of those rules, it was ordered that the protection from process, to be given to any petitioner from filing his petition, shall be called the interim order for protection, and shall be in the form set forth in the Schedule A. No. 2, annexed to those orders. Upon referring to the Schedule A. No. 2, we find the form of the interim order, corresponding in every respect with that which is now under consideration. And the first question resolves itself into this,—whether the thirteenth section conferred upon the judges and commissioners of the court of Bankruptcy the power of prescribing this form for the order of protection, and thereby dispensing with the ordinary rule of law, which requires that an order made under special statutory authority shall state such facts as are necessary to warrant its being issued.

There is certainly no express authority to prescribe any such form; and none of the special objects particularised in the thirteenth section have any relation to such an order. But the terms of general authority to make rules for the better carrying that act into execution are large enough to include the power that has been exercised: and, when the provisions of this statute are closely examined, it will be found that it was necessary to prescribe some special form in order to carry the act into execution; for, if the commissioner could give no interim protection without stating the facts necessary to give him jurisdiction, he must either affirm, without any investigation, the facts alleged in the petition to be true, or he must wait till he had ascertained [686] their truth upon inquiry, and thus delay the protection, which was intended to be immediate, and anticipate a great portion of the investigation, which, according to the statute, is to take place at the termination of the interim protection at the first examination of the insolvent. As the expediency of such a form of order, therefore, is apparent, and the words of the statute are large enough to warrant it, we think the order in question must be considered as sanctioned by the legislature, and that therefore no objection can be made to it on the ground that it does not sufficiently shew the authority of the commissioner to make it.

The next question will be, whether the court ought to direct the defendant to be discharged out of custody without requiring him to make out, by affidavit, the authority of the commissioner to grant him the protection under which he seeks his release. And we think we ought; because, although the sheriff must stand excused for the arrest, as the order was not produced at the time of the arrest, yet it now appears that the order had been in fact issued some days before; and the statutory stay of process operates from the date of the order; and, if we were to require proof of the commissioner's authority, the whole object of the legislature might be defeated; for, upon examining the provisions of the statute, we can see that it was intended that this temporary protection should be afforded to petitioners upon their subjecting their property to seizure by the official assignee, and before the investigation of the truth of their petitions. But if we were to require the petitioner to prove, by affidavit, the jurisdiction of the commissioner, we could not refuse to receive affidavits on the other side; and thus we should be instituting, in this court, an inquiry which the legislature intended should be postponed until the time fixed for the first examination before the [687] commissioner (a); for the statute does not require, or even authorise, the commissioner to receive any proof, by affidavit or otherwise, of the truth of the petition, before that time. We think that it is enough for the defendant to shew that the order for protection was issued before the day of the arrest. It is unnecessary, therefore, for us to make any further remarks on the many defects in the present affidavits, which were pointed out in the course of the argument.

The only remaining question is, upon what terms the defendant ought to be released. He asks, that either the plaintiff or the sheriff shall pay the costs of this application. Such a term it would be manifestly unjust to impose upon the sheriff,

(a) To which examination the petitioner is not bound to subject himself, where he has reason to apprehend that any of the statements in the petition, upon which he obtained the interim order, and which gave him the opportunity of placing himself beyond the reach of his creditors, and of withdrawing from the jurisdiction of the commissioner who granted the order, will be disproved.

who was ignorant of the existence of the order of protection at the time of the arrest, and who, if he had afterwards released his prisoner upon the production of the order, might have rendered himself liable to an action for an escape if it had eventually appeared that the commissioner had no jurisdiction to grant the protection: for, as the object of the legislature seems to have been to afford protection from subsequent arrest, and not to release debtors already in custody, it has provided no indemnity for the sheriff in such a case as the present. And it is difficult to see how the sheriff could defend himself in an action for an escape, if the statements in the defendant's petition should eventually prove to be untrue. This difficulty is provided for by the 117th section of the statute 6 G. 4, c. 16, in the case of bankrupts, and by the eighty-first section of the 7 G. 4, c. 57, in the case of insolvents^(b); [688] and the peril in which a sheriff would be placed by discharging an insolvent, even under the general power given to the commissioner by the latter act, without the protection of such a clause of indemnity, is pointed out by the judges of the court of Queen's Bench, in the case of *Saffery v. Jones* (2 B. & Ad. 598); a peril which would be much more obvious in this case, where no power is given to the commissioner to order the discharge of an insolvent already in custody. If the order had been produced at the time of the arrest, the question might have assumed a different character.

With respect to the plaintiff, he seems to have been also ignorant, at the time of the arrest, that any order of protection had been obtained by the defendant; and, indeed, it does not appear that the order had at that time reached the defendant; and, when the plaintiff was afterwards applied to for an order to liberate the defendant, he was placed in this difficulty—that, if he had given the order, and the defendant had been liberated, and had afterwards failed to make out the allegations in his petition, the commissioner's order would have been void; and the liberation of the defendant by the act of the plaintiff would have been a bar to all future remedies under his judgment. The plaintiff had issued his process in the usual course; and he was not bound to interpose, and to decide whether the defendant was entitled, or was not entitled, to his release.

We are therefore of opinion that the rule for the discharge of the defendant out of custody should be made absolute, but without costs.

Rule absolute accordingly^(b).

[689] HOLT v. EADES. May 11, 1843.

The defendant was served with a copy of a writ of summons to appear in the Queen's Bench, tested by the Lord Chief Justice of the Common Pleas. At the time of the service, and also when served with notice of declaration in the Common Pleas, the defendant said that he would see the plaintiff and arrange about paying the debt:—Held, that he thereby waived the irregularity.

Halcombe Serjt., on a former day in this term (21st April), obtained a rule calling upon the plaintiff to shew cause why the affidavit of service of the writ of summons, the appearance entered by the plaintiff, the notice of declaration, and all subsequent proceedings, should not be set aside.

It appeared from the affidavits upon which the rule was obtained, that on the 3d of April, the defendant was served with a copy of a writ of summons, dated the 31st of March, by which he was commanded to enter an appearance in the court of Queen's Bench, in an action on promises, and tested in the name of the Chief Justice of this court. An appearance was entered for the defendant in the court of Queen's Bench. (It did not appear when this was done.) On the 11th of April the defendant was served with a notice of declaration in this court.

Sir T. Wilde Serjt. now shewed cause, upon an affidavit stating that, when the copy of the writ of summons was served upon the defendant, he said he would see the

(b)¹ Re-enacted by 1 & 2 Vict. c. 110, s. 110.

(b)² And see the 7 & 8 Vict. c. 96, amending the 5 & 6 Vict. c. 116, but which also makes no provision for ascertaining, previously to the discharge of the petitioner, the truth of the allegations contained in the petition.

See also remarks on these statutes in the Law Review for November, 1844 (No. I.) art. xiv.

plaintiff and make an arrangement for the payment of the debt. On the 11th of April (the same day on which the defendant was served with notice of declaration), the plaintiff caused an appearance to be entered for the defendant, in this court, according to the statute; on which day, the defendant again said he would see the plaintiff and arrange the payment of the debt and costs. On the 19th of April the defendant took out a summons to set aside the notice of declaration and all subsequent proceedings, for irregularity. This summons was attended and heard before Maule J. on the 20th, when it was [690] dismissed without costs, upon the ground that the defendant had waived the irregularity; and at the request of the defendant, four days' further time to plead was given to him.

The learned serjeant admitted that the copy of the writ of summons was irregular; but contended that the application to set it aside should have been within the time of appearance, and before the defendant had taken any fresh step; *R. H. 2 Will. 4, r. 33*; *Smith v. Clarke* (2 Dowl. P. C. 218), *Tyler v. Green* (3 Dowl. P. C. 439), *Child v. Marsh* (c). [Erskine J. It has been decided that allowing the plaintiff to enter an appearance is not a "fresh step" on the part of the defendant, within the meaning of the *R. H. 2 Will. 4 (d)*.] The defendant here has taken a fresh step by obtaining time to plead, whereby he has clearly waived the irregularity; and he has also done so by his promise to see the plaintiff and arrange the debt; *Raves v. Knight* (1 Bingham 132; 7 J. B. Moore, 461), *Lloyd v. Hawkward* (1 M. & R. 320).

Halcombe Serjt. in support of the rule. The service of the copy of the writ of summons was not a mere irregularity within the *R. H. 2 Will. 4*; it was an absolute nullity, which could not be waived. In *Hinton v. Stevens* (4 Dowl. P. C. 283), the defendant, on the 8th of August, was served with a copy of a writ of summons, directed to him by a wrong name; on the 30th he was served with a notice of declaration, in which he was properly described: upon an application to set aside the declaration and notice, and all subsequent proceedings, for irregularity, it was held [691] that the application was not too late, being made before the time for pleading had expired. The extended time for pleading in this case expired on the 21st, on which day the rule nisi was obtained. He also cited *Moffat v. Carter* (2 N. R. 75), *Hill v. Parker* (2 Chitt. R. 165), and *Newnham v. Hanny* (5 Dowl. P. C. 259). The mere asking for time to settle the action will not waive an irregularity; *Anon.* (1 Dowl. P. C. 23); nor will an acquiescence in the decision of a judge at chambers; *McDougall v. Nicholls* (3 A. & E. 813; 5 N. & M. 366), *Wright v. Skinner* (2 C. M. & R. 746; Tyrwh. & Gr. 69; 4 Dowl. P. C. 727). In *Topping v. Fuge* (5 Taunt. 330), where a plaintiff having served an irregular process, the defendant gave him notice of the irregularity, and told him that if he proceeded thereon, he, the defendant, would move to set aside the proceedings, it was held that this was an exception to the ordinary rule, that the party applying to set aside irregular proceedings must come before the other party has taken any further step in the cause.

TINDAL C. J. As regards the waiver on the part of the defendant, by promising to see the plaintiff and arrange the debt with him, I do not see how this case can be distinguished from *Raves v. Knight* and *Lloyd v. Hawkward*. The cases which are referred to in a note to the latter case—*Anon.* (1 Chitt. R. 129) and *Lowes v. Clarke* (2 Chitt. R. 240)—are also in point. Upon this ground, therefore, I am of opinion that the rule must be discharged.

COLTMAN J. The cases of *Raves v. Knight* and *Lloyd v. Hawkward* are founded upon reason. By a promise to pay the debt, the plaintiff is lulled into [692] security, and is prevented from looking curiously into the proceedings.

ERSKINE J. concurred.

MAULE J. I agree with the rest of the court in thinking the rule should be discharged, though it may be hard upon the defendant, as he has no opportunity of answering the plaintiff's affidavit. But that cannot be helped. The irregularity in the copy of the writ of summons was waived by the promise of the defendant, which implied a knowledge on his part that a suit was pending, and that he had no defence. *Raves v. Knight* is a sufficient authority upon that point. In *Lloyd v. Hawkward* the judgment of the court does not appear to have proceeded on the ground of the promise

(c) 3 M. & W. 433; 6 Dowl. P. C. 576. See *Fynn v. Kemp*, 2 Dowl. P. C. 620; 4 Tyrwh. 990; *Rutty v. Arbur*, 2 Dowl. P. C. 36; *Edwards v. Collins*, 5 D. P. C. 227.

(d) See *Chalkley v. Carter*, Tyrwh. & Gr. 210, 4 Dowl. P. C. 480; *Davis v. Skerlock*, 7 Dowl. P. C. 530.

or admission by the defendant. The marginal note to that case is as follows:—“Where the service of a writ is irregular, but the defendant, on receiving notice of declaration, says, ‘It is all right, I will call and settle the debt and costs,’ the irregularity is waived.” But the court, in giving judgment, said, “The principle is a sound and plain one, that where a defendant means to take advantage of an irregularity in point of form in the plaintiff’s proceedings, he must act promptly, and not, by lying by, lure the plaintiff on to incur increased expenses.” So that they would appear to have decided the case upon the ground of delay, and not upon the waiver by the defendant’s promise, which no promptitude on his part in applying to the court could have got over.

Rule discharged.

[693] HAGUE v. HALL. May 11, 1843.

Where a cause was entered as a special jury cause, but was taken in the defendant’s absence and tried by a common jury, as an undefended cause, the court set aside the trial and verdict, with costs.

Sir T. Wilde Serjt., on a former day in this term (21st April), applied, on the part of the defendant, to set aside the trial and verdict in this cause, and to have a new trial, with costs.

It appeared from the affidavit upon which the motion was made, that issue was joined in the cause on the 4th of May 1842, when notice of trial was given for the sittings for Middlesex after the then next Trinity term; that the plaintiff, on the 13th of May, obtained a rule for a special jury, which jury was afterwards struck and reduced, and that the cause was set down as a special jury cause; that, in consequence of the plaintiff’s not having lodged the record, the cause was struck out of the paper by the marshal; that notice of trial was again given by the plaintiff on the 16th of January last, for the sittings after the then present Hilary term, and the cause was again set down as a special jury cause; that shortly afterwards the plaintiff’s attorney informed the defendant’s attorney that an application was about to be made on behalf of the plaintiff for leave to strike the cause out of the special jury list, and to have the same tried by a common jury, but the defendant’s attorney answered that he should oppose the application, and nothing was done thereupon; that, at the sittings after Hilary term, the cause was the last but two in the special jury list; and that on the 9th of February notice was given by the court that only two special jury causes (of which this was not one) would be taken on the following day; but that on the next day the cause was called on in the absence of the defendant’s attorney and of any person on the defendant’s behalf, and tried by [694] a common jury as an undefended cause, when a verdict was given for the plaintiff.

The learned serjeant cited *Holt v. Meddowcroft* (4 M. & S. 467).

A rule nisi having been granted,

Channell Serjt., for the plaintiff, now admitted that the rule must be made absolute, but submitted that it ought not to be made absolute with costs.

TINDAL C. J. The words of the jury act (6 G. 4, c. 50, s. 30) are very strong—that “every jury so struck shall be the jury returned for the trial of such issue.” The trial was clearly irregular, and must be set aside with costs.

Per curiam. Rule absolute.

DRIVER v. PEMELLER. May 11, 1843.

Writ of summons in debt; declaration filed, and notice thereof, in assumpsit. Held, that irregularity was not waived by taking the declaration out of the office.

The writ of summons in this case was in debt, and the declaration, in assumpsit.

Bompas Serjt., having obtained a rule nisi to set aside the declaration for irregularity,

Channell Serjt. now shewed cause, upon an affidavit, which stated that the misdescription of the form of action in the process, was a clerical error, and that the notice of declaration corresponded with the declaration itself. He admitted that the variance between the writ and the [695] declaration was an irregularity; but submitted

that it had been waived by the defendant having taken the declaration out of the office, which was a fresh step. The notice shewed the name, and the defendant might have moved to set aside the notice; or he might have inspected the declaration without taking it out of the office. He relied upon *Gilbert v. Kirkland* (2 Dowl. P. C. 153) and *Robins v. Richards* (1 Dowl. P. C. 378).

Bompas Serjt. in support of the rule. In the cases cited, the objection was to the notice of declaration, which would be waived by taking the declaration out of the office. But here, the objection is to the declaration itself, and of that objection there has been no waiver.

Per curiam (c)¹. Rule absolute.

BICKLEY v. FELL. May 11, 1843.

A rule for judgment as a case of a nonsuit, having been discharged, the court refused to re-open it, upon the ground that the affidavit upon which it had been discharged was false.

A rule nisi having been obtained for judgment as in case of a nonsuit, it was afterwards (5th of May) discharged upon a peremptory undertaking.

Shee Serjt. now moved that the former rule might be re-opened, upon an affidavit stating that the excuse for not proceeding to trial, which had been sworn to when the former rule was discharged, was false. He submitted that the defendant had no opportunity, on the former occasion, in disproving the statement in the affidavit made on the part of the plaintiff.

[696] TINDAL C. J. The same observation might be made in any case where one party has the opportunity of swearing last. If the present application were acceded to, it would tend to endless inconvenience.

Per curiam. Rule refused.

EX PARTE NASH. May 11, 1843.

Articles of clerkship having been entered into in March 1829, were subsequently stolen: the court, in Easter term, 1840, allowed a copy thereof to be inrolled, but not nunc pro tunc.

Nash had been articulated to one Miller, an attorney, by indenture bearing date the 2d of March, 1829. The money for the stamp duty having been advanced by one Anthony, the articles of clerkship were deposited with him, and were stolen, with other property, from his house in the month of July following.

Dowling Serjt., upon an affidavit of these facts, now moved for leave to enrol a verified copy of the articles of clerkship nunc pro tunc; and to file an affidavit of the execution of the original articles. [Maule J. What is meant by tunc?] Three months after the execution of the articles. The learned serjeant referred to *Ex parte Clarke* (see 22 Geo. 2, c. 46, ss. 3, 4, 9. 3 B. & A. 610), and *Ex parte Chapman* (3 Dowl. P. C. 562).

TINDAL C. J. The copy of the articles may be enrolled; but not nunc pro tunc. Per curiam. Rule accordingly (c)².

[697] AGASSIZ AND WIFE v. PALMER. May 6, 1843.

A capias cannot issue upon a scire facias, on a judgment under 1 & 2 Vict. c. 110, s. 35.

An order was made by Lord Abinger C. B. on the 20th of March, directing that the defendant should be held to bail. Upon this order a capias was issued, under which the defendant was taken and committed to the Queen's Bench prison.

This order was obtained on the affidavit of the plaintiff Maria Agassiz, which stated that, in Michaelmas term, 1841, before her intermarriage with the plaintiff

(c)¹ Tindal C. J. was absent.

(c)² See *Ex parte Joy*, 3 Dowl. P. C. 342.

George Agassiz, she recovered in this court 1000l. debt, and 39l. 18s. in an action upon a bond conditioned for the payment to her of an annuity of 100l. by half-yearly instalments—that, before judgment, there had been a suggestion of a breach in the non-payment of 50l. for a half year's annuity, on which breach damages had been assessed and paid; and that, since the intermarrying of the plaintiffs, a sci. fa. had issued to recover the judgment, and that the defendant was about to leave England for India.

April 22.—Sir Thomas Wilde Serjt. moved to set aside the order of the learned judge, and to discharge the defendant out of custody, contending that a judge has no authority under the 1 & 2 Vict. c. 110, s. 35, to require that a party shall be held to bail in a proceeding by sci. fa. (a).

A rule nisi having been granted,

[698] Talfourd Serjt. now shewed cause. The fifth section of the 1 & 2 Vict. c. 110, authorizes the making of orders to hold to bail, in the manner directed by the third section, at any time before final judgment. A judgment recovered under 8 & 9 W. 3, c. 11, though in form a general judgment, is, in substance and effect, an interlocutory judgment, inasmuch as it does not terminate the proceedings. [Tindal C. J. In this case the sci. fa. is not merely to revive the proceedings and to assess further damages, it introduces a new party on the record, and appears to be, in reality, a new action.] If the defendant had been arrested in the original action, it was considered that he could not be held to bail in the new proceeding. Not having been arrested in the original action, the defendant might have been held to bail before the passing of the 1 & 2 Vict. c. 110; *Bishop v. Powell* (6 T. R. 616), *Barnes v. Matson* (cited in the judgment in *Kinnear v. Tarrant*, 15 East, 631).

Sir Thomas Wilde Serjt. (with whom was Hugh Hill), in support of the rule. The proceeding by sci. fa. is [699] not a new action; it is a continuance of the former action, Tidd's Practice, 1145 (9th ed. 1145; 6th ed. 1158). [Tindal C. J. The object of the sci. fa. in this case was to introduce a new party upon the record.] There could have been formerly no arrest upon a sci. fa. until the party had succeeded in obtaining an award of execution; and the statute 1 & 2 Vict. c. 110, does not extend the power of arrest to cases in which no arrest upon mesne process lay before. All the provisions of that statute relate to actions commenced by writ of summons; and the fifth section expressly gives the power of making orders to hold to bail "after the commencement of such action;" that is, of an action commenced by writ of summons, as directed by sect. 2.

Cur. adv. vult.

May 6.—TINDAL C. J. now delivered the judgment of the court. We wished to look into the cases upon this point, and we are of opinion that this court has no power to issue a *capias*. The object of the sci. fa. is to call upon the defendant to shew cause why execution should not issue; and it directs the sheriff to give notice only.

(a) For this Tidd cites the judgment given by Ashhurst J. in 1 T. R. 388, *Executors of Wright Bart. v. Nutt, in Error*, where the testator having undertaken to bring no writ in error, it was held that the executors could not bring error upon the sci. fa. issued against them. The judgment is thus reported:—"This is not a new action, but a continuation of the old one. It is only a sci. fa. to revive the former judgment; and as the testator himself, if he had lived, could not have brought a writ of error, in consequence of the agreement, neither can his executors." It is obvious that, with reference to the agreement not to bring error, the testator and his executors were one person, and the first action and the *scire facies* were one and the same proceeding. Lord Coke says (Co. Litt. 290 b.) "Albeit, it be a judicial writ, yet, because the defendant may thereupon plead, the *scire facies* is accounted in law, to be in the nature of an action." This observation, which agrees with the text of Littleton, s. 505, seems to apply as well to the writ of *scire facias*, at common law (vide H. 14 H. 7, fo. 16, pl. 5), upon a change of parties, as to the statutory *scire facias*, given by Westm. 2, st. 1, c. 45, between the same parties, where no execution has issued within the year and a day, in lieu of the action of debt upon the judgment. It is observable, however, that the statute, so far from treating the *scire facias* as a new action, expressly says, "*talem de cætero habeant vigorem quod non sit necesse in posterum de hiis placitare.*" And see *Grey v. Jones*, 2 Wils. 251; *Pulteney v. Townson*, 2 W. Bla. 1227; 2 Wms. Saund. 71 (4).

The sheriff had no power to take the defendant. If this was a new action, the court had no power to grant a *capias*. There was no process before the new statute, to take the party in execution; and that act, by sect. 3, gives the power of directing the defendant to be held to bail in any action "in which he is now liable to arrest." This sentence refers to the commencement of an action; because, by sect. 5, it is enacted "that any such special order may be made at any time after the commencement of the action, and before final judgment shall have been obtained therein." If this was an old action, then the fifth section shews that the learned judge had no authority to direct that the defendant should be held to bail. Whether the proceeding by *sci. fa.* be treated as a new action, or as a continuance of a former one, or whether the *capias* ought not to have issued, the rule must be absolute for discharging the defendant out of custody.

Rule absolute (a).

Talfourd Serjt. submitted that it was reasonable, that the defendant should be restrained from bringing an action for the arrest.

TINDAL C. J. He would hardly bring an action for an arrest made under a judge's order. But we have no power to restrain him. We are giving him only that which he has a right to claim at our hands.

PEARSON v. LEMAITRE. May 11, 1843.

[S. C. 6 Scott, N. R. 607; 12 L. J. C. P. 253. Referred to, *Hebditch v. M'Ilwaine*, [1894] 2 Q. B. 61.]

In an action for defamation, either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive; but if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of such other cause of action.

Case for a libel. The declaration, after stating as inducement that the plaintiff used and exercised the profession and business of an attorney and solicitor, and held the office of solicitor of the city of London, set out the libel, which was in the form of a letter, dated the 13th of November 1841, addressed to one Thomas Starling, containing the following passages; "You must [701] be aware of the circumstances attending my visits to Italy, in the endeavour to recover from the heiress of the Zeeubio estate considerable advances I had, at her desire, made in liquidation of claims on my old friend the Count, who had left me his executor. I engaged Charles Pearson (meaning the plaintiff) as solicitor, a man whose total destitution of honourable principle we have found commensurate only with his consummate art, tact, and general ability. I thought him (meaning the plaintiff) honest, and believed his representations of having vastly more business than he had means to execute; and I was induced to make him several loans of some 50l. at a time, and seeing him, on one occasion, communicate information that threw his wife into great distress, I hastened home, and, unsolicited, inclosed him my cheque for 100l., offering to double this sum, if he required so much to settle his difficulty. With these claims on his justice, if not his gratitude, he was profuse in protestations of attachment. * Having been arrested at the suit of a pretended claimant on the count's estate. I gave Pearson (meaning the plaintiff) a cheque for a sum between 500l. and 600l. to lodge with the secondary in lieu of bail. The chancellor, on the hearing, ordered the money to be immediately refunded; and I now saw the necessity for a journey to Italy. Despite of the order, under various pretences, Pearson (meaning the plaintiff), deferred obtaining the return of my deposit from day to day for three weeks; and, at the end of this time, gave me such assurances, I no longer doubted I should have it during the day, and therefore took places and prepared for my journey the next morning. To secure the money, I waited at his (meaning the plaintiff's) house much of the day, and until after midnight, when he appeared and said he had been again prevented seeing the secondary; but, if I would leave directions, the disposal [702] of the money might be relied upon by ten the next morning. I had no choice, and wrote out instructions to pay 300l. to your father's care, and the balance, near 300l. more, to my bankers, to meet various cheques I had

(a) And see *Badman v. Pugh*, ante, 391 (b).

drawn; and I advised your father to take charge of this money, as we had agreed. Your father made repeated application for this money without success; and at length, doubting Pearson's (meaning the plaintiff's) veracity, called on the secondary to enquire why the deposit was not delivered up. The books were referred to; and your father is my witness that the scoundrel Pearson (meaning the plaintiff) had taken up the deposit two months before, and on the very day on which I had left England! Your father hastened to Pearson (meaning the plaintiff), who again protested however that he could not get the money out of the hands of the secondary. Indignant at his (meaning the plaintiff's) base treachery, your father said he had examined the books, and, on this denouement, Pearson (meaning the plaintiff) admitted the fraud, and confessed that he had applied the sum to his own uses, and had no present means of repayment.* On my return to England, and, after very much of vexatious difficulty and delays, I obtained from P. (meaning the plaintiff), not the return of the money of which I had been swindled, but a specious statement of pretended claims on property in the West Indies, &c. After much pressing him (meaning the plaintiff), finding I was obliged to revisit Italy, I obtained from him 100l. In Italy I took legal proceedings, and soon obtained from the countess a bond, to be accepted and guaranteed by her agents in England, for the full amount of my claim, reaching finally to upwards of 3000l. I forwarded the bond to Pearson (meaning the plaintiff), with instructions that he (meaning the plaintiff) should take all necessary steps to get this document ratified. Receiving no acknowledgment, I wrote again and again, but in vain. [703] At length I sent a statement of the particulars to my friend Place, who called on P. (meaning the plaintiff); and having obtained of him (meaning the plaintiff) the free avowal that I had been the greatest benefactor he (meaning the plaintiff) had ever known, put to him (meaning the plaintiff) the stringent query—how, then, could he (meaning the plaintiff) treat me so shamefully? He (meaning the plaintiff) at first denied the possibility that he (meaning the plaintiff) could ill-use me: but on Place handing him (meaning the plaintiff) my letter, he (meaning the plaintiff) lowered his face upon his hands, and affected to weep bitterly, conceding the truth of my statement, but utterly denying that he (meaning the plaintiff) had received any communication from me, although, after sending him the bond, I had written to him (meaning the plaintiff) five several letters. I was now obliged to obtain a duplicate copy of the bond. This I hastened to forward to Place, begging him to confide it into careful hands, upon which he could fully rely. Will it be believed! Place, in his progress to execute my desires, unhappily met Pearson (meaning the plaintiff) in the Strand; and such was the fascinating power of this wretch (meaning the plaintiff) that he (meaning the plaintiff) actually prevailed on Place to surrender to his (meaning the plaintiff) traitorous hands my second bond. Pearson (meaning the plaintiff) had promised me that, as I was forced to leave England on the second occasion with slender means, he (meaning the plaintiff) would supply the needful; but he (meaning the plaintiff) sent not one penny to my aid, and, with the wicked and cruel design of prolonging my absence, or perhaps bribed to commit the theft, he (meaning the plaintiff), daringly suppressed and denied that he (meaning the plaintiff) had received any communication, although his (meaning the plaintiff's) wife and her mother and brother well knew the fact, and have all [704] three confessed to me the truth:” and in a certain other part of the libel was the false, &c. matter following: “From time to time I therefore renewed my applications; and, on my appointment to a foreign station, I gave instructions to Mr. Ashurst to enforce the payment, putting into his possession a correspondence wherein his own (meaning the plaintiff's) confessions would have destroyed him (meaning the plaintiff). With as much delay as he (meaning the plaintiff) could throw in pleading all manner of objections, and offering bills at one and two years for 150l., which I rejected, he (meaning the plaintiff) consented to my proposal to arbitrate. I now had hope of a settlement; but neither threat nor entreaty could extort from him (meaning the plaintiff) the name of his arbitrator; and at length, within forty-eight hours of the appointment to embark, I was reduced to the mortifying necessity of accepting his (meaning the plaintiff's) bills, resigning his (meaning the plaintiff's) letters, and executing the infamous release drawn up by his (meaning the plaintiff's) best wits, to bear testimony to a solemn lie, that he (meaning the plaintiff) had settled my demands. But it was, as my professional adviser said, this or nothing; for I could not put to hazard an appointment of 800l. per annum, to stop and litigate my claims; and my return to my country at any

distant day even was very unlikely : and this, Pearson (meaning the plaintiff) knew full well. I embarked, and was ship-wrecked. Soon after this event, finding that these bills were considered worthless, I condescended to call and ask my plunderer (meaning the plaintiff) to cash one or both of them. He (meaning the plaintiff) had the heartlessness to receive me rudely, and flatly refused my request. Seeing him (meaning the plaintiff) afterwards rolling in his (meaning the plaintiff's) carriage, bought at the price of which he (meaning the plaintiff) had [705] defrauded me, I prevailed on my friend Place to endeavour to get him (meaning the plaintiff), even now, to renew the plan of arbitration of our differences. With great and persevering labour, Mr. Place at length extorted his (meaning the plaintiff's) assent, provided I would restore the bills. I consented to lodge them in our joint names. He (meaning the plaintiff) had concluded this was not in my power ; and, so soon as he (meaning the plaintiff) found me willing, he withdrew his consent, and closed abruptly the negotiation : and every endeavour to re-open it has proved fruitless. This is Charles Pearson, (meaning the plaintiff) the man elevated by the noodled corporation of London, to a place of confidence and great trust, though his (meaning the plaintiff's) real character and deeds are known to many of them. But, as regards my unhappy connection with him (meaning the plaintiff) this is not the whole amount of injuries inflicted on me. When I learned from his own (meaning the plaintiff's) confession, that all hope of obtaining the second deed must be abandoned, I had no resource but to throw myself on the generosity of the agents of the countess. The monstrous hardship of my case was not to be denied : but for five or six years they put me at defiance, always challenging me to produce my bond. Worn out, however, by my continued applications, they made me the offer of 500l., which, in my hopeless state, I was constrained to accept, and give my release for 3200l., and interest. By this settlement I lost, besides my property, my peace of mind, my health ; in some sort, suffering also in character, from the non-performance of duties and obligations I had been bereft of the means of fulfilling. To what extent P. (meaning the plaintiff) may have profited by my loss, I shall never ascertain. His (meaning the plaintiff's) scruples on this score may be easily conceived ; and his (meaning the plaintiff's) gene-[706]-ral conduct too clearly elucidates his (meaning the plaintiff's) instincts. You have some time asked, my dear sir, why this lengthened episode ? and, what has this to do with my father's affairs ? I commenced it with the intention of shewing the original ground for my requiring the loan, and I have pursued it in order that those branches of your family who feel an interest in my circumstances may learn the amount of the moral persecution I have endured from the cold-blooded, unprincipled Pearson (meaning the plaintiff) : By means of which," &c.

Pleas : first, not guilty ; upon which issue was joined : second, a justification to so much of the libel set out in the declaration as is included between * * *.

Replication, *de injuriâ*.

The cause was tried before Coltman J. at the Middlesex sittings, after Hilary term last. After proving the libel the plaintiff tendered in evidence two other letters from the defendant, the one bearing date the 27th of May 1842, and the other, the 25th of February 1843 (both written after the commencement of the present action), and addressed to the Lord Mayor for the time being. These letters were objected to on the part of the defendant ; but they were received, on the ground that they would shew the animus of the defendant in writing the libel in question. The first letter contained a distinct charge that the plaintiff had received the sum of 500l. from the secondary, and had not paid it over ; and the second reiterated, in substance, the charges contained in the letter to Starling. The defendant having failed to prove his plea of justification, a verdict was found for the plaintiff, damages 100l.

April 21.—Shee Serjt., on a former day in this term, moved for a new trial, upon the ground that the letters in question had been improperly received. They were not neces-[707]-sary to explain the alleged libel, or to shew the animus with which it was written, as that was sufficiently plain from the language of the libel itself. [Crosswell J. The argument then is, that the libel contained so much internal evidence of malice, that the plaintiff had no right to give any further evidence of malice.] It amounts perhaps to that. The letters put in were in themselves libellous, and separate actions might have been maintained upon each of them. He cited *Pearce v. Ormsby* (1 Mood. & R. 455), *Symmons v. Blake* (ibid. 477), and *Stuart v. Lovell* (2 Stark. N. P. C. 93). A rule nisi having been granted,

May 6.—Sir T. Wilde Serjt. (with whom were Talfourd Serjt. and M. D. Hill), on a subsequent day, shewed cause. The libel set out in the declaration contains several distinct charges against the plaintiff, a small part only of which is attempted to be justified. It was material to shew under what circumstances the libel was written,—to fix the real motive of the defendant—to prove that whilst he was putting forward one set of motives, he was actuated by others of a totally different character. Looking at the letter only, it might be supposed that the object of the writer was, to put forward some claim. Great allowances are made by courts of law in favour of parties who are betrayed into using harsh expressions in respect of matters in which they are personally interested; and the opinion of Lord Ellenborough was, that the convenience of mankind in conducting the ordinary affairs of life required very great latitude in cases of privileged communications. To repel any arguments of this description, if brought to bear upon the present case, it became desirable on the part of the plaintiff to anticipate such a line of de-[708]fence. The course resorted to by the plaintiff had the desired effect; and this rule was moved for, not on the ground of the libel being a privileged communication, but to raise the question, whether the defendant's letters to Sir John Pirie and to Mr. Alderman Humphery, when they respectively filled the office of Lord Mayor of London, were admissible in evidence. But for the production of those subsequent letters, the defendant would, no doubt, have contended that the letter declared upon had been written for the purpose of conveying information to Starling, without any intention of injuring the plaintiff. [Shee Serjt. It never was supposed that this was a case of privileged communication.] The defendant was prevented from resorting to that species of defence by the course taken by the plaintiff in anticipation of such an attempt. The first libel purports to have been written to a person with whom the defendant appears to have had some pecuniary transactions; and if the two subsequent letters had not been produced and read, it is impossible to say that a jury might not have been persuaded by the defendant's counsel, to look upon the first letter as being in the nature of a privileged communication. [Cresswell J. Would it be any defence to A. B.'s action for a libel that the defendant had said to a third person "I want to borrow money of you, because A. B. decoyed me into a gambling-house, where I was robbed of all I had?"] The cases have gone very far. *Fairman v. Ives* (5 B. & Ald. 642); *M'Dougall v. Claridge* (1 Campb. 267). It is not contended that the plaintiff may give evidence of having made another and distinct false charge against him the defendant, but the letters produced in this case contained merely a repetition of the former imputations. These letters were received for the purpose of establishing the malicious motive of the defendant, in [709] publishing the libel declared on. It was not an attempt to prove the existence of malice at one period by shewing that it existed at another. The malicious motive may be implied, and, on the other hand, such implication may be excluded by the occasion on which the defamatory expressions were used. [Cresswell J. In *M'Dougall v. Claridge* the defendant had an interest in the subject matter of the communication. In *Hearne v. Stowell* (12 A. & E. 719, 4 P. & D. 696) the defamatory words declared on not having been spoken upon any justifiable occasion, the court of Queen's Bench refused to enter into a consideration of the motives by which the defendant was actuated. Where defamatory expressions are used the law in the first instance infers malice. If the occasion be such as rebuts the presumption of malice, the plaintiff is bound to shew malice in fact. In considering the occasion of the communication, the court will not look at the motives of the speaker or writer.] The point is, however, sufficiently open to argument to justify a plaintiff in not relying upon the defendant's abstaining from such a course. The two letters were clearly admissible for the purpose of shewing the animus with which the defendant made the charge contained in the libel declared on. A wide door will be opened for defamation and libel, if every party is at liberty to mix up slander with any matter in which he may have an interest. In *Fairman v. Ives* the question left by Abbott C. J. to the jury was, whether the petition presented to Lord Palmerston contained only a fair and honest statement of the facts, according to the understanding of the party who presented it. In that case Holroyd J. said "So, in the case of a confidential communication made between friends, to prevent an injury, and not for the purpose of slandering, the occasion justifies the act." [710] [Cresswell J. That must mean a communication to some friend upon some subject in which he is interested.] Mr. Justice Holroyd was very accurate as to the terms in which he expressed himself.

[Cresswell J. The qualifying words may have been omitted in the report.] The same learned judge cites the case of *Cleaver v. Sarraude* (cited in 1 Campb. 268) to the same effect. So, here, counsel might have applied the rule there laid down, to the present case, saying that the letter was sent solely for the purpose of inducing Starling to acquiesce in the writer's demand. Best J. concurs in the judgment, and says, "The letter complained of was addressed to the secretary at war, and was delivered to him, and to him only, with an intent to prevail on him to exert his authority to compel the plaintiff, an officer in the army, to pay to the defendant a debt." Here, if the plaintiff had omitted to prove that the defamatory matter had been shewn to other persons, the defendant would have relied upon the circumstance of the communication appearing to have been made to Starling only. There could be no better means of shewing that the act of the defendant did not come within the class of privileged communications, than by bringing before the jury the conduct of the defendant upon other occasions with reference to the same matter. Several cases which appear at first sight to militate against this view of the subject, are distinguishable from the present. In *Finnerty v. Tipper* (2 Campb. 72) Sir James Mansfield C. J. refused to admit evidence of subsequent libels. But this was solely on the ground that the latter did not relate to the same subject matter; by which is meant, not the same paper, but the same charge. In the criminal courts it is the constant practice, upon the trial of an indictment for passing forged bank notes, to shew an uttering of such [711] notes upon another occasion. There is no substantial difference between saying "That which was written is true," and—repeating the libel verbatim, and adding the words "And all this is true." As was observed by Sir James Mansfield C. J. in that case, with reference to the case of *Tate v. Humphrey* (2 Campb. 73, n.) tried before Mr. Baron Graham. "Upon consideration I think the case before Mr. Baron Graham was rightly decided, inasmuch as the circumstance of preferring the indictment was there proved to shew the malice; and the indictment, in point of fact, merely repeated the words for which the action was brought." So here, what is there but a repetition of the same libel, to the Lord Mayor of London for the time being? The letters were written in a deliberate manner, to persons whose had opinion would be most prejudicial to the plaintiff. In *Finnerty v. Tipper* (ibid. 72) the evidence rejected related to other publications. Here, the evidence given related to the same charge. It is totally unlike the case,—put by Sir James Mansfield C. J.,—of proof of murder being offered upon the trial of an indictment for horse-stealing. *Symmons v. Blake* (1 Mood. & R. 477) and *Pearce v. Ormsby* (ibid. 455) are said to be in point; but neither of those cases will, it is conceived, be found to apply. In *Mead v. Daubigny* (Peake, N. P. C. 125), Lord Kenyon held, that in actions for defamation the plaintiff may give in evidence any words used by the defendant, with a view to shew the spirit with which the defendant was actuated. His lordship was however of opinion in that case, that he could not receive evidence of words actionable in themselves. But in the subsequent case of *Lee v. Huson* (g), that learned judge appears to have abandoned [712]—doned the restriction which he had adopted in *Mead v. Daubigny*, as to receiving evidence of other words actionable in themselves. In *Charlter v. Barret* (Peake, N. P. C. 32) the words complained of were spoken of the plaintiff as an attorney; and Lord Kenyon held that words spoken at different times might be given in evidence to shew the intention of the defendant. [Cresswell J. Were the words equivocal?] The words admitted in evidence were the same as those originally spoken. It might be convenient that the plaintiff should bring no other action for a repetition of the same words occurring before the trial of the first action. The distinction between giving evidence of other actionable words and of other words not actionable, is not founded on any principle. *Pearce v. Ormsby* was cited on moving for the rule, but in that case the rejection of the subsequent words proceeded upon a different ground. [Cresswell J. I think the evidence was offered with reference to the amount of damages.] It was. In *Symmons v. Blake* the subsequent words could have had no other effect than to inflame the damages, though they were tendered as proving that the plaintiff was the party meant in the conversation declared upon. Patteson J. there says, "I do not think the meaning of the words in this declaration can be mistaken. They are

(g) Ibid. 166. It is said that, in *Scott v. Lord and Lady Oxford*, Lawrence J. permitted words not laid in the declaration, and which were actionable, to be given in evidence in aggravation of damages, ib. 126, n.

perfectly clear; and if other words of the same or similar import are given in evidence, the damages in this cause may be increased by those words, and yet this record be no evidence in a subsequent action which may be founded upon them. That is the mischief to be guarded against. I understand Lord Abinger recently acted on this principle. At Exeter, I admitted evidence of similar words spoken by the defendant on a previous occasion, and of an action having already been brought and damages recovered for those words, on the ground that the repetition of the slander [713] charged in the case shewed the malevolence of the party. In that case there was no ground for suggesting that the act was equivocal; the effect of the evidence tendered could therefore have been only to inflame the damages. In *Lee v. Huson* Lord Kenyon said that he "thought these letters (offered in evidence) by the plaintiff which also amounted to libels, might be received as evidence though they contained matter for another action;" and observed, "that in actions for words it was the practice to admit evidence of other words besides those charged in the declaration." The same principle was recognised by Sir James Mansfield C. J. in *Finnerty v. Tipper*. In *Macleod v. Wakley* (3 Carr. & P. 311) evidence was offered of another libel published after action brought. Lord Tenterden is reported to have said, "I am by no means satisfied that what is published at any time before the trial, may not be evidence to shew the motive of the party; however late any thing takes place, it may be evidence of a previous intention as to a previous fact." It is no legitimate argument against the admissibility of evidence, that it may possibly injure the defendant upon the trial of another action. That is not the proper test. The question to be decided is, whether the evidence is applicable to the then cause of action. If it is, the possibility of injury to the defendant is not to be regarded (and see *Collett v. Lord Keith*, 4 Esp. N. P. C. 212). Upon an indictment for horse-stealing, where the circumstances under which the horse was taken rendered it doubtful whether a felony had been committed or not, any acts or declarations of the prisoner down to the time of trial would be receivable in evidence against him. It is no ground for excluding evidence of particular facts that the defendant has thereby rendered himself liable to other proceedings. In many cases in which I have been engaged the objection has been taken, [714] and it has uniformly failed. Here, the judge in summing up has endeavoured to guard the jury against the error of giving damages for matters not included in the action which they are trying. The possibility of the jury's being induced by the evidence to go wrong, would be an objection which might be taken in every case. In *Barwell v. Adkins* (ante, vol. i. p. 807), which was an action for a libel in the *Northampton Herald*, the plaintiff was allowed to give evidence of a paragraph contained in a subsequent number of the newspaper, in which the charge was reasserted, for the purpose of shewing the defendant's intention. In leaving the case to the jury, the judge told them to take both paragraphs with them, and to give such damages as they considered the plaintiff was entitled to under the circumstances (b). This was held to be a proper direction, the court considering that the jury would understand the direction to import that they were to give damages only for the first paragraph, after ascertaining what the intention in publishing that paragraph was by looking at the second (vide post, 720 (a)). It would be a very great hardship upon plaintiffs if such a course were not allowed to be taken. If either party is to suffer, it ought not to be the plaintiff but the defendant, by whom the plaintiff has been slandered. If motives can be put forward on behalf of the defendant, the plaintiff surely has a right to meet and repel them.

Talfourd Serjt. on the same side. In a case which is not yet reported, Maule J. admitted evidence in mitigation of damages, after the cause of action in the special count had been proved. If evidence is receivable in mitigation of damages, it may be admitted in aggravation. In *Chubb v. Westley* (6 Carr. & P. 436), which was an action for a libel contained in a periodical work, articles which had appeared in subsequent numbers alluding to the action and defaming the plaintiff, were received in evidence for the purpose of shewing that the publications were part of a system, and not an accidental slip. Here, it was a question whether the communication was or was not intended to be confined to Starling; upon which point these letters would be

(b) The jury do not appear to have been cautioned against finding damages with reference to all the circumstances before them. Perhaps not many juries would be able, and fewer still would be inclined, to act upon any such caution, if given.

most material. In support of this view of the case *Plunkett v. Cobbett* (5 Esp. N. P. C. 136, S. C. 2 Selw. N. P. 7th ed. 1048) is important. There, after proof of the publication by the defendant of a paper called *Cobbett's Weekly Register*, containing a libel on the plaintiff, before action brought, the witness was permitted to be asked, whether after action brought he had purchased another copy of the same paper at the defendant's office, for the purpose of shewing that the paper was circulated deliberately. [Cresswell J. Was that another copy of the same number? If not, it would be evidence to shew that there was a weekly publication of the *Register*, though the particular numbers so produced might not refer to the same subject.] Suppose the defendant had said whilst his trial was going on, "I wrote that for the purpose of injuring the plaintiff." [Cresswell J. The evidence cannot be shut out merely because it shews that which may be the subject of a future action. Libels published by the plaintiff against the defendant may be given in evidence in mitigation of damages. In *Fraser v. Berkeley* (2 Mood. & R. 3, 7 Carr. & P. 621. And see *Tarbart v. Tipper*, 1 Camp. 350) a libel published by the plaintiff, was allowed to be given in evidence in mitigation of damages, in an action for a battery, although it might have been said that the libel [716] might become the subject of a cross-action.] Such action had in fact been brought against Fraser.

Shee Serjt., in support of the rule. Letters of the plaintiff were put in for the purpose of shewing the period at which the transaction alluded to in the defendant's letter to Starling took place, that the defendant was a creditor of the plaintiff, and that the defendant's circumstances were such that it would have been useless to sue him. It is said that the plaintiff put in the defendant's letters to Sir John Pirie and Alderman Humphery, for the purpose of anticipating a case of privileged communication, which, it is suggested, the defendant might probably have set up. The plaintiff had no right to anticipate the taking of such a course by the defendant. The defendant knew that there was nothing in the position of Starling which would have justified the making of a statement to him containing scandalous matter. The plaintiff was bound to know that the defendant had no right to treat this as a privileged communication; and he had no right to act upon the probability that it would be so treated. It was never contended that the publication proved in this case, was an excusable publication. It was simply said that the latter letters would never have been sent if the plaintiff had not thought proper to bring this case before a jury. It was not contended that this was the less a libel by reason of the relation in which the parties stood to one another. The letters to the Lord Mayors appear to come within the rule as to privileged communications. [Wilde Serjt. If so, that removes all objection to their admissibility in evidence. Tindal C. J. We do not think that you need labour that part of the case.] It seems to be admitted that *Finnerty v. Tipper* does not apply. The other cases which have been cited are more to the point. In *Symmons v. Blake* the additional [717] matter offered in evidence was contained in the same book. [Cresswell J. I cannot see why the reason would not apply to the admissibility of proof of words subsequently used, where the plaintiff is not precluded from suing in respect of such subsequent words, by reason of the statute of limitations having run.] It may be admitted that words spoken before the libel are not so strongly indicative of the intention of the party in publishing the libel as words spoken afterwards. All the cases are reconcilable with the opinion expressed by Lord Ellenborough in *Stuart v. Lovell* (2 Stark. N. P. C. 93). That was an action by the editor of the *Courier* newspaper against the editor of the *Statesman* newspaper for a libel in the latter paper. Marryat for the plaintiff tendered in evidence subsequent publications by the defendant in the *Statesman*, to shew quo animo the defendant published the articles declared on, urging that they would be admissible in the case of an indictment, and stated that the subsequent publications were not in themselves substantively actionable. His lordship said: "No doubt they would be admissible in the case of an indictment; and so they would here, to shew the intention of the party, if it were at all equivocal; but if they be not admitted for that purpose, they certainly are not admissible for the purpose of enhancing damage." In *Chubb v. Westley* (6 Carr. & P. 436) the evidence was admitted solely for the purpose of shewing quo animo the libel was published, and that the defendant considered it as applying to the plaintiff. By the term quo animo, must be understood the sense in which the words were used, and not, as contended on the other side, the motive of the defendant. This is shewn more clearly by *Hunt v. Elgar* (6 Carr. & P. 245). There, the question was, whether an article inserted in a

newspaper was a libel or not; which depended upon the effect to be given [718] to the qualifying word "fudge," the introduction of which, it was contended, shewed that no discredit was meant to be thrown on the plaintiff. In *Bond v. Douglas* (7 Carr. & P. 626) the placards published by the defendant were received as evidence of the animus, that is, the intention, of the party. So, in *Delegal v. Highley* (8 Carr. & P. 444), evidence was given of the publication of the same libel in another newspaper. [Tindal C. J. There the evidence was admitted for the purpose of shewing malice in fact.] Here, there is nothing equivocal. It is plain that it was intended to impute to the plaintiff gross misconduct in his character as attorney. [Tindal C. J. The case is one of considerable importance, and we will take time to consider.]

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was an action for a libel, contained in a letter written by the defendant to one Starling, bearing date the 13th of November 1841. The plaintiff obtained a verdict for 100l. A rule nisi for a new trial was granted, on the ground that the learned judge before whom the cause was tried, had allowed the plaintiff to give in evidence two letters, written by the defendant, and bearing date the 27th of May 1842, and 25th of January 1843, each addressed to the Lord Mayor for the time being, containing, in substance, a repetition of the libellous matter for which the action was brought. In answer to the rule it was contended, that the letters were admissible for the purpose of shewing the existence of actual malice in the mind of the writer of the libel complained of, in order to repel by anticipation any attempt by the defendant to establish that it was a privileged communication. But we think that there was no pretence for saying that the letter to Mr. Starling [719] was a privileged communication, and that the other letters were not admissible for the purpose of answering by anticipation an untenable proposition.

But it was further contended that the subsequent letters, containing a repetition of the same defamatory matter, explained the motives by which the defendant was actuated in writing to Mr. Starling; and, that with a view to the damages to be recovered, the plaintiff was entitled to prove that the defendant was actuated by malice in fact. To this it was answered, that although subsequent publications, not in themselves actionable, might have been given in evidence for that purpose, yet these letters, containing matter for which other actions might be brought, were inadmissible, as there was nothing ambiguous in the language of the letter to Starling which they tended to explain: and two modern cases—*Pearce v. Ornsby* (1 Moo. & R. 455) and *Symmons v. Blake* (ibid. 477) were cited, which, in one view of them, are authorities to that effect. On the other hand, Lord Ellenborough, in *Rustell v. Macquister* (1 Campb. 49) altogether denied the soundness of the distinction, and there held that "you may give in evidence any words, as well as any act, of the defendant, to shew quo animo he spoke the words which are the subject of the action." And in other cases he appears to have admitted evidence to shew the motive and intention of a party publishing a libel; *Phunkett v. Cobbett* (5 Esp. N. P. C. 136. *Geare v. Britton* (Bull. Ni. Pr. 7) is an authority to the like effect. On the same principle a defendant has been allowed to give evidence palliating, though not justifying, his act in publishing a libel, ex. gr. that he copied it from a newspaper; *Saunders v. Mills* (g). And this appears to us to be the correct rule, viz. that either party may, with a view to the damages, give evi-[720]-dence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And, if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of *Pearce v. Ornsby* and *Symmons v. Blake* went no further than this. It may be difficult to reconcile all the nisi prius cases upon this subject; and the point does not appear to have been decided by any of the courts in Westminster Hall (a). But, upon principle, we think that the spirit and intention of the party

(g) 6 Bingh. 213, 3 M. & P. 520. So, from Fox's Book of Martyrs, Cro. Jac. 91.

(a) It has however been held in K. B., that in an action for a libel, the tendency of the publication, and not the intention of the writer, is the question to be submitted to the jury; *Haire v. Wilson*, 9 B. & C. 643, 4 Mann. & Ryl. 605. In *Fisher v. Clement*, 10 B. & C. 472, 5 M. & R. 730, the court recognised this distinction, even

publishing a libel, are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded simply because it may disclose another and different cause of action.

Another argument against the admissibility of the letters tendered in evidence, was founded on the length of the time that had elapsed between the date of the libel complained of, and the writing of those letters. But,—as it seems to us,—as they clearly relate to the same subject, the respective dates of the libel and of the letters may affect the value, but not the admissibility, of the evidence; and we think that, notwithstanding the two grounds of objection which have been taken, these letters were properly received.

The rule for a new trial must therefore be discharged.

Rule discharged.

[721] WITHERS v. SPOONER. April 23, 1843.

It is no objection to a motion for judgment as in case of a nonsuit, where a clear default has been committed, that a similar application was unsuccessfully made in the previous term, upon an affidavit which left it doubtful whether the application was not then made too soon.

Gaselee Serjt., on a former day in this term, obtained a rule nisi for judgment as in case of a nonsuit, the default alleged being in not proceeding to trial at the sittings after last term.

Dowling Serjt. shewed cause. Early in last Hilary term, the defendant obtained a similar rule to the present, which was discharged a few days afterwards, no default appearing in the affidavit. The motion was immediately renewed upon an amended affidavit; but that rule was also discharged, on the ground that the court will not permit a second application to be made in the same term upon what are substantially the same materials (see ante, p. 268). The present motion is likewise irregular, being founded on the same default. [Cresswell J. The affidavit on which the first application was founded, merely stated that issue was joined as of Trinity term last, without saying whether the cause was a town or a country cause, and consequently it disclosed no default: for the cause might be a country cause, in which case the plaintiff would not be guilty of a default, until two assizes had passed. That objection, however, is removed by lapse of time, as a second assize has passed; so that whether a town cause or country cause, a clear default has been committed.] A party cannot move twice upon the same state of facts; and, whatever the lapse of time, there has only been one default. [Coltman J. Since the last application, the plaintiff has been guilty of a default in not giving notice of trial for the sittings after term.] [722] The plaintiff had not time to give notice of trial, after the discharge of the second rule. [Cresswell J. Did that rule amount to a stay of proceedings?] Perhaps not. [Cresswell J. Then there was nothing to prevent him from giving notice of trial.] Although not absolutely prevented, it is submitted that he was not bound to proceed while the last application remained undecided.

Gaselee, in support of the rule, contended that there was a clear default to which no answer had been given.

TINDAL C. J. The objection taken upon the original application was far from being a gracious one. The plaintiff must give a peremptory undertaking.

Rule accordingly.

BURGESS v. LANGLEY. April 27, 1843.

[S. C. 6 Scott, N. R. 518; 1 D. & L. 21; 12 L. J. C. P. 257.]

The court refused to grant a rule nisi for a new trial, upon an affidavit stating that one of the jury declared in open court in the presence and hearing of the others that the verdict had been decided by lot.

Debt, to recover 47l. 16s. 3d. the price of a phaeton sold and delivered by the plaintiff to the defendant. Plea: nunquam indebitatis.

while supporting a contrary ruling of Lord Tenterden, on the ground that the jury must have understood the words "intention of the writer" to have been used in the sense of "tendency of the publication."

At the trial before Tindal C. J. at the sittings at Guildhall after last Hilary term, the only question between the parties was, whether the carriage had been sold for ready money or upon an unexpired credit of twelve months; and on this point there was contradictory evidence. It appeared that the sale took place in August 1842, and that the action was commenced immediately afterwards.

The jury having returned a verdict for the defendant,

Shee Serjt. on a former day in this term moved for a new trial, alleging misconduct on the part of the jury. [723] The motion was supported by an affidavit of the plaintiff's attorney, who deposed that the case having been summed up to the jury, they retired to consider of their verdict; that the Lord Chief Justice left the court, it having been arranged that the verdict should be received by the officer; that the jury were absent for nearly an hour, and, on their return into court, being asked by the officer whether they had agreed on a verdict, the foreman replied in the affirmative, and said they found for the defendant, but that they recommended that each party should pay his own costs; that the officer thereupon informed the jury that such recommendation could not form part of their verdict (a), but that the verdict must be entered generally for the defendant; that immediately on the delivery of the verdict, an officer of the court paid to the jury the accustomed fees; that just as the payment of such fees was concluding, and before the jury had retired from the court, one of them, in the presence and hearing of the several members of the jury [724] remaining in court, openly and publicly announced,—marking on the verdict what had just been recorded,—that they the said jury never should have agreed as to a verdict in the said cause, but that they were equally divided, being six for the plaintiff and six for the defendant, and that none of the jury would give way, but that they had agreed to put their names into a hat, and resolved that the names should be drawn by the foreman, and the first name drawn, whether for plaintiff or defendant, should go on the opposite side to that for which he was for finding a verdict, and that thereupon the jury should give their verdict in court for the party who had, by such means, the majority of jurors, and should recommend that each party should pay his own costs of the action; and the said juror declared that accordingly such plan was adopted, and that the name first drawn was that of a juror who was in favour of the plaintiff, and whose voice was thereupon reckoned, according to the said arrangement, for the defendant; and thereupon the said jury had returned into court and given their verdict as before mentioned; that the declaration or statement so made by the said jurymen was made in court immediately after the giving of the said verdict, and in the presence of the others of the said jury in this cause then being present in court and hearing the same, and that such declaration or statement was not disavowed, nor denied, nor contradicted by any one of the jury, but that, on the contrary, one of the jury who was at that moment appealed to by the member of the jury, who made the above statement as to the mode in which the verdict had been obtained, as to whether the juror appealed to had not been for the plaintiff before the said drawing of the said names of the jury, the juror so appealed to replied—no, that he was for the defendant, and that the juror so appealing to him had had to come on the defendant's side; that the deponent verily believed that the verdict, so given for the defendant, was obtained

(a) Where the verdict is for the defendant, the jury has no jurisdiction with respect to costs, the 23 Hen. 8, c. 15, giving the defendant, when he succeeds by non-suit or verdict, "judgment to recover his costs against the plaintiff, to be assessed and taxed at the discretion of the court." But where the plaintiff obtains a verdict, his costs are assessed by the jury, and the court only gives costs de incremento. This appears to be not an immaterial distinction, as it was said by Richardson C. J. of C. P. in *M. 5 Car. I.* to be the resolution of all the justices in *K. B.* and *C. P.* that in an action upon the case for slander, though the court are bound by the 21 Jac. 1, c. 16, and cannot increase the costs when the damages are under 40s., yet the jury are not bound by that statute, and therefore they may give 10l. costs where they give 10d. damages; 1 Salk. 207. This resolution seems, however, to turn upon the particular words of the sixth section of the 21 Jac. 1, c. 16, "shall have and recover only so much costs as the damages so given or assessed amount unto, without further increase of the same." The 21 Jac. 1, c. 16, s. 6, though not among the statutes and enactments expressly repealed by the 3 & 4 Vict. c. 24, appears to be inconsistent with the provisions of the latter statute.

by the means of [725] drawing a lot for the same as aforesaid; and that the statement of the said jurymen as to the drawing as aforesaid was made in the presence and hearing of the officer of the court.

The learned serjeant contended that the affidavit disclosed sufficient grounds for setting aside the verdict. [Cresswell J. Had the statement made in the affidavit come from the officer who had charge of the jury, we might have attended to it; but it has long been decided, that the affidavit of a jurymen as to the mode in which the jury arrived at their verdict, cannot be received. If that be so, how can we act on a mere statement made by a jurymen, and coming through the attorney of the losing party? Erskine J. In *Straker v. Graham* (4 M. & W. 721) the court of Exchequer rejected an affidavit made by the plaintiff's attorney, who deposed that one of the jury had told him that they had decided their verdict by tossing up.] This case is distinguishable; for here the statement was made in open court before the rest of the jury. [Erskine J. Not of all; for some, if not the greater part, appear to have gone away (b).] Taken in conjunction with the recommendation as to costs, it is submitted that the verdict is so unsatisfactory as to call for a new trial.

TINDAL C. J. On general principles such an affidavit as the present is clearly inadmissible. We will, however, inquire of the associate whether any thing occurred in his presence at the time that the verdict was delivered, so as to take the case out of the general rule.

Cur. adv. vult.

TINDAL C. J., on a subsequent day, said:—We have made inquiry of the associate as to what took place in [726] his presence at the time of giving the verdict, and from his statement it appears that, in answer to the usual question put by him when they came into court, the jury said they found for the defendant, but recommended that each party should pay his own costs; that the associate told him that they had nothing to do with the costs, and asked them if they were agreed in their verdict for the defendant, when he received an answer in the affirmative, whereupon he recorded the verdict. Under these circumstances, we think that the case falls within the principle acted upon in *Straker v. Graham* and in other decisions, and that the rule must be refused.

Rule refused.

KAVANAGH v. GUDGE AND OTHERS April 26, 1843.

[S. C. 6 Scott, N. R. 508; 12 L. J. C. P. 258; 7 Jur. 352. For subsequent proceedings see 7 Man. & G. 316.]

A rejoinder in trespass *quare domum fregit*, setting out a proviso for re-entry, in case the rent, which was reserved half-quarterly, should be unpaid on any day on which the same should become due, or within ten days afterwards, and averring that, the rent for one year being due and unpaid, they, as servants of the landlord, entered, &c. (without alleging that the entry was made after the expiration of ten days from the time that any half quarter became due), is bad for duplicity, as setting up either seven or eight half-quarterly periods at which rights of entry accrued.—The right of re-entry being considered by the court to be in the nature of a right of re-entry for a forfeiture, leave to amend was refused (*vide post*, 734 (b)).

Trespass. The declaration stated that the defendants, on the 27th of March 1841, and on other days between, &c., with force and arms, broke and entered a dwelling-house of the plaintiff, situate, &c., and made a great noise and disturbance therein for a long time, to wit, &c., and forced and broke open, &c., divers, to wit, five doors of and belonging to the said dwelling-house, &c. &c., and on the day and year first aforesaid, with force and arms, ejected, &c., the plaintiff [727] and her family from the possession and enjoyment of the said dwelling-house, and kept them so ejected, &c., for a long time, to wit, thence until the commencement of this suit, and also during the time aforesaid, to wit, on the 12th of May in the year aforesaid, with force and arms, seized and took divers goods and chattels, to wit, &c., of the plaintiff, of great

(b) But the affidavit speaks, not of "several," but of "the several" members of the jury, and afterwards, not of "others," but of "the others," *supra*, 723, 724.

value, to wit, 50l. ; and also during the time aforesaid, to wit, on the day and year last aforesaid, with force and arms, assaulted the plaintiff, and beat and bruised and ill-treated the plaintiff, and seized and laid hold of her, and with great force and violence pushed, pulled, and dragged her about, and forcibly forced her to go from and out of the said dwelling-house into the public streets there : by means of which premises the plaintiff, during all the time aforesaid, lost and was deprived of the use and benefit of her said dwelling-house, and was put to great inconvenience and much expense, to wit, 20l., in procuring and removing to another residence for herself and family ; and other wrongs, &c.

Plea—as to so much of the declaration as relates to the breaking and entering the said dwelling-house and to the making a little noise and disturbance therein, and continuing therein making such noise and disturbance for the said space of time in the declaration mentioned, and as to the forcing and breaking open the said doors, &c., and as to the ejecting, &c., the plaintiff, from the possession and enjoyment of the said dwelling-house and keeping her so ejected, &c., for the said space of time in the declaration also mentioned, and as to the seizing and taking the said goods and chattels, and as to the assaulting the plaintiff and seizing and laying hold of her and gently forcing her from the said dwelling-house into the public streets in the declaration also mentioned—that one Evans, before any of the said times when, [728] &c., to wit, on the 3d of October 1823, was seised, in his demesne as of fee, of and in the said dwelling-house, and being so thereof seised, afterwards and before any of the said times when, &c., in the declaration mentioned, to wit, on the day and year last aforesaid, by a certain indenture then made by and between Evans of the one part and Temperance Arden of the other part [excuse of profert], Evans did demise, lease, and to farm let, unto Arden the said dwelling-house ; habendum, unto Arden, her executors, &c., from the 29th of September then last past to the full end and term of fifty-four years thence next ensuing ; and that such indenture is still in force and effect ; that Arden being so thereof possessed, the plaintiff claiming title to the said dwelling-house, under colour of a certain charter of demise, pretended to be thereof made to her by Evans, for the term of her natural life, before the making of the said demise by Evans to Arden as aforesaid,—whereas nothing of or in the said dwelling-house, or any part thereof, ever passed by virtue of that charter,—afterwards and before any of the said times when, &c., and during the continuance of the said term so demised to Arden as aforesaid, to wit, on the first day in the declaration mentioned, entered into and upon the said dwelling-house, and was thereof possessed, whereupon the said defendants, as the servants of Arden, and by her command, at the several times when, &c., in the declaration mentioned, broke and entered into and upon the said dwelling-house, and made a little noise and disturbance therein, and stayed and continued therein making such noise and disturbance for the space of time in the declaration mentioned, and then forced and broke open the said doors, &c. ; and because the said goods and chattels in the declaration mentioned, before the said several times when, &c., and had been wrongfully and injuriously put and placed, [729] and were at those times remaining and being, in and upon the said dwelling-house and encumbering the same, they, the defendants, as the servants of Arden, in that behalf, and by such command as aforesaid, gently removed the same from and out of the said dwelling-house to a small and convenient distance, and there left the same for the use of the plaintiff ; and thereupon the plaintiff, just before and at the several times when, &c., being unlawfully in the said dwelling-house, endeavoured to prevent the defendants from obeying such command as aforesaid, and stayed and continued in the said dwelling-house, making a great noise and disturbance without the leave or licence and against the will of Arden and of the defendants ; and thereupon the defendants, as the servants of Arden, and by her command, then requested the plaintiff to go and depart from and out of the said dwelling-house, which she then wholly refused to do ; whereupon the defendants, as the servants and by the command of Arden, in order to obtain possession of the said dwelling-house, gently laid their hands upon the plaintiff in order to remove, and did then remove, the plaintiff from and out of the said dwelling-house, as they lawfully might for the cause aforesaid, &c., which are the same, &c. Verification.

Replication—that after making the said indenture of demise, and whilst Arden was possessed of the said dwelling-house for the term thereby granted and before any of the said times when, &c., to wit, on the 25th of December 1834, the said Arden

demised the said dwelling-house in the said declaration mentioned, and in which, &c., to the plaintiff and W. H. Goddard as tenants from year to year, by virtue of which said demise the plaintiff and the said Goddard afterwards, and before any of the said times, when, &c., entered into the said dwelling-house in the said declaration mentioned, and in which, [730] &c., with the appurtenances, and became and were possessed thereof from thence until the defendants afterwards, to wit, at the several times when, &c., of their own wrong, broke and entered into the said dwelling-house in the said declaration mentioned, and in which, &c., and committed the said several trespasses in the introductory part of the plea mentioned, modo et formâ.—Verification.

Rejoinder—that the demise in the replication mentioned was a certain demise by Arden to the plaintiff and Goddard on the said 18th of December 1834, by a certain agreement in writing, made and entered into by and between Arden of the one part and the plaintiff and Goddard jointly and severally of the other part, whereby Arden agreed to let, and the plaintiff and Goddard jointly and severally agreed to take of Arden, from the 25th of December then instant, as yearly tenants, subject to six months' legal notice to be given by either party to the other, a house and premises, with the use of fixtures and other things as scheduled at the back thereof, and appurtenances situate, &c., at the clear yearly rent of 30l., payable half-quarterly; and the plaintiff and Goddard jointly and severally agreed to pay the rent in manner aforesaid, and also to pay all land-tax, sewer-rates, &c.; and in default thereof, and without first requiring the payment by the plaintiff and Goddard, Arden might, and she was thereby authorised to, pay the same or any part thereof, and, without any demand whatsoever, recover the amount so paid by distress upon the said premises as in case of distress for rent in arrear, or by any other legal proceedings whatsoever, with the expenses thereof respectively: and the plaintiff and Goddard also agreed to keep the whole of the house and premises in good repair, &c.; and Goddard did thereby further agree that if the said rent or any part thereof should be unpaid on any [731] day on which the same should become due, or within ten days afterwards, or if the plaintiff and Goddard should not at all times observe and keep the several conditions and agreements therein-before mentioned, or quit and deliver up possession of the house and premises according to the notice therein-before mentioned, then, and in either of such cases, and without any demand whatsoever, it should be lawful for the said Arden and her agents immediately to enter upon and take possession of the house and premises, and the plaintiff and Goddard, and all persons claiming under them for ever to expel and remove therefrom without any legal process whatsoever, and as effectually as any sheriff might do in case the said Arden had obtained judgment in ejectment for the recovery of possession thereof, and as if a writ of habere facias possessionem or other process had issued on such judgment, directed to such sheriff in due form of law; and in case of such entry, and of any action being brought or other proceedings taken for the same by any persons whomsoever, the defendants might plead leave and licence of the plaintiff; and Goddard, their executors or administrators, or any persons claiming any interest or possession from or under them to Arden, her executors and administrators, and all persons acting therein, by their or any of their order for the entry or trespasses or other matters to be complained of in such action or other proceedings. By virtue of which agreement the plaintiff afterwards and before the commencement of this suit, to wit, on the said 25th of December 1834, entered into and upon the said premises, being the said dwelling-house in the declaration and in the said replication to the said last plea mentioned, and became and was possessed thereof for the said term so thereof granted as aforesaid. Averment: that afterwards and after the making of the said agreement, and before the [732] commencement of this suit, and during the continuance of the said term, and whilst the plaintiff was so in the possession of the demised premises as aforesaid, under and by virtue of the said demise, to wit, on the 25th of March 1844, a large sum of money, to wit, 30l. of the rent aforesaid for one year of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable from the plaintiff to Arden under and by virtue of the agreement, and was then demanded by Arden of the plaintiff and Goddard, and was at the several times when, &c., in the declaration mentioned, and still is, in arrear and unpaid; wherefore the defendants, as the agents of Arden, and by her command, on the said first day when, &c., in the declaration mentioned, and whilst the said plaintiff was so in the possession of the said demised premises as aforesaid, and during the said term, did, in pursuance of the power

contained in the said agreement, enter into and upon the said dwelling-house, for the purpose, and with the intent, of taking possession of the same, as authorised by the said agreement; and thereupon the defendants then requested the plaintiff to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon the defendants, as such agents, and by such command as aforesaid, at the time first above mentioned, gently laid their hands upon the plaintiff in order to remove, and then did remove, the plaintiff from and out of the said dwelling-house, and because the said goods and chattels in the declaration mentioned, before and at the several times when, &c., were wrongfully in and upon the said dwelling-house, encumbering the same, and doing damage there, they, the defendants, at the said time when, &c., seized and took the said goods and chattels in the said dwelling-house, there so encumbering the same as aforesaid, and re-[733]-moved and carried away the same to a small and inconvenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage on the occasion aforesaid, as they lawfully might for the cause aforesaid, &c.

Special demurrer to this rejoinder, assigning for cause, amongst others, that the particular forfeiture on which the defendants relied was not stated in the rejoinder in this, to wit, it appeared that the rent was payable half-quarterly; and it was alleged that a year's rent became due on the 25th of March 1841, which included eight half-quarterly payments and eight causes of forfeiture; and it did not appear on which of those forfeitures the defendants relied as putting an end to the said term and justifying the trespasses in the declaration complained of, and in this respect the said rejoinder was double and multifarious and no single surrejoinder could be pleaded hereto. Joinder in demurrer.

Bompas Serjt. in support of the demurrer. The rejoinder is clearly bad; for the defendants had no right to enter until ten days after the rent was due; and it contains no averment, as it ought to have done, that the rent had been due for that period. All that is alleged is that one yearly rent was due. It will perhaps be argued, as the rent was to be paid half-quarterly, that it is necessarily to be inferred that more than ten days had elapsed after default in payment of the first half-quarter's rent; but if that be so, then the rejoinder is bad for duplicity, for the same inference will arise with respect to every half-quarter, except perhaps the last; and the plaintiff cannot tell for which default the defendants claim to exercise the right of re-entry.

Channell Serjt. contra. It is submitted that the proviso set out in the rejoinder gives two rights of re-entry,—the one if the rent be not paid on the day when it [734] becomes due, and the other if it be not paid within ten days afterwards; *Doe dem. Rudd v. Golding* (6 J. B. Moore, 231). The literal construction of the words is, to confer two rights of entry; and we have availed ourselves of one of them. If it should be thought that the words "or within ten days afterwards" are inconsistent with the right to re-enter on the day the rent falls due, they may be rejected, and the proviso read as giving the right to re-enter for a default upon the day; which will make the rejoinder good. Supposing, on the other hand, the proper construction of the proviso to be that it gives only one right of entry if the rent be not paid within ten days after it falls due, then it as clearly appears that more than ten days had elapsed since a default had been made; as a year's rent is averred to be due. [Tindal C. J. That gives rise to the objection as to duplicity.] That might be so if this is to be considered as a condition; but in *Doe dem. Davis v. Elsam* (b), it was held by Lord Tenterden that

(b) M. & M. 189. In that case Lord Tenterden says, "I do not think provisions of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms; and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisos ought to be construed according to fair and obvious construction, without favour to either side." This was said by Lord Tenterden upon the trial of an ejectment brought to enforce the forfeiture, and would be still more applicable to a defence in an action of trespass brought against the landlord for acting upon the terms of his contract.

However no laxity of construction would have enabled the court to treat seven matters, (the eighth period of re-entry not being shewn to have arrived,) each giving a right of entry, as constituting one defence.

provisoes for re-entry in a lease are to be construed like other contracts, and not with the strictness of conditions at common law. [Coltman J. This is not so much a question as to the construction of the proviso, as it is to the proper mode of pleading it.] The contract substantially contained in the [735] proviso is, that if any rent be overdue, the lessor shall have a right to re-enter. [Cresswell J. On the nonpayment of which half-quarter do you rely?] The defendants are not bound to say: they allege that a year's rent(a) is due. [Cresswell J. Then when did it become due? You are driven to sever the year, and if so, for which of the eight portions do you claim, and why one more than another? Erskine J. How could the plaintiff reply a waiver of the forfeiture as to any particular half-quarter (b)?]

TINDAL C. J. This is a point of pleading. It is impossible to read the agreement without seeing that the landlord had no right to re-enter until after the expiration of ten days from the time that some half-quarter's rent falls due; and the question is, how does it appear on the record that any part of this rent was due and unpaid for ten days. If the defendants say that the rejoinder, by alleging that a year's rent is due, necessarily shews that the first half-quarter is so overdue, the plaintiff may reply—that is equally the case with the last half-quarter but one. The defendant has no right, in order to support his rejoinder, to select any half-quarter that he pleases (c). It seems to me that, at any rate, the rejoinder is bad for duplicity.

Channell Serjt. asked leave to amend, which was refused by the court, as it would be in favour of a forfeiture (vide supra, 734 (b)), and there was a plea of leave and licence on the record.

Judgment for the plaintiff (e).

[736] FURNIVALL v. COOMBES AND OTHERS. April 28, 1843.

[S. C. 6 Scott, N. R. 522; 12 L. J. C. P. 265; 7 Jur. 399. Referred to, *Kelner v. Baxter*, 1866, L. R. 2 C. P. 186. Discussed, *Williams v. Hathaway*, 1877, 6 Ch. D. 549; *Watling v. Lewis*, [1911] 1 Ch. 422.]

By indenture between A. of the first, B. of the second, and C., D., E. and F. of the third part, A. covenanted with C., D., E., and F. to do certain repairs to the parish church of Z.; and in consideration of covenants on A.'s part, C., D. E. and F. "churchwardens, and overseers of the poor of the parish of Z., for themselves and for their successors, churchwardens, and overseers of the said parish, and their assigns, did thereby covenant with A., his executors and administrators, that they, the said churchwardens and overseers of the poor, their successors or assigns, should and would well and truly pay, or cause to be paid, unto A." the sum specified, by certain instalments. After this covenant the deed proceeded as follows: "Provided always that nothing in these presents contained, shall extend, or be deemed, adjudged, construed, or taken to extend, to any personal covenant of, or obligation upon, the said several persons parties thereto, of the third part, or in anywise personally affect them, any or either of them, their, or any or either of their executors, administrators, goods, effects, or estates in their private capacity, but shall be, and is intended to be, binding and obligatory upon churchwardens and overseers of the poor of the parish of, &c., and their successors for the time being, as such churchwardens and overseers of the poor, but not further or otherwise."—Held, that the covenant of C., D., E. and F. was a personal covenant, and that the proviso, being repugnant thereto, was void.

Covenant. The declaration stated that on the 11th of May 1841, by a certain indenture then made between the plaintiff of the first part, Charles Bleadon and Charles Furnivall, of the second part, and the defendants, of the third part (which indenture being in the possession of the defendants, the plaintiffs could not shew the same to the court, &c.), the plaintiff covenanted, contracted, and agreed with the

- (a) But not that ten days elapsed, after that rent became due, and before the entry.
- (b) Quære, whether the recognition of a tenancy after the seventh right of re-entry had accrued, would not have been a waiver of preceding rights.
- (c) Quære, whether a defendant would not be allowed to plead each separately, under the statute of Anne.
- (e) See a further report of his case, post, vol. vi.

defendants, and their successors and assigns, churchwardens and overseers of the poor, for the time being, of the parish of St. Botolph without Aldgate, in the city of London and county of Middlesex, that the plaintiff, his executors, or administrators should, for the consideration thereafter mentioned, within the space or time of five calendar months from the day of the date of the said indenture, do, perform and execute, or cause and procure to be done, performed and executed, in, and to, the said parish church of St. Botolph without Aldgate [737] aforesaid, all the works and repairs mentioned or referred to in the specification thereafter contained, and according to such specification and the drawings thereafter also contained, and finish and complete the whole of such works and repairs, within the time aforesaid, in a good, proper, workmanlike and substantial manner, under the direction, and to the satisfaction, of Messrs. W. & B. surveyors and architects, or other the surveyors or surveyor, architects or architect, for the time being, of the said churchwardens and overseers, their successors or assigns, fit for use and divine service to be performed therein, &c. &c., and that, in consideration of the covenants and agreements therein contained on the part of the plaintiff, they the said several persons parties thereto of the third part, churchwardens and overseers of the poor of the parish of St. Botolph aforesaid, for themselves and for their successors, churchwardens and overseers of the said parish, and their assigns, did thereby covenant and promise with and to the plaintiff, his executors and administrators, that they the said churchwardens and overseers of the poor, their successors or assigns, should well and truly pay, or cause to be paid, unto the plaintiff, his executors or administrators, the sum of 1169l., or such other increased or diminished sum as the said surveyors and architects, surveyor or architect, for the time being, as aforesaid, should, under the powers aforesaid, certify between the said several parties, to be the proper sum to be paid for the works and repairs, by the instalments at the several times and in manner thereafter mentioned; that is to say, one-third of the amount thereof within two months from the commencement of the works on the third part thereof from the time of the completion of the said several works, and the remaining one-third thereof, at the expiration of one calendar month from the time [738] of such completion of the said works and repairs; as by the said indenture, reference being thereunto had would appear. Averment: that, after making the indenture to wit, on, &c., the plaintiff did, performed, and executed, in and to the said parish church, all the works and repairs mentioned and referred to in the said specification, according to such specification and the said drawings, and finished and completed the whole of the said works and repairs in a good, proper, workmanlike manner, under the direction, and to the satisfaction, of the said Messrs. Wyatt and Brandon, fit for use and divine service to be performed therein, &c. &c. Breach: that, although the defendants had paid to the plaintiff two of the said instalments of the said sum of 1169l., and although the period of one calendar month from the time of the completion of the said works and repairs had elapsed before the commencement of this suit, and although W. and B., by the procurement of the defendants, had refused and neglected to ascertain and affix the measure and value of the increased and additional works and repairs, or to certify the proper sum to be paid to the plaintiff for such increased and additional works and repairs, although a reasonable time in that behalf had elapsed before the commencement of this suit, and although they were, after such additional work and repairs were completed, to wit, on, &c., requested by the plaintiff so to do; yet the defendants did not nor would pay to the plaintiff the said remaining one-third part of the sum of 1169l., amounting to 389l. 13s. 4d., and the said amount of the measure and value of the said increased and additional works and repairs, or any part thereof, and the same still remained wholly due and unpaid to the plaintiff, &c.

The defendants confessing that the said indenture at [739] the time of the plaintiff so declaring was, and still is, in their possession, so that the plaintiff could not, nor can, produce the same to the court here as in the declaration alleged, craved over thereof. The plea then set out the indenture, which bore date the 11th of May 1841, and was made between James Furnivall (the plaintiff) of the first, Charles Bleadon and Charles Furnivall of the second, part, and Robert Coombes, Edward Jones, Charles R. Coltman, and Isaac Simmonds, churchwardens of the said parish of St. Botolph without Aldgate, in the city of London, and county of Middlesex aforesaid, and William Pattinson, Robert Clarter, Samuel Hawkins Jutsum, John Neal, John Anthwaite, and Stephen Boxall overseers of the poor of the said parish of the third

part. The deed, after various covenants entered into by the plaintiff, which were described as being entered into with the said several persons parties thereto of the third part, and their successors and assigns, churchwardens and overseers of the poor for the time being of the parish of St. Botolph without Aldgate, contained the following on the part of the defendants: and, in consideration of the covenants and agreements herein contained on the part of the said J. Furnivall, they the said several persons parties thereto of the third part, churchwardens and overseers of the poor of the parish of St. Botolph for themselves, and for their successors, churchwardens and overseers of the said parish, and their assigns, do hereby covenant and promise with and to the said J. Furnivall, his executors and administrators, that they the said churchwardens and overseers of the poor, their successors or assigns, shall well and truly pay, or cause to be paid, unto the said J. Furnivall, his executors or administrators, the sum of 1169l., or such other increased or diminished sum as the said surveyors and architects, surveyor or architect for the time being as aforesaid, shall, under the powers aforesaid, certify between the [740] said several parties to be of the proper sum to be paid for the works and repairs by the instalments at the several times and in manner thereafter mentioned, that is to say, one third of the amount thereof within two months, from the commencement of the works, one other third part thereof at the time of the completion of the said several works, and the remaining one third part at the expiration of one calendar month, from the time of such completion of the said works and repairs: provided always, that nothing in these presents contained shall extend to, or be deemed, adjudged, construed, or taken to extend to, any personal covenant, of or obligation upon the said several persons parties hereto of the third part, or in anywise personally affect them, any or either of them, their or any or either of their executors, administrators, goods, effects, or estates in their present capacity; but shall be, and is intended to be binding and obligatory upon churchwardens and overseers of the poor of the said parish of St. Botolph, and their successors for the time being as such churchwardens and overseers of the poor, but not further or otherwise, &c. &c. The plea then proceeded to state that before the said sums in the declaration alleged to have become due and payable to the plaintiff, or any or either of them, or any part thereof became due, and before the commencement of this suit, to wit on the 29th of March 1842, the defendants ceased being churchwardens and overseers of the poor of the said parish of St. Botolph, and they were not at any time since, or at the commencement of this suit, such churchwardens and overseers. Verification.

The second plea—as to the cause of action in the declaration mentioned, in respect of the defendants not paying to the plaintiff the said remaining one third part of the said sum of 1169l., amounting to 389l. 13s. 4d.,—stated that the plaintiff did not within the space or time of [741] five calendar months, from the day of the date of the said indenture, do, perform or execute, or cause or procure to be done, performed or executed, in and to the said parish church, all the works and repairs so covenanted and agreed by him to be done, performed, and executed as in the declaration alleged; concluding to the country.

Replication to the plea of the defendants by them first above pleaded, so far as the same related to the defendants, J. Simmonds and S. Boxall—that the defendant J. Simmonds continually, from the time of making the said indenture until and at the several times when the several sums of money in the declaration mentioned became due and payable, and from thence until and at the commencement of this suit, was and still is churchwarden of the said parish, and the defendant, S. Boxall, continually, from the time of making the said indenture until and at the several times when the several sums of money became due and payable to the plaintiff, and from thence until and at the commencement of this suit, was and still is overseer of the poor of the said parish; without this, that the defendants, J. Simmonds and S. Boxall, or either of them, ceased being churchwarden or overseer of the poor of the said parish in manner and form as in the said first plea alleged; concluding to the country.

Demurrer to the same plea, so far as it related to the other defendants, shewing, for causes of demurrer, that the same plea did not avoid the declaration, and the other defendants, by ceasing to be churchwardens and overseers, were not excused or discharged from the performance of the covenant upon which the plaintiff had declared; and the said indenture did not provide that the defendants should cease to be liable for the performance of the said covenant when they ceased to be churchwardens and

overseers; nor did they cease to be liable on the said covenant when they ceased to be churchwardens and overseers: that the [742] proviso in the said indenture was repugnant to the said covenant, and void, and was an illegal and fraudulent attempt on the part of the defendants to render their successors, and the future inhabitants, liable for the said repairs of the said church, the price and value of which repairs the defendants were bound by law to retain, and, it must be presumed, did retain, out of moneys in their hands, before and at the time of making the said indenture: that it did not appear, in or by the said first plea, that the said other defendants, or any or either of them, ever were churchwardens and overseers; and that the averment in the same plea, that the defendants had ceased to be churchwardens and overseers, was uncertain, and tended to raise an immaterial issue, and was consistent with the fact of some of the defendants still being churchwardens and some of them, overseers. Joinder.

The plaintiff also demurred specially to the second plea, alleging for causes, that it was not by the indenture and the covenant of the defendants mentioned in the declaration, a condition precedent to the payment of the said sum of 389l. 13s. 4d. therein mentioned, that the plaintiff should, within the space or time of five calendar months from the day of the date of the said indenture, do, perform or execute, or cause or procure to be done, performed or executed, in and to the said parish church all the works and repairs covenanted and agreed by the plaintiff to be done, performed and executed; nor did the plaintiff, by the said indenture, covenant to do, perform or execute, or to cause to be done, performed or executed, all such works and repairs within such space of time; that the plea was immaterial in this, to wit, that it tied the plaintiff to prove a strict and literal performance of all the works and repairs covenanted to be done, within the said space of time; whereas, a substantial performance of such works was sufficient, within the true intent and meaning of the said [743] indenture; that it was not necessary that all the works and repairs should be done, if the works and repairs were finished and completed within such time in a good, proper, workmanlike, and substantial manner, to the satisfaction of the said architects, fit for use and divine service to be performed in such church; that the said works and repairs might have been so finished within such time, though all the works and repairs might have been done within such time, and yet the same might not have been finished and completed in manner aforesaid, according to the said covenant; that, therefore, whichever way a jury should find any issue joined upon the second plea, such finding would be immaterial, and not decisive of the cause; and that the plea introduced new matter, and should have concluded with a verification, and not to the country. Joinder in demurrer.

The defendants demurred to the replication to the first plea, assigning for causes, that the said replication was an argumentative traverse of all the defendants having ceased being churchwardens and overseers, as in the first plea alleged; that the replication afforded no answer to the plea, inasmuch as allowing that the said J. Simmonds continued churchwarden, and that the said S. Boxall continued overseer of the poor, as in the replication was alleged, yet that afforded no ground for the joinder of the other defendants in the action.

Joinder in demurrer.

Manning Serjt. (with whom was Shee Serjt.) in support of the demurrers to the pleas. The question on the first plea is, whether the proviso therein set out, is not wholly repugnant to the covenant which it professes to qualify. The covenant is clearly a personal contract on the part of the defendants. It is true that they are described as churchwardens and overseers; but neither in the one character nor in the other, had they capacity to contract. [744] And even if as churchwardens or as overseers they could have contracted, they have clearly no joint capacity to do so. Their description, therefore, must be rejected; and the covenant must be read as if the defendants had contracted, generally and personally, that the churchwardens and overseers should do the acts specified. Having entered into such a personal covenant, the proviso by which it was sought to relieve them from all individual liability, is void—first, because it is utterly repugnant to, and at variance with, the covenant; and, secondly, inasmuch as the defendants thereby seek to do what the law will not allow, namely, to bind the future churchwardens and overseers of the parish. Lord Coke, in commenting upon one of the sections in Littleton (s. 220), says 146 a., "By this section it appeareth, that when, in a general grant, the law doth give two

remedies, the grantor may provide that the grantee shall not use one of them, and leave the party to the other. But where the grantee hath but one remedy, there the remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant." So also, in *Sir Anthony Mildmay's case* (6 Co. Rep. 41 b.), it is laid down that "a proviso good at the beginning, by consequence may become repugnant; as if a man by his deed grants a rent for life, proviso that it shall not charge his person, this is a good proviso; yet if the rent is in arrear, and the grantee dies, his executors shall charge the person of the grantor in an action of debt; for otherwise they would be without remedy; and therefore now it is become repugnant and, by consequence, void." Here, the repugnancy is immediate and contemporaneous with the covenant, and renders the proviso void; for if the proviso were to have any operation, it would wholly release the defendants from their liability. If churchwardens could be charged [745] as such, the charge would, in effect, be on the parish fund; but there is no power, neither is it legal, to throw any liability on future parishioners. In *Dyer*, 9 b. *Anon.* 19 H. 8, it is said, "that if a man appoint A. and B. executors, with a proviso that B. do not administer, the proviso is void, and they shall sue jointly." Two feoffees granted custodiam parci of A. to W. N. *capiendo feodo quod J. S. nuper parcarius cepit*, proviso quod scriptum non extendat ad onerandum one of the grantors; and this proviso was held void; for this restrains all the effect of the grant against him." Bro. Abr. Conditions, pl. 238, Vin. Abr. Condition, (A a.) pl. 10. In *Jenk. Cent.* 96, pl. 86, it is said, "A. makes a feoffment of land to B., with warranty; proviso that the warranty shall be void: this is a void proviso; as in a deed, an habendum which is repugnant to the premises is void; for both being in one instrument where the latter clause is repugnant to the former, the latter is void." So, in *Mary Portington's case* (10 Co. Rep. 35 a.), it is laid down, "Suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives, according to 32 Hen. 8, c. 28, or to levy a fine with proclamation, according to the acts in such case, to bar his issue, provided always, that he shall not make leases or levy a fine; none will deny, but such proviso would be repugnant." In *Sir John Davis's Reports*, 34 b. it is stated, "If a feoffment be made to J. S. and his heirs, with a proviso that his daughters shall not inherit, such proviso is void." Also in *Vin. Abr. Condition* (Z), pl. 11 (quoting from Bro. Abr. Conditions, pl. 116), it is said, that "if a man aliens in fee, upon condition that if the feoffee or his heirs make any assignee the feoffee or his heirs may enter, this is a void condition; for it is repugnant to the estate." So, in *Jenk. Cent.* 242, pl. 26 (*S. C. Dyer*, 343), it is laid down, that "a con-[746]-dition annexed to an estate-tail that the unmarried donees shall not marry, is void; for without marriage he cannot have an heir of his body." In *Co. Litt.* 206 b. it is said, that "if a man make a feoffment in fee, upon condition that he shall not alien, this condition is repugnant and against law, and the estate of the feoffee is absolute. But if the feoffee be bound in a bond that the feoffee or his heirs shall not alien, this is good, for he may, notwithstanding, alien if he will forfeit his bond that he himself hath made. So it is, if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the estate is absolute. But a bond with a condition that the feoffee shall not take the profits, is good. In *The King v. Stevens* (5 East, 244. *S. C.* 1 J. P. Smith, 437, 3 J. P. Smith, 366), it was held that an allegation, sensible in the place in which it occurs, and not repugnant to antecedent matter, is to take effect, though repugnant to subsequent matter. [Tindal C. J. Is the proviso actually repugnant to the covenant, or is it intended merely to make the plaintiff look for payment to a particular fund? Cresswell J. The defendants do not covenant to pay out of any particular fund.] That the defendants could not charge their successors and the future funds of the parish, or make a retrospective rate for the purpose of reimbursing themselves, has been established by numerous cases, *Towney's case* (2 Ld. Raym. 1009, 2 Salk. 531, 6 Mod. 97), *Dawson v. Wilkinson* (Cas. temp. Hardw. 381), *Rex v. The Churchwardens of Bradford* (12 East, 556), *Rex v. The Churchwardens of Dursley* (5 A. & E. 10, 6 N. & M. 333); all of which were reviewed by the court of Exchequer Chamber in *The Braintree case* (*Veley v. Burder, in Error*, 12 A. & E. 265, 4 P. & D. 452). Another objection to the first plea is, that [747] although it alleges that the defendants had ceased to be churchwardens and overseers, it does not state that they had not retained sufficient money in their hands to pay the plaintiff. The plea is also bad in this respect,—that it does not aver that the defendants are neither churchwardens nor overseers, but

states that they are not churchwardens and overseers. Consistently with this allegation, some of them may be churchwardens and the rest, overseers.

The second plea is undoubtedly bad ; for it assumes, that it is a condition precedent to the plaintiff's right to receive payment, that the whole of the works and repairs should have been completed within five months. It is unnecessary to cite cases to shew that this proposition cannot be maintained. *Dallman v. King* (4 New Cases, 105, 5 Scott, 382) may, however, be mentioned, as strongly in point. Moreover, if there had been any thing in this objection, the plea should have concluded with a verification, inasmuch as it introduces new matter (*vide post*).

With respect to the replication to the first plea, it is not meant as an answer to the whole plea, but only to so much of that plea as relates to the defendants Simmonds and Boxall. Supposing them to continue liable, and the rest of the defendants to be discharged, the bringing of the action against the whole of the defendants is not a misjoinder—it is a joinder of parties who, originally liable, may be discharged by matter *ex post facto*. [Tindal C. J. Is it not a singular thing to divide a plea in this manner?] An objection might possibly have been raised to it ; but none has been taken.

Channell Serjt. (with whom was Byles Serjt.) for the defendants. It must be admitted that the second plea is open to the objection which has been taken to it. [748] But it is submitted that the first plea furnishes a good defence to the action. In *Mildmay's case*, and the other cases cited, the grant or covenant was at first absolute. But the very question here is, whether the covenant was or was not absolute ; 2 Wms. Saund. 234, n. (c). The covenant is to be construed according to its legal effect. This is not a covenant entered into by the defendants, by name. [Cresswell J. In what event do you say the plaintiff might have sued?] If the whole of the defendants had continued in office, it could not have been successfully contended that they were not liable. The proviso is to be read in connection with the covenant, as explaining the intention of the parties. Although it may be admitted that the defendants would have continued responsible if the whole of the debt had accrued while they remained in office, the understanding of both parties clearly was, that the plaintiff was not to look to the defendants if they did not continue in office, but was to seek for payment from their successors, who are distinctly referred to in the deed. [Erskine J. Do you say that this is a distributive covenant for payment, by the defendants, of all instalments falling due while they remain in office, and by their successors, of all future instalments?] It is submitted either that the covenant may be taken distributively or that the words raise an ambiguity which will let in the proviso by way of explanation. Looking at the covenant as distributive, the proviso will operate, not as an exception, but as a limitation ; for a remedy is still given for sums accruing while the defendants continue to be churchwardens and overseers. Suppose the covenant itself had been, that the defendants would pay provided they remained in office or had funds, the plaintiff would have had a possible remedy under it. The cases cited on the other side apply only where the proviso is in total destruction of the covenant. Why should it be [749] supposed that the defendants entered into a covenant imposing risk on themselves and none on the plaintiff? The parties had to deal with a matter difficult of execution, and each side must be presumed to take upon itself a certain risk ; and should the covenant be held to be personally binding on the defendants, only while they remained in office, the plaintiff is to be considered as having agreed to take the chance of the work being completed during the period the defendants continued churchwardens and overseers. [Erskine J. Suppose one of the defendants to go out of office, then, according to your argument, their personal covenant would cease. Do you say, taking the covenant and proviso together, that if five of the defendants continue in office, they must pay? Cresswell J. Suppose the six had gone out of office, and been re-appointed, would they hold the same office?] No. [Cresswell J. Would they then be liable as their own successors?] It is apprehended not. [Tindal C. J. You want us to read this as a covenant to pay only if there are funds.] The intention clearly is, that the defendants, if they are to be held personally liable, are to be so only so long as they remain in office. Supposing those who continue in office to be alone liable, the plaintiff cannot have judgment on this record, as he has sued the whole six ; for the rule in actions on contracts is, that if you sue too many defendants, you must fail. If the construction of the covenant now contended for be right, then some of the defendants have ceased to be parish

officers and are not liable. It is the same as if the objection was, that the declaration did not contain an averment that they did continue in office. This case is distinguishable from *Rew v. Pettet* (1 A. & E. 196, 3 N. & M. 456); for there the defendants did not sign the promissory notes as churchwardens, &c., but [750] those words were merely added as the description of the parties. There is no magic in the word "proviso." It may be either an explanation of the covenant or an exception out of it; and the rule as to when it is to be stated by the plaintiff and when by the defendant is laid down in *Thursby v. Plant* (1 Wms. Saund. 234).

With respect to the replication to the first plea, the defendant having pleaded jointly, the plaintiff has no right to reply distributively.

Manning Serjt. in reply. The rejection of repugnant conditions and provisos is not confined to cases where they would destroy the effect of the whole of the previous matter, but applies equally where part only would be rendered nugatory. The ground of rejection is, not that it is opposed to all, but that it is inconsistent with something, that has gone before. With respect to the argument, that the defendants are liable only so long as they remained in office, it is absurd to suppose that the plaintiff would agree, that the payment of his work should depend upon the contingency of the defendants' remaining in office. The replication, it is submitted, is good. [Tindal C. J. Nothing will turn upon it.]

TINDAL C. J. It appears to me that the question in this case will depend substantially on the declaration; for, as the proviso is set out on oyer of the indenture, it is the same in effect as if the whole deed had been stated in the declaration. The question is, whether, taking the covenant and proviso together, the plaintiff has any cause of action. The covenant is as follows. [Here, his lordship read the covenant.] The first question is, whether this is a personal covenant, or is it a covenant by the defendants as a corporate body. It [751] must fall within the one class or the other. Churchwardens and overseers, though they are by statute a corporate body for some purposes, cannot enter such a covenant as this in a corporate character; and if not, then the contract must be a personal covenant. If it be, the next question is, what does it bind the defendants to do? At all events, it binds them, while they remain in office, to pay. Looking at the proviso, however, it is utterly inconsistent with the covenant. [Here, his lordship read the proviso.] Therefore, if the defendants have entered into a covenant which, to any extent, binds them personally, this proviso is at variance with such covenant, and consequently must be rejected as repugnant according to the authorities cited. If the proviso is rejected, then the first plea is no answer to the action. With respect to the last plea, no attempt has been made to support it. Therefore, as regards both, the plaintiff is entitled to judgment. It would have been a different thing if the defendants had so shaped their covenant as to make the payment come only out of the parish fund.

COLTMAN J. When we look at the covenant by itself, it is clearly a personal covenant. It has been said, that although what is called the proviso is, in terms, a proviso, it is to be construed as merely limiting the general words of the covenant. That might be so, if it could be shewn that there would still remain a personal liability in a given event contemplated by the parties. But the argument proceeds on a misapprehension of the proviso, which declares "that the covenant is not to be taken as a personal covenant, or to affect the defendants in their private capacity." Stopping there, the proviso would clearly be repugnant. It proceeds to say, however, "but shall be and is intended to be binding and obligatory upon churchwardens and overseers of the poor of the said parish of St. Botolph, and their successors, for the [752] time being, as such churchwardens and overseers of the poor, but not further or otherwise." This latter part is supposed to explain the covenant by limiting its personal effect to the time that the defendants remain in office. But that I think was not the real meaning of the parties. The intention obviously is, that no one shall be personally liable; which imports, in truth, that there shall be no liability at all.

ERSKINE J. The covenant by the defendants clearly constitutes a personal liability; for though they are described to be churchwardens and overseers, they covenant for themselves and for their successors. The part in which they covenant for the latter is of no avail, and may be struck out. Then what do they undertake on their own part? To pay for the work by the stipulated instalments. It is said that the proviso qualifies the full extent of the covenant, and gives it a limited construction. If that had really been so, I should have thought the argument a sound one; but

when the proviso is examined it is utterly inconsistent with any personal liability whatever. The only part of it which, according to the argument, would be effective is that which declares that the covenant is intended to be binding on the defendants and their successors in their official character only. But that is a direct contradiction to the covenant. I cannot see, therefore, how the covenant and proviso can be construed together, so as to create the limited liability now contended for. My brother Channell was obliged to admit that, supposing his view was correct, the covenant would cease to operate if any one of the defendants went out of office; but it is highly improbable that any one would enter into such a contract. The defendants appear to have intended to bind the funds of the parish; but they have attempted to do that in a manner in which such an intention cannot be carried into effect.

[753] CRESSWELL J. I am of the same opinion. The defendants first enter into a clear personal covenant, and then they endeavour, by the proviso, to relieve themselves from all personal liability.

Judgment for the plaintiffs.

Channell Serjt. then prayed for leave to withdraw the pleas, and pay money into court to cover the third instalment and also any claim for the additional works and repairs. A rule nisi having been granted,

Manning Serjt., on a subsequent day, shewed cause, submitting that the amendment would go beyond the pleas on which the former argument turned.

The court, however, made the rule absolute.

EDGER, ESQUIRE, v. KNAPP, D.D. May 3, 1843.

[S. C. 6 Scott, N. R. 707; 1 D. & L. 73; 7 Jur. 583. Distinguished, *Thorpe v. Stallwood*, 1843, 5 Man. & G. 774.]

A. and B., directors of a joint-stock company, being sued for debts due from, and for damage done by, the company, employ C. to defend them upon their joint responsibility. A. pays the whole of C.'s bill of costs. Held, that an action is maintainable by A. against B. for contribution.—Where the plaintiff had been nonsuited upon the opening speech of his counsel, and it afterwards was shewn by affidavit that his witnesses could have proved a good cause of action not stated in the opening speech, the court granted a new trial upon payment of costs.

Assumpsit, for money paid, and upon an account stated.

Plea: non assumpsit.

At the trial at the London sittings after Michaelmas term 1842, before Tindal C. J., it appeared, that in 1836 a joint-stock company was formed for the purpose of obtaining an act for the formation of one of several competing lines of railway from London to Brighton. After an ineffectual attempt to carry their bill through the [754] House of Commons, the company coalesced with the supporters of rival lines, and an act was obtained under which the present railway was constructed. A call of 6s. per share was made for the purpose of defraying the expenses of the now dissolved company, but several claims were made which it was thought advisable to resist. Some of these defences the company failed in supporting; in others, which were successful, the plaintiffs were unable to pay the defendants' costs. Messrs. Pearson and Wilkinson, the attorneys of the company, being unwilling to embark in these proceedings upon the responsibility of a numerous floating body of shareholders, took the precaution to obtain a retainer from four members of the company, viz. the plaintiff, the defendant, Sir John T. Claridge, and Mr. ——— Solani. In opening the case to the jury, Shee Serjt. did not state the retainer, respecting which his instructions were silent, Messrs. Pearson and Wilkinson not having been previously examined by the plaintiff's attorneys. During the examination of Pearson, the first witness for the plaintiff, the learned judge was of opinion that, on the opening speech, the action must be taken to be a proceeding by one partner against another upon an open unsettled partnership account. He therefore nonsuited the plaintiff.

In Michaelmas term following Shee Serjt. obtained a rule nisi to set aside the nonsuit, and for a new trial, upon an affidavit made by Pearson, in which it was stated that Pearson and Wilkinson were appointed solicitors to the company, upon an agreement that, provided the directors made advances for the costs out of pocket, and paid

the bills monthly, P. and W. were to debit the funds of the company, and not the directors. In 1837 the funds of the company were nearly exhausted; P. and W. accepted 300l., part of such funds, in discharge [755] of the directors; the balance in hand was applied towards the liquidation of the debts; and the company was dissolved. Various demands by engineers, &c. were made upon the then late directors of the company, exceeding 6000l. Some of these claimants were then suing some of the directors. P. & W., being cognizant of the transactions, were employed to defend these actions, upon an understanding and agreement with all the parties, such defences were undertaken upon the responsibility of the defendants, and not upon the credit of the company, which had been dissolved when the greater part of the actions were commenced. In almost all the cases, though the defendants were successful, the plaintiffs were insolvent, and P. and W. looked to the defendants for their costs. Advances were made by each of the parties sued, in various sums, as the causes proceeded; and, in the end, signed bills were delivered to them. Actions would have been brought for the amount, but Edger obtained an order for the taxation of the bills upon the usual undertaking to pay the balance. The balance found to be due to P. and W. amounting to between 500l. and 600l., was paid by Edger.

Bompas Serjt. shewed cause. The plaintiff and the defendant and other persons were partners; and until an account is taken it cannot be ascertained what each is to receive or pay. The account can be taken only in an action of account, or upon a bill filed in Chancery for an account. [Cresswell J. Suppose four persons to be sued in respect of a partnership transaction, in which other partners are concerned, and the debt is levied upon one of the defendants, would he not be entitled to contribution against his co-defendants?] It is submitted that he would not. [Erskine J. The question is, whether he would not be entitled to contribution where there was a special agreement between them; whether one of four [756] partners sued would not be entitled to contribution against his co-defendants upon a special agreement to employ the same attorney for their mutual defence.] The cases cited *ad nisi prius* were *Holmes v. Higgins* (1 B. & C. 74, 2 Dowl. & Ryl. 196), and *Milburn v. Codd* (7 B. & C. 419, 1 Mann. & R. 238). In the former of these cases it was held that an agent for a railway bill, who was himself a subscriber to the undertaking, could not maintain an action against the chairman of the committee for his agency; in the latter, an attorney, who was a member of a trading company, was employed by two other members of the company to defend an action brought against the two; he was held not to be entitled to sue the latter for his costs, being, as a member of the company, liable to bear his proportion of their costs. These cases have been followed and confirmed by *Neale v. Turton* (4 Bingh. 149, 12 J. B. Moore, 365), in which some circumstances occurred very much stronger than the present. In that case a shareholder in a joint-stock company sued the directors of the company upon two bills of exchange, drawn by him upon the secretary of the company on account of goods supplied to the company by the plaintiff, and accepted by the secretary. It was held that the plaintiff, being a partner, could not sue. So, here, the plaintiff has paid bills on account of the company. *Goddard v. Hodges* (3 Tyrwh. 209, 1 C. & M. 33) and *Teague v. Hubbard* (8 B. & C. 345, 2 Mann. & R. 369) are authorities to the same effect. The payment made by the plaintiff was on account of the company of whom he was a member. [Cresswell J. That appears to me to be the question in the cause. Suppose the party to say "I will sell to you two, and will not sell to the company!"] Here, the parties were sued as members of the company. Some of the actions were against four, some against three, some [757] against two. In many insurance companies the policies are signed by three of the directors; but they are not the less the contracts of the company. Here, several calls had been made; some of the shareholders have paid more, some less. Is there to be a second action for contribution in respect of this difference in the payments? Some of the actions defended by these parties were brought, not upon contracts, but for damage sustained through the operation of the company. [Tindal C. J. If the plaintiff can shew that the four agreed to treat their defence as a separate job, if such an expression may be used, the case will not fall within the general rule.] There is no evidence of any such contract. [Erskine J. The case was stopped.] But not without giving full effect to every thing which my brother Shee said he could prove. [Tindal C. J. Four persons being sued for a debt which they have contracted jointly with others apply to Pearson and Wilkinson to defend them.] The learned serjeant cited *Fox v. Clifton* (6 Bingh. 776, 4 M. & P. 676),

Kempson v. Saunders (4 Bingh. 5, 12 J. B. Moore, 44, 2 Carr. & P. 366), *Wright v. Hunter* (1 East, 20), *Howell v. Brodie* (6 New Cases, 44, 8 Scott, 372), *Holmes v. Williamson* (6 M. & S. 158).

Shée Serjt. (with whom was White), in support of the rule. Frustra petit qui mox restitutus est (*g*); and therefore one partner cannot sue another in respect of a partnership transaction. But this was not a partnership transaction. In the first place, there was no partnership, since, until an act of parliament was obtained, the projected company could not be formed. Secondly, supposing a company to have been constituted, it appears, [758] from the affidavit of Pearson, that the payment to him and his partner was made upon a distinct collateral contract. [Cresswell J. For the defendant it is contended, that the payment was made on behalf of the partnership.] If the four had been sued by P. & W., the non-joinder of the other shareholders could not have been pleaded in abatement. [Tindal C. J. That may be true as against P. & W., although the four may not be entitled to contribution inter se. The question here is, whether, as between themselves, it was made a separate transaction.] Pearson refused to undertake the defence except upon the personal retainer of the four defendants. It is not to be assumed that the defence was for the benefit of the company. [Tindal C. J. You must make out that the partners agreed to contract for themselves personally, without looking to the partnership. Cresswell J. I do not agree that you are entitled to have a new trial. Tindal C. J. The action for money paid to recover contribution is founded upon the old writ de contributione faciendâ; of which it is said, in Fitzh. N. B. 378 (*a*)¹. "And if there be three or four coparceners of lands, and the eldest sister do the suit to the lord of whom the lands are holden for all the coparceners, and the others will not allow her for her charges and losses (*b*), according to the rate (*c*), for the same suit, that coparcener who did the suit may have this writ of contribution. And if there be many coparceners, and the eldest does the suit, and the other coparceners agree with the eldest for a rate, now the writ of contribution shall be brought against the others, and who would not contribute, &c. (*d*). And if many be infeoffed [759] of land for which one suit ought to be done, now if they agree amongst themselves that one of them shall do the suit, and the others shall contribute unto him, if he do the suit, and afterwards the others will not allow him for that suit according to their rate, then he shall have the writ of contribution against them, and the writ shall mention the agreement, &c. And if they cannot agree, then the lord shall distrain them all for all their suits, if the suit be not done. But if one feoffee, of his own will, do the suit for them all without any agreement for the same made between them, the lord cannot then distrain the others for the suit; for as to the lord it is not material whether there be any agreement between them or not, but between the feoffees, he that did the suit shall not have the writ of contribution against his companions without agreement thereof made betwixt them" (*a*)². So here, in order to entitle the plaintiff to recover against the defendant, he was bound to shew a contract independent of the relation of partner. However,

(*g*) As to this maxim in the form of Frustra petis quod statim alteri reddere cogaris, see Jenk. 256, pl. 49, where it was applied to an appeal of mayhem by a villein against his lord.

(*a*)¹ In the quarto edition, but in the last English, following the French editions, p. 162.

(*b*) Pur ses charges perde.

(*c*) Solonque leur rate, i.e. according to their proportion.

(*d*) This materially varies from the original, upon the very point for which it is cited. What Fitzherbert says is this: "And if there be many coparceners, and the eldest does the suit, and some [ascuns] coparceners agree with the eldest for their proportion, now the writ of contribution shall be brought against the others who would not make contribution." By which it would appear that not the assenting, but the dissenting, coparceners were to be compelled to contribute by writ.

(*a*)² From this extract, as corrected from the French original (see last note), it appears that a coparcener distrained upon is entitled to contribution without any agreement; and it may be inferred that a joint-feoffee is not. The reason for this distinction probably is, that the coparcener comes in by act of law, whilst the joint-feoffee comes in by his own act, and might have protected himself by stipulation or covenant at the time he accepted the estate.

upon payment of the costs of the trial, the nonsuit may be set aside, and the plaintiff let in to try that cause again.]

Per curiam. Rule absolute for a new trial (b).

[760] CHARLES THARPE, AND SARAH his Wife, Administratrix of Letitia Evans, Deceased, v. STALLWOOD AND ANOTHER. May 5, 1843.

[S. C. 6 Scott, N. R. 715; 1 D. & L. 24; 12 L. J. C. P. 241; 7 Jur. 492. See *Foster v. Bates*, 1843, 12 Mee. & W. 233; *In re Pryse*, [1904] P. 305; *Ocean Accident and Guarantee Corporation v. Ilford Gas Company*, [1905] 2 K. B. 498.]

An administrator may maintain trespass for acts done after the death of the intestate, and before the grant of administration.—The rule that a party cannot be made a trespasser by relation, is only applicable where the act complained of was lawful at the time.—The court will not grant a new trial upon the ground of surprise, merely because the unsuccessful party has neglected properly to instruct his attorney.

Trespass, for taking certain goods and chattels of the plaintiff Sarah, as administratrix, &c., and carrying away the same, &c.

Plea, not guilty, "by statute."

At the trial, before Tindal C. J., at the sittings for Middlesex after last term, the following facts appeared in evidence:—One Cole was tenant to the defendant Stallwood, of a house in which the intestate had occupied an apartment. She died in June 1842, possessed of certain household furniture in the apartment in question. On the 28th of July the furniture was seized by Stallwood and the other defendant (a broker), as a distress for rent alleged to be due from Cole to Stallwood; some of the furniture being at the time of the seizure off the premises, as the plaintiffs were in the act of removing it at the time. On the 29th administration [761] of the estate and effects of the intestate was granted to the female plaintiff. The defendants failed to prove the tenancy of Cole, it appearing that it was under a written agreement, which was not produced. It was then contended on their behalf that trespass would not lie by an administrator for an act done before the date of the letters of administration. Leave was reserved to the defendants to move to enter a nonsuit upon this point; and the plaintiffs obtained a verdict for 21l.

Bompas Serjt., on a former day in this term (20th of April), moved accordingly. He submitted that there was a distinction between trespass and trover. The latter may be supported by an administrator for a conversion before the grant of administration; but the right to bring trespass stands upon a different footing. He cited *Cooper v. Chitty* (1 W. Bl. 65, 1 Burr. 20), *Smith v. Milles* (1 T. R. 475), *Carlisle v. Garland* (7 Bingh. 298, 5 M. & P. 102, S. C. in Cam. Scac., 10 Bingh. 452, 4 M. & Sc. 24, 2 C. & M. 31, 3 Tyrwh. 705; in Dom. Proc. 4 New Ca. 7, 4 Scott, 587), and *Balme v. Hutton* (9 Bingh. 471, 3 M. & Sc. 1, 1 C. & M. 262, 2 Tyrwh. 620). Although it is said in 1 Williams on Executors (page 493, 3d ed.) (citing *Long v. Hebb* (Style, 341), 2 Roll. Abr. 399, tit. Relation (A.), pl. 1 (h), *Anon.* (Comb. 451), Selw., N. P. (page

(b) This cause was tried a second time before Maule J., at the sittings after Easter term 1843, when the plaintiff obtained a verdict, which the court refused to disturb.

See further, as to contribution, [760] *Sadler v. Nixon*, 5 B. & Ad. 936; S. C. per nomen, *Sadler v. Hickson*, 3 N. & M. 258. See also Rastall's Entries, 161; Vet. Int. 42; *Philips v. Biggs*, Hardres, 164; *Offley and Johnstone's case*, 2 Leon. 166; *Anon.* Sir F. Moore, 136, No. 280; *Anon.* 2 Ventr. 348; *Walton v. Hanbury*, 2 Vern. 592; *Parsons v. Briddock*, ib. 608; *Cowell v. Edwards*, 2 Bos. & Pull. 268; *Deering v. Earl of Winchelsea*, ibid. 270; *Graham v. Robertson*, 2 T. R. 282; *Brand v. Boulcott*, 3 Bos. & Pull. 235; *Osborne v. Harper*, 5 East, 225; 1 J. P. Smith, 411; *Kelby v. Steel*, 5 Esp. N. P. C. 194; *Dobson v. Wilson*, 3 Campb. 480; *Lloyd v. Sandilands*, Gow. N. P. C. 13; *Betts v. Drewe*, 2 A. & E. 57, 4 N. & M. 64; *Dimes v. Arden*, 6 N. & M. 494; Bac. Abr. Obligation (D), 5.

(h) Thus rendered in 18 Vin. Abr. 285, same tit. :—

"If a man dies possessed of certain goods, and after a stranger takes and converts them to his own use, and then administration is granted to J. S., this administration

717, 6th ed.), and *Patten v. Patten* (Alcock & Nap. 493)) that "an ad-[762]-ministrator may have an action of trespass or trover for the goods of the intestate taken by one before the letters granted unto him;" yet the only case that supports the position as to trespass is the short note of *Long v. Hebb* (a). [Coltman J. After a verdict for the plaintiff in ejectment, the lessor of the plaintiff may maintain an action for mesne profits antecedent to the day of the demise: how is that explained except upon the doctrine of relation?] The action of ejectment is altogether anomalous. [Tindal C. J. referred to Com. Dig. tit. Administration (B. 13), where it is said that since the statutes 4 Ed. 3, c. 7, and 31 Ed. 3, c. 11, "an executor or administrator shall have trespass or trover for the goods of the testator taken in his life-time" (b); and his lordship observed, that it would be a strange anomaly to hold that an administrator could maintain trespass for an act done before the death of the intestate, and not for one done afterwards.]

The learned serjeant moved also, upon the ground of [763] surprise, on an affidavit of the defendant's attorney, stating that he had inquired of the defendant Stallwood whether Cole held under a lease or any written agreement, when the defendant informed him that Cole was merely a yearly tenant; and that the deponent had not the least idea of there being any written document between them. A rule nisi having been granted,

Shee Serjt. (with whom was Wordsworth) now shewed cause. Upon the ground of surprise, the affidavit is insufficient. It discloses a case of negligence, either on the part of the defendant Stallwood or his attorney; but that will not entitle him to a new trial. There is no affidavit by the defendant himself; and the one sworn does not even state that any rent was due. [Tindal C. J. It leaves us in complete doubt whether there was any agreement or not.] The other is the material question in the case, namely, whether an administrator can maintain trespass for an act done to the intestate's estate after his death, but before the grant of administration. The defendants, by pleading not guilty only, have admitted the representative character of the female plaintiff, and that she was possessed of the property in that character. [Tindal C. J. The possession is undoubtedly admitted on the face of the record.] It will be contended, on behalf of the defendants, that in the case of an administrator, his title does not relate back to the death of the intestate, as it does in the case of an executor to the death of his testator; but if that were so, and an action would not lie in such a case as the present, it would be a striking instance of a wrong without a remedy, which the law abhors. But the distinction between executors and administrators in this respect does not exist; in Com. Dig. tit. Administration (B. 10) it is said, "An executor or administrator has the property of the goods of his testator, or intestate, [764] vested in him before his actual possession, and therefore may have trover,

shall relate to the death of the testator, so that J. S. may maintain an action of trover and conversion for this conversion before the administration granted to him. Trin. 10 Car. B. R., between *Locksmith and Creswell*, adjudged; this being moved in arrest of judgment, after verdict for the plaintiff. Intratur, Hill, 9 Car. Rot. 729."

(a) "In a trial between *Long and Hebb and Others*, it was said by Rolfe, Chief Justice, that letters of administration do relate to the time of the death of the intestate, and not to the time of granting them; and therefore an administrator may bring an action of trespass or a trover and conversion for goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for this wrong done."

(b) Citing (Wentw.) Off. Ex. 98, Moo. 400. (*Harris v. Vandecogie*) Cro. El. 377. (*Elizabeth Countess of Rutland v. Isabel Countess of Rutland*, S. C. Owen, 156; Sir F. Moore, 266), Lat. 168 (Dict. in *Mason v. Dixon*); and, 242 (Dict. in *Sale v. The Bishop of Coventry*); 1 Leon. 193, 194 (*Russell and Prat's case*). The stat. 4 E. 3, c. 7, expressly gives an action to executors for trespasses done in the life of their testator. The case in Sir F. Moore, 400, is as follows: "Pasch. 37 Eliz. between *Harris and Vandecogie*, it was held that an administrator shall have trespass de bonis asportat' in vita intest' by the equity of the statute of 4 E. 3, c. 7, and the executor of an executor by the statute of 25 E. 3, c. 5."

The other authorities cited by Comyns, relate to the power of executors to maintain an action of trover.

trespass, &c. against him who takes them before he has actual possession of them" (a). [Cresswell J. There is a case in Fitz. Abr. tit. Administrators, pl. 2 (b), citing T. (M.), 18 H. 6, 22 (c), where [765] the question was raised as to the right of an administrator to

(a) Citing Cro. El. 377 (*Elizabeth, Countess of Rutland, v. Isabel, Countess of Rutland*).

(b) "Trespass de bonis asportatis brought by administrators. The defendant says that, before the administration to them committed, the ordinary delivered these goods to the defendant to re-deliver them; wherefore he took them, and afterwards re-delivered them to the ordinary, and afterwards the ordinary committed the administration of them to the plaintiffs, &c., without this, that he is guilty after the administration: and the opinion was that it is a good plea; wherefore they accepted an issue upon this (post, 773 (a)); and the opinion was that administrators have their power from the death of the intestate, and not from the commission, and [may] have action of those goods taken before the administration. Therefore quære, if a release made by them, before administration, be a bar, after the administration, of a debt or goods of the intestate, &c."

(c) "A writ of trespass was sued by administrators, of goods which were of one J., qui obiit intestate, and being in their custody; and they counted how the defendant took and carried them away, &c. Markham Serjt. for the defendant. True it is, that he died intestate; but long time before the administration committed to you at London the administration was committed to us of the same goods whereof this action is conceived; by force whereof we demanded the same goods, and afterwards he committed the administration of the residue of the goods, which were of the testator [intestate] to you, by colour whereof you took the goods to you committed, and also the goods now in action, and we re-took them out of your possession, as it was lawful for us to do. Judgment, if wrong, &c. Fortescue Serjt., to Markham. How do you shew the administration? Markham. That is not needful for us, for we plead by way of bar. Fortescue. It seems to me that this plea is sufficient enough as to that, notwithstanding that I am for the plaintiff. [He then gave his reasons.] Therefore if you wish this for a plea, we will imparle. Markham waived the plea [and pleaded as stated above in the note last preceding.] Portington Serjt. This plea does not amount to more than not guilty after the administration committed: but to my intentment that shall not be, for in this case the plaintiffs might have a general action of trespass (if they would) of their own goods carried away, as well as this action of trespass; in which case the plea which the defendant has pleaded would not be a plea, because that it amounts to nothing more than not guilty generally; and yet the plaintiffs had no cause of action, unless by cause of the administration, which shall have regard [relation] to the death of the man intestate. . . . Fulthorp Just. of C. P. There is a great diversity between a writ of trespass of the goods of the deceased taken out of the custody of executors, and out of the custody of administrators; for executors take their power from the death of their testator; in which case they may maintain an action for every trespass between the death of their testator and the commission of administration: but the administrators take their power from the time of the administration to them committed, wherefore they shall not have an action unless of trespass after the administration granted, because they take their power from the ordinary. Paston Just. of C. P. It seems to me that there is no diversity between executors and administrators as to that: for let us put that one makes you his executor, and dies, and certain goods which were the testator's are taken out of your possession, —before the administration, thereof you shall have a good writ of trespass, because the administration is committed to you; then, inasmuch as you are executor, and make me your executor, and die, shall now the action of trespass be gone; Fulthorp. No, sir, inasmuch as being executor, you shall have a good writ of trespass thereof. Paston. Well, sir, and yet the executor who took his power from the death of the testator paramount is dead: so in our case the ordinary took his power from the death of the testator [intestate]? Then he is as dead; and is restrained as to any administration by the ordinary as executor afterwards. Why, then, shall not an administrator have a writ of trespass of that which was done in the time of the ordinary, as the executor shall have of that which was done in the time of the other executor? Quasi diceret, that he should have. And so the executors and the administrators take their power from the time of the death after the administration has been committed to them. Fortescue. If I grant the reversion of my tenant for term of life, by a deed, and

maintain trespass under circumstances similar to those of the present case. But the objection was not [766] put, as here, on the ground of any supposed distinction between trespass and trover; it rested entirely upon the question whether the property before administration [767] vested by relation in the administrator after administration granted. The matter appears, from the report in the Year Book, to have been very elaborately, if not very satisfactorily, discussed. It is difficult, without some research, to make out which is judge and which is counsel.

between the grant and the attornment the tenant does waste, this waste shall be punishable; for if after the attornment the grantee bring writ of waste, the tenant may shew how at the time of the waste supposed, the reversion was in the grantor, and how by his commandment he did the waste, without this, that he did the waste after the attornment. So here, he has shewn cause for having the goods before the administration committed to the plaintiffs, without this, that he is guilty after the administration committed. So it seems that the plea is good enough. Paston. Suppose one makes his executors, &c., then he dies testate; suppose then that the goods are taken out of their possession, and after the executors are willing to administer, and the ordinary commits the administration to them, shall not they have then an action for that which was carried away in the time of the ordinary? (Q. d. quod sic.) And yet, when the ordinary administered, he died intestate. Wherefore shall not they have administration and action in such case also? (Q. d. quod, they shall have.) Fulthorp. Sir, because when the executors have accepted the administration, then they shall be called executors from the time of the death of their testator: but it is not so of administrators, for they have not any power except from the ordinary, who has power between the death, &c. and the administration committed. Ascough Just. C. P. To my intendment, administrators are but deputies or servants of the ordinary, and that which they do is in right of the ordinary; and this is true that the ordinary shall have a writ of trespass for the goods of the intestate taken out of his possession. So, to my intendment the administrators have but the occupancy in his right. And it seems to me that this is not a plea as the defendant has pleaded here. . . . Paston. If there are two executors [and] one refuses the administration before the ordinary, and the other takes it, then I shall have a writ of debt against him who administers, alone, saying nothing of the other, or for a thing which I have delivered to the testator in his life to re-deliver to me, &c., which is now come into his hands as executor; and yet if the executors shall have regard (relation) to the death of their testator, I shall have an action against both executors. And, sir, for the same reason that I shall have a writ of debt against him alone, for the same reason he shall have trespass in his name alone against me for the goods of the testator taken before the administration committed and accepted; and this proves that the executors take their power from the ordinary, which is against your intendment. Wherefore then shall not the administrators take, e contra, their power from the death of their testator? . . . Fulthorp. The executors take their effect upon the death of their testator, but it is upon a condition in law viz. if they agree to the administration, and if not, then he who disagrees before the ordinary, as your case is, shall be taken and intended, as he had not ever been made executor. . . . But, Sir, in the case of administrators, they take their effect upon the commission of the ordinary, and there shall not be any condition there although they agree or disagree at that time; and if they agree, this shall have no relation but only to the time of the commission, and namely, when a trespass is to be punished which commenced after the death of the intestate. . . . Fortescue. But to my intendment, although the law be such, &c. that administrators shall have an action for a thing done before the administration, as they well may to my intendment, because that when the administration is committed to them it is then to be intended as if there had been no mesne occupation by the ordinary, but it shall be as though the administration had been committed to them immediately after the death, &c. . . . And so in a writ of debt upon a bond made to the intestate in his life, the administrator shall have an action, and shall recover damages after the death of the intestate. So it seems that the law shall be such as I have said before." He then proceeds to give his reasons for thinking the plea under consideration good. The report ends with the plaintiff's joining issue on the plea by the usual "et alii e contra."

The question, however, seems ultimately to have been left in doubt (a)¹.] *Long v. Hebb* is a distinct authority in favour of the position contended for on behalf of the plaintiff. The question was raised in *Bacon v. Simpson* (3 M. & W. 78), where the plaintiff was the widow and administratrix of an intestate. The action was brought upon an agreement to take a house, and the declaration stated that the plaintiff was effectually possessed of the house, &c. (not saying in her representative character), which allegation was traversed. It appeared that the agreement was entered into some time before she took out administration; and it was objected, that these facts would not support the allegation of possession, inasmuch as at the time of the contract she had not taken out letters of administration, and there could be [768] no title by relation back in such a case. But no opinion was given by the court upon this point (a)². Bushe C. J., in giving the judgment of the court in *Patten v. Patten* (Alc. & Nap. 493, 504), after stating that there was undoubtedly some distinction between the relation on the grant of probate and on the grant of letters of administration, added, "On the other hand it is clear, that, to certain purposes, the grant of administration has a relation to the time of the intestate's death; that it gives him a title to the chattels, real and personal, from the time of the intestate's death, as laid down in Lord Ellenborough's judgment in *The King v. The Inhabitants of Horsley* (8 East, 405, 410)." In the last mentioned case it was held that a sole next of kin had such an equitable interest in a leasehold tenement of an intestate, as to gain a settlement by residing forty days after the intestate's death before administration granted. *Cooper v. Chitty*, *Smith v. Miller*, and the other cases cited when the rule was moved for, do not establish any such distinction between trespass and trover as is now contended for on the part of the defendants.

Bompas Serjt. in support of the rule. The defendants are at liberty to dispute the title of the female plaintiff as administratrix, as the plea of "not guilty by statute" puts all special matters in issue; *Fisher v. The Thames Junction Railway Company* (5 Dowl. P. C. 773). [Cresswell J. That was settled in *Ross v. Clifton* (11 A. & E. 631, 1 G. & D. 72, 9 Dowl. P. C. 1033).] The distinction between trespass and trover was fully discussed and recognised in the cases of *Carlisle v. Garland* and *Balme v. Hutton*. In the last-mentioned case, which was trover by the assignees of a bankrupt against a sheriff, for [769] goods seized after an act of bankruptcy, but before the commission, Patteson J., in giving the judgment of the court of Exchequer Chamber, made these remarks:—"The action of trover is founded on property; and as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action." "The action of trespass is very different: it is founded not on property, but on possession; and, where there is no actual possession, but right of property is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass: here, he had no such right, except by relation; and the cases establish that a man shall not be made a trespasser by relation (vide post, 777 (a)). There is reason in such a rule; for in trespass, the damages are unlimited: in trover, they are limited to the value of the property." No argument has been urged on the other side to shew that this principle, laid down in cases of actions by assignees against a sheriff, does not apply to the case of an administrator. His rights stand upon a very different footing from those of an executor. The appointment of an administrator is the act of the ordinary: the appointment of an executor is the act of the testator. In the former case it is not certain to whom the ordinary may grant administration. An administrator cannot release or distrain before administration, though an executor may; *Middleton's case* (5 Co. Rep. 28 a.); *Doe d. Hornby v. Glenn* (1 A. & E. 49, 3 N. & M. 837); *Whitehall v. Squire* (1 Salk. 295); *Waring v. Dewberry* (Gilb. Eq. Rep. 223, cited 1 Stra. 97, Fortescue, 360, 11 Vin. Abr. tit. Executor (Q.), pl. 29. See 1 Wms. Executors, 494, 3d ed.). [Tindal C. J. The meaning of the doctrine that a man shall not be made a [770] trespasser by relation is, that an act which was lawful at the time shall not be made unlawful by relation (vide post, 777 a.); but that can hardly apply where a party was clearly a wrong-doer

(a)¹ The plaintiff withdrew his objection to the plea. See the last note, and post, 773 (a).

(a)² *Doe dem. Hornby v. Glenn*, 1 A. & E. 49, 3 N. & M. 837, and *Middleton's case*, 5 Co. Rep. 28, were cited in support of the proposition.

at the time the act was done. The question here is, in whom was the legal possession of the intestate's property, from the time of the decease. Cresswell J. In Roll. Abr. tit. Trespass (T.), pl. 2, there is the following authority, which is precisely in point: "An administrator shall have action of trespass for trespass done to the goods of the testator after his death before the administration granted to him; for the relation may settle the possession ab initio, so that he may have the action" (Vin. Abr. same title). And he cites 36 H. 6, 8, adding, "Dubitatur, 18 H. 6, 22 b.," which is the case already referred to. The case in 36 H. 6, 8 (anno 36 H. 6, fo. 7, pl. 4. Vide post, 773 (a)). fully supports the position in Rolle. It is as follows:—"Writ of trespass was brought by an administrator (d) against a man, who pleaded in bar, that the testator was possessed of the same goods as of his own goods, and made one J. C. and J. S. his executors, and died: after whose death the goods came into the hands of the plaintiffs, and afterwards the defendant, by commandment of the said J. C. and J. S. executors, &c., and as their servant, took the goods, &c. out of the possession of the plaintiff, and afterwards the said J. C. and J. S. refused the administration before the ordinary, and afterwards the ordinary committed the administration of all the goods of the said deceased to the said plaintiff:" concluding with a verification. The counsel for the plaintiff (Wangford Serjt.) took several exceptions to the plea: one, that it did not give colour,—as not confessing that the plaintiff was ever in possession. The different objections were argued at length; and Prisot (C. J. of C. P.) said he thought the plea was good, and [771] observed, "As to that which is said that the defendant has not given to the plaintiff any colour, yes, sir, he has confessed in him a possession; and although he had not alleged such possession in the plaintiff, yet it is good colour enough; for it is a matter in law, whether an administrator shall have a writ of trespass for goods carried away before administration to him committed and after the death of the testator, or not: then when it is a matter in law, it is better to shew the matter as it is, and to put it in the discretion of the justices, than to plead to the common issue. And, in my opinion, there is no question, but that they shall have action for goods carried away before the administration; because it shall be called an administration from the time of the death: and so the colour here is sufficient enough, for he has confessed a possession in the plaintiff" (a). It appears that the court ultimately decided the plea to be bad upon other grounds.] That appears to be a strong dictum; but it cannot have the weight of a decision. The real point in the case appears to have been whether the defendant had given colour to the plaintiff. [Cresswell J. Or whether he had confessed a sufficient right of action in him. The conclusion of the case is, "that makes all the difference" (b). Counsel are sometimes satisfied with a hint.] There are different kinds of administrators—a person may be appointed administrator pendente lite, or durante minore ætate; in such cases would his title relate back to the time of the death of the testator? Or would it do so in the case of administration de bonis non?

Upon the point of surprise, he referred to *Edger v. Knapp* (supra, p. 753) as a stronger case than the present.

[772] TINDAL C. J. There are two points for consideration in this case; the first of which is of considerable importance, namely, whether an action of trespass is maintainable by an administrator for a seizure of his intestate's goods, made between the death of the intestate, and the grant of the letters of administration. No direct authority has been cited on the part of the defendant to shew that such an action is not maintainable; but reliance has been mainly placed upon a supposed analogy between the position of an administrator and that of the assignees of a bankrupt in respect of their right of action against a sheriff: it having been definitively settled, by the cases of *Garland v. Carlisle* and *Balme v. Hutton*, that assignees cannot treat the sheriff as a trespasser by relation, for taking the goods of the bankrupt before the fiat, although they may maintain an action of trover against him. But it appears to me that the analogy is not so strong as has been contended. In actions by assignees against the sheriff for taking goods in execution the latter has done a lawful act. He was authorized by the writ to take the goods of the bankrupt; and the only question

(d) Cum testamento annexo, ut semble.

(a) He adds, "and although that had been omitted, the colour would have been good enough."

(b) "Needham and Moile (JJ. of C. P.), Ceo veut changer le cas," &c.

is, whether, at the time of the seizure, the property in those goods had been divested out of the bankrupt. But here, the defendant, if he has taken the goods at all, is a wrong-doer *ab initio*. If the sheriff had a writ against the goods of A. B. and an administrator were to bring an action against him for taking the goods, not of A. B., but of his intestate, the sheriff in that case would be a wrong-doer. But in the case of assignees, the goods taken are at least the proper subject of the writ; and therefore the sheriff is not a wrong-doer in taking them, though after the fiat, he is not entitled to retain them against the assignees. In this case, however, the defendant is a wrong-doer any way. Independently of this, there are authorities upon the subject, to which we are bound [773] to yield. In the first place, there are those which the industry of my brother Cresswell has brought to light. There is the case in the Year-books, 36 H. 6, fo. 8, where the broad principle is stated,—that an administrator may maintain an action of trespass for taking away the goods of his intestate after his death and before the grant of the letters of administration. And that is precisely the present case. In Roll. Abr. tit. Trespass (T.), pl. 2, we find that proposition adopted and incorporated. The same position is laid down in Fitz. Abr. tit. Administrators, pl. 2, upon the authority of an earlier case in the Year-books, 18 H. 6, fo. 22; which, however, is not so distinct an authority (a). Then further on we find Rolle himself, when Chief Justice in the time of the Commonwealth, laying down the same doctrine in *Long v. Hebb*, and still later we find Lord Chief Baron Comyns in his Digest (Com. Dig. tit. Administration, B. 10) treating the same doctrine as settled law. And no one case has been cited in opposition to this continuous current of authorities (b). And if this were not the rule of law, the extraordinary anomaly which I have before adverted to, would follow. By the statute 4 Ed. 3, c. 7, executors are enabled to bring actions for trespasses to the estate of the testator during his lifetime; and administrators have always been held to be within the equity of this statute. It would be strange [774] indeed, if an administrator might sue for a trespass committed in the lifetime of his intestate, and for one committed after the grant of the letters of administration, but not for one committed in the intermediate time. I think therefore that, both upon principle and authority, the present action is maintainable.

As to the motion for a new trial on the ground of surprise, the case of *Edger v. Knapp*, which has been relied upon, is not in point. The plaintiff in that case having been nonsuited, might have brought a new action; and I thought it would be putting him to an unnecessary expense to compel him to adopt that course. But the present case stands upon the ground of surprise. It does not appear to me that the defendants have made out a case of surprise; and as it seems to be clear that they could not make a good defence to the whole action, inasmuch as some of the goods were not upon the premises at the time of the seizure, I think the rule obtained must, upon this ground also, be discharged.

COLTMAN J. I am of the same opinion. There are various authorities to shew that a man shall not be made a trespasser by relation in respect of an act which was lawful at the time. But the defendants here were clearly trespassers *ab initio*; and the only question is, who had the right to sue them for the trespass? When the rule was first moved for, it occurred to me to ask how it was that a successful lessor of the plaintiff in ejectment could maintain trespass for mesne profits antecedent to the day of demise; as he had no right of action at the time the alleged trespass was committed. It appeared to me that in that case the defendant was not made a wrong-doer by relation, but was shewn to have been one at the time the profits accrued. To that question I received no answer, except that ejectment was a peculiar action. But the

(a) With the exception of judgments of respondeat ouster orally delivered on pleas in abatement, few decisions in the form of judgments are to be found in the Year-books. Upon a pleading being objected to, the objection is discussed at the bar and on the bench. If the objector finds the inclination of the court to be against him, he takes or joins issue, or confesses and avoids; if the objection appears to be favourably received, the mal-pleader amends toties quoties until, having rendered his pleading unexceptionable, he is in a situation to compel his adversary to take or join issue or to confess and avoid. The ultimate opinion of the court is shewn by the course taken by the party against whom the opinion is perceived to be.

(b) See *Murray v. East India Company*, 5 B. & Ald. 204.

rule is the same as obtained in the old action of trespass for disseisin, where the disseisee, [775] upon recovering possession, might maintain an action for the profits accruing in the intervening period (a).

The point of surprise has been sufficiently answered by my lord. The court would not, on that ground, send down a case for a new trial, unless they were satisfied that the verdict was substantially wrong.

ERSKINE J. I am of the same opinion upon both points. As to the first, we must assume that the defendants have failed to make out their justification; and that they have taken goods to which they had no right. In other words, they have inflicted an injury; and the only question is, who is entitled to compensation for it? Now the right to these goods was clearly vested in the female plaintiff by the letters of administration granted to her. She was therefore beneficially interested in the goods to which the injury has been done; and consequently she and her husband would be entitled to sue in respect of that injury, unless some strong authority could be produced against their right to maintain the action. But all the authorities that have been cited, both by the bench and at the bar, are in favour of the plaintiffs' right of action. The dictum, in the judgment pronounced by Patteson J. in *Balme v. Hutton*, (for it is no more than a dictum, as it was not necessary to the decision of the case,) might, if pressed to the utmost, support the distinction that has been attempted to be raised in this case between the actions of trespass and trover. But I agree that that dictum may be explained upon the ground put by my learned brethren. Where an action is brought by assignees for a seizure of the bankrupt's goods before the issuing of the fiat, the principle is, that trespass will not lie; because the sheriff was doing an act which was lawful at the [776] time, and which is not to be rendered unlawful by relation merely.

With regard to the question of surprise, I also am of opinion that there is no ground for the application. *Edger v. Knapp* is not in point; nor indeed was that case put upon the ground of surprise.

CRESSWELL J. I also am of opinion that there is no ground to make this rule absolute in either alternative. The principal question that has been raised is as to the form of action; my brother Bompas having contended that trespass is not maintainable under the circumstances of this case. But the older authorities that have been cited shew that there is no doubt upon the point. The case in 36 H. 6, fo. 8, seems clearly to establish the principle that an administrator may maintain trespass for acts done after the death of the intestate, and before administration; and that principle no one, in that case, ventured to dispute: the only dispute being, whether the defendant by his plea had sufficiently confessed a right of action at some time in the plaintiff. That principle is adopted by Fitzherbert and Rolle in their abridgments, and by the latter high authority when sitting as Chief Justice in *Long v. Hebb*; and it is again recognised by Lord Chief Baron Comyns. Have any of these authorities ever been overruled? Is there even any dictum that an administrator cannot maintain trespass under such circumstances? None has been cited. The whole argument on the part of the defendants has rested upon the supposed analogy between the present case and that of an action by the assignees of a bankrupt against a sheriff for taking the goods of the bankrupt under an execution, after a secret act of bankruptcy, but before the issuing of the fiat; in which case it has been held that, although trover will lie by the assignees against the sheriff, trespass will not. Now the principle [777] of that rule is this—the quality of an act that has been done cannot be altered by relation; and therefore the seizure by the sheriff cannot be made a trespass if he was not a trespasser originally; but the seizure of the goods and the refusal to deliver them to the assignee, in whom the property has afterwards vested, is a conversion, for which the assignees are entitled to sue. In the dictum in *Balme v. Hutton*, which has been pressed upon us, it is obvious that the court did not contemplate the question whether trespass would lie in such a case as the present. They were drawing the distinction between trespass and trover as applicable to the circumstances of that particular case. The court say “there is reason for such a rule, for in trespass the damages are unlimited; in trover, they are limited to the value of the property.” They evidently thought that no wrong had been done by the sheriff in taking the goods; but, that as there had been a conversion by him, he ought to pay the value of

(a) Vide *Butcher v. Butcher*, 1 Mann. & R. 220, 221 (c).

the goods. In this case a trespass has clearly been committed by the defendants; they are wrong-doers; and for doing the wrong, they are liable to damages. They are not trespassers by relation, but trespassers de facto. Upon principle, therefore, as well as upon the authorities—which remain undisputed,—I think the present action is maintainable (a).

I agree that no case of surprise has been made out.

Rule discharged (b).

[778] **FREDERICK WILLIAM FISHER v. MAGNAY AND ANOTHER** May 3, 1843.

[S. C. 6 Scott, N. R. 588; 1 D. & L. 40; 12 L. J. C. P. 276.]

In trespass by A. B., the defendant justifies under a ca. sa. alleged to have been issued against "the now plaintiff," without otherwise describing him. This justification is established by the production of a ca. sa. against C. B. and proof, that in the former action the now plaintiff was the party sued by the name of C. B.—Semble, that the plea would have been more formal if it had alleged that the ca. sa. was against C. B., and that the party against whom the ca. sa. issued, and the now plaintiff, were one and the same person.—And although it had been alleged that the ca. sa. was against C. B., the averment of identity would have been sufficient without averring, that the plaintiff was known as well by one name as by the other.

Trespass for false imprisonment. Pleas: first, not guilty; secondly, a justification under a writ of ca. sa. against the now plaintiff at the suit of James Thoms.

Replication: that Thoms did not sue out the said writ against the now plaintiff, modo et formâ.

At the trial before Tindal C. J., in Middlesex after last Trinity term, the following facts appeared:—

In May 1841 a writ of summons, issued by Thoms against Frederick Fisher, was served upon the real debtor George Thomas Fisher, who, seeing it addressed to [779] Frederick Fisher, handed it over to his son, the now plaintiff, whose name is Frederick William. Thoms proceeded as if the now plaintiff was the defendant in that action; and, in the course of it, the now plaintiff made an affidavit, which was entitled, "James Thoms v. Frederick William Fisher, sued as Frederick Fisher." It was contended, on behalf of the plaintiff, that the issue upon the replication to the second plea must be found for him, inasmuch as the writ produced, commanded the sheriff to take Frederick and not the now plaintiff, Frederick William; and *Cole v. Hindson* (6 T. R. 234), *Shadgett v. Clipson* (8 East, 328), *Scandover v. Warne* (2 Campb.

(a) It has been since held in the Exchequer that an action lies by an administrator for goods sold after the death of the intestate and before administration granted; *Foster v. Bates*, 12 M. & W. 226.

(b) In M. 11 H. 4, fo. 12, pl. 26, "An apprentice came into C. P. to Thirning C. J. and Hankford J., and brought with him the copy of an indictment, in which was contained that A. smote B. on the head with a stick, so that his life was despaired of; that A. was arrested by two constables, who had him in their ward; and afterwards the constables, of their own will and assent, suffered A. to escape; and afterwards B., who was smitten, died, and A. was indicted be-[778]-fore the coroner, of the death. And upon this the apprentice asked the justices if the constables should be put to answer to that indictment as felons, and if their act should be adjudged to be felony or not. Thirning. When they suffered him to escape, B., who was smitten, was alive, and during his life no felony was done. Then having regard to this cause, the constables did no felony, inasmuch as A. did no felony until the other was dead. Apprentice. Sir, when a man is smitten and afterwards is dead, the felony shall have relation to the time when he was smitten; for the preceding blow causes the subsequent death. Hankford. He was arrested by authority of the law; and when he was in their ward they had no power to let him go; but they should have considered and weighed the peril which might happen. Thirning. At least they are worthy to make fine to the value of their goods. And then the apprentice asked for a full solution of the question. Thirning. We will advise ourselves."

270), and *Finch v. Cocken* (4 Tyrwh. 285, 2 C. M. & R. 196, 3 Dowl. P. C. 678), were cited. A verdict was found for the plaintiff upon both issues, damages, 40s., with leave to move to enter a verdict for the defendants upon the second issue.

April 19. Early in this term Bompas Serjeant moved accordingly, relying upon *Crawford v. Satchwell* (2 Stra. 1218), and distinguishing the cases cited at nisi prius, as decisions upon arrest, not on final, but on mesne process. A rule nisi having been granted,

Byles Serjeant (with whom was Corry) now shewed cause. The question is, whether the affirmative of the issue was proved by the writ given in evidence. There can be now no plea of misnomer in abatement; but the 3 & 4 W. 4, c. 42, s. 11, provides a different remedy, enabling the party sued by a wrong name,—to apply for an amendment of the declaration in which the misnomer occurs. There having been no plea in abatement and no amendment of the declaration, it is admitted on the record in that action, that the then defendant was properly named “Frederick Fisher.” It is not contended [780] that the plea in the present action might not have been so framed as to establish a sufficient defence for the sheriff. The point for the sheriff to make out was that the now plaintiff was the defendant in the former action. In that action, the father was the party really sued by Thoms. [Cresswell J. The now plaintiff has sworn that he was the party sued. Coltman J. The defendant in an action is the party served with the writ of summons.] Who was the debtor? The father stated that it was he who owed Thoms the money. George Thomas Fisher was the real debtor. *Crawford v. Satchwell*, upon which this rule was obtained, shews that the real debtor who is served with the process, is to be considered as the real defendant, whether properly described in the process or not. No other person can, by any admission on his part, substitute himself as defendant instead of the party who has been served with the process, and who is also the real debtor. If it were otherwise a plaintiff would have an option to proceed against the party originally sued, or against a stranger who had made himself defendant by his admission. [Tindal C. J. The statement of the party may give a particular colour to an equivocal act. Cresswell J. Suppose the officer served one person, and discovering that he had served the wrong party, afterwards served the right person, the latter service would be effectual. So here, the father hands over the writ to the son, who accepts it as process served upon himself.] *Cole v. Hindson* is a much stronger case than the present, because there it was pleaded that the writ under which the goods of the plaintiff Aquila Cole were taken, was issued against Aquila Cole by the name of Richard Cole. Lord Kenyon says, “The defendants were not justified in seizing the goods of Aquila Cole under a distringas against Richard Cole; and the averment in the plea; that Aquila and Richard are the same person, will not assist them; as [781] they have not also averred that the plaintiff was known as well by one name as by the other.” Here, the plea should have alleged that the plaintiff was known as well by the name of Frederick Fisher as by the name of Frederick William Fisher. That should have been averred, and, if traversed, proved. [Cresswell J. Suppose there was no evidence that the plaintiff had ever been known by the name in which he was sued in the former action. A party sued by a wrong name may plead, and may suffer the proceedings to go on to judgment without taking any notice of the misnomer. Is the plaintiff to lose the fruits of his judgment? Tindal C. J. Supposing a man sued by the name of Thomas appears, and without pleading in abatement, or taking any other objection to the misnomer, allows the suit to proceed against him by that name, can he not be lawfully taken under a ca. sa. against Thomas, although that is not his real name?] It is true that he may be lawfully taken; but in justifying that taking it must be shewn that there was a reasonable ground for issuing the ca. sa. in the name of Thomas. This was so held in *Scandover v. Warne*, upon the authority of *Shadgett v. Clipson*, to which Lord Ellenborough expressly refers. [Coltman J. If the defendants in this case had alleged that the now plaintiff was known as well by one name as the other, it would have been only an expansion on the record of the allegation that the ca. sa. issued against the plaintiff. Tindal C. J. By appearing in a name by which the party is sued by mistake, he does not admit that he is known by one name as well as by the other.] *Shadgett v. Clipson* shews that there is no difficulty where a party is sued by a wrong name. If he is taken in execution by the wrong name the defendant may justify by alleging that the plaintiff is known by one name as well as by the other; for if he is not so known, the sheriff had no warrant for taking him at all; *Scandover v. Warne*; [782] *Morgans v. Bridges* (1 B. &

Ald. 647). Here, the defendant should have averred that the plaintiff was the person sued by Thoms, and that he was known as well by the name Frederick Fisher as by the name of Frederick William Fisher. [Tindal C. J. Why is it necessary that he should have been known by a different name, if he has suffered judgment by the wrong name?] It is said that the sheriff seized the person against whom the judgment was obtained; but this ought to appear by the proceedings themselves, and not to be introduced by parol evidence; *Finch v. Cocken*.

Bompas Serjt. (with whom was Kennedy) in support of the rule. At the trial it was taken as admitted that the now plaintiff was the party against whom the ca. sa. issued. Although the plaintiff sues by the name of Frederick William Fisher, it must not be assumed that his name is really different from that under which he was taken in execution. A defendant cannot now dispute the name in which the plaintiff chooses to sue. [Coltman J. May he not call upon the plaintiff to alter the name in his declaration?] The court of Exchequer, in *Moody v. Aslatt* (5 Tyrwh. 492, 1 C. M. & R. 771), refused to allow such an alteration to be made, considering it to be unnecessary. In general, the defendant cannot know whether the name in which the plaintiff chooses to sue, is his real name or not. Here, however, the plaintiff has admitted conclusively that his name is Frederick Fisher. The plea in *Crawford v. Satchwell* contains no allegation that the party was known as well by one name as by the other. In this case, the plea states that "the plaintiff" was the party against whom the ca. sa. issued; which is equivalent to saying, that the former defendant and the [783] present plaintiff are one and the same person. The plea does not profess to set out the form of the ca. sa. In all the cases in which it was considered necessary to allege that the party was known as well by one name as the other, the question arose upon mesne process. Here, the process under which the plaintiff was taken, was a writ of execution, which necessarily pursued the judgment. But if, instead of suffering judgment by default, the defendant in the former action had put in issue the debt sued for in that action by Thomas, evidence of liability on the part of Frederick William Fisher, with proof that Frederick William Fisher was the party acting as defendant in the action, would have been sufficient to support the issue.

TINDAL C. J. In this case an action has been brought against the sheriff of Middlesex in the name of Frederick William Fisher, for assault and false imprisonment; and the sheriff has justified under a ca. sa. directed to him. The mode in which the issuing of the writ is stated is this: "That one James Thoms sued and prosecuted out of the court, &c. a certain writ, called a capias ad satisfaciendum, against the plaintiff, directed to the sheriff of Middlesex, by which writ the sheriff was commanded that he should take the plaintiff, if he should be found in his bailiwick, and should safely keep him, so that he might have the plaintiff's body before, &c. immediately after the execution of the writ, to satisfy the said J. T. a certain debt of, &c." The real objection upon the production of the writ, appears to be that it is a writ issued against one Frederick Fisher, and not against Frederick William Fisher, it being objected that the writ does not make out the allegation that the ca. sa. issued against the plaintiff. I agree that if this were a capias ad respondendum, the objection would apply, and that it would be necessary to shew that the [784] plaintiff was known as well by one name as by the other. This is not a process to bring the party into court, where he has the power of compelling the plaintiff to set the name right, if he is served by a wrong name. But the plaintiff has suffered judgment to go against him in the wrong name, and the sheriff in effect says, "you were taken under a ca. sa. which issued against you." I cannot distinguish this case from that of *Crawford v. Satchwell*. There, the plea pointed out that the person then plaintiff, was the same person who had been sued and taken in execution by another name. Here, the same thing is done in a less circuitous way. If the plaintiff was dissatisfied with the general mode of pleading he might, perhaps, have compelled the defendant to set out the precise terms of the case in his plea. In 1 Wms. Saund. 297, n. (1), it is said, that "in trespass, when the defendant justifies under a writ, warrant, precept, or any other authority whatever, he must set forth particularly in his plea; for it is not sufficient to allege generally (a), that he committed the act complained of by virtue of a certain

(a) The generality objected to by Serjt. Williams appears to have been of a much more vague character than that which could be objected to in the plea in the principal case. Vide post, p. 786 (a).

writ or other warrant directed to him; but he must set it forth specially; Co. Litt. 283 a.; 3 Mod. 137, *Mathews v. Cary*, 138. *Matthews v. Carew*; S. C. 1 Salk. 107, 108; 4 Mod. 378, *Lamb v. Mills*; Com. Dig. Pleader (E. 17); and the defendant ought further to aver in his plea, that he has substantially pursued such authority; Co. Litt. 303 b." Suppose that here, the plaintiff had objected to the generality of the language of the plea, and the defendant had been compelled to alter his plea by stating that the ca. sa. issued against Frederick Fisher, he would have alleged that Frederick Fisher and the now [785] plaintiff were one and the same person. The plea would then have been in the same form as in *Crawford v. Satchwell*, and the evidence would have supported the plea.

COLTMAN J. I am of the same opinion. It appears from *Crawford v. Satchwell*, that the writ of execution must follow the judgment, and must issue against the party in the same name in which judgment was recovered against him, but that in justifying under such a writ, it is not necessary to aver that the party is known by one name as well as by the other. It would be very odd if that were necessary. A plaintiff who had recovered judgment against a party sued by a wrong name, would be in a strange position if he could not safely issue execution against him by that name, though he may never have been known by that name up to the day on which he was sued. Here, the point arises upon the question, whether there is or is not a variance. The allegation—that the writ issued against the plaintiff,—appears to me to be satisfied by shewing that the plaintiff was the party against whom that writ really issued. It is a compendious mode of stating that which in *Crawford v. Satchwell* is expanded on the record.

ERSKINE J. The fallacy of the argument on the part of the plaintiff, appears to me to be this:—that two different points which arise in a defence of this sort, are not kept distinct. The first point is, whether the writ was wrongly sued out; the second is, whether there is a variance between the allegation in the plea, and the writ produced to support that allegation. Upon the first point it appears to me that the writ could not have been sued out in any other name than that in which the judgment was recovered, whatever the real name of the party may have been. There can therefore be no [786] objection to the form of the writ. In the cases cited, the question has been, not whether the person taken was the person sued, but whether the writ was a proper writ. Where mesne process issues against a party by a wrong name, the writ itself is bad, and cannot be cured by shewing that the party is the same, without going on to aver that he is known as well by one name as by the other. But here, the whole question arises upon the point of variance. It is alleged in the plea that the writ issued against the plaintiff; then who is the plaintiff? Whether the person named in the writ and the person who brings this action, are one and the same person, is a question of evidence; and here, it clearly appears that they are. The question whether it is sufficient to frame a plea in this general form is not now before the court. The objection might have been taken by special demurrer (a), and then the defendant could have amended his plea by adopting the form pursued in *Crawford v. Satchwell*.

(a) Before demurring to such a plea, a plaintiff would do well to consider, whether as the court has decided in the principal case—agreeably to the determination in *Crawford v. Satchwell*—that it is immaterial in what name the ca. sa. issued against the party who complains of the imprisonment, the non-disclosure of that immaterial fact is any ground of objection to the plea; it being sufficient to plead an instrument according to its legal effect without pursuing its terms. Vide ante, vol. iii. 780.

The very passage in Co. Litt. referred to by Williams Serjt., supra, p. 784, is simply this. "Here, it is to be observed that the law of England respecteth the effect and substance of the matter, and not every nicety of form and circumstance. Qui hæret in literâ, hæret in cortice; et apices juris non sunt jura." As to the three other references—in *Mathews v. Carey* the defendant justified under a mandate from the dean and chapter; whereas he ought to have shewn a warrant from their steward;—in *Lamb v. Mills* the objection was, that the plea alleged that the defendant took the plaintiff's goods as bailiff, without shewing any process authorising him to take them—and Com. Dig. Pleader (E. 17) contains merely a reference to Co. Litt., and an abstract of the case of *Mathews v. Carey*, 3 & 4 Mod.

[787] CRESSWELL J. I am of the same opinion. The distinction is between mesne and final process. Upon the former the defendant has a right to insist upon being sued by his real name. But, if, when sued in a different name, he omits to take his objection in the mode pointed out by law, he acquiesces in being sued by that name, and cannot afterwards retract his admission. In *William Price v. Harwood* (3 Campb. 108), W. P. being asked whether his name was not John Price, answered that it was; upon which process issued against him by the latter name, and his goods were taken to compel an appearance. It was held (*b*) that trespass was not maintainable against the officer: and Lord Ellenborough seems to have considered in that case, that the statement made by the party was conclusive upon him (*c*). So here, the plaintiff is bound by his admission. Then the question is this,—did the *ca. sa.* issue against the plaintiff? The case in *Strange* is an authority for the position that it is not necessary that the name should be the same; and the sheriff has not undertaken to shew that the writ, under which he justifies, issued against the plaintiff by the name of Frederick William Fisher.

Rule absolute (*d*).

(*b*) Under a plea of not guilty, given by a local act.

(*c*) That was a *nisi prius* case. But in *Coote v. Lighworth*, Sir Fra. Moore, 457, “Coote brought false imprisonment against Lighworth, who justified because he had a warrant to arrest J. D., and he asked of Coote what his name was; and that he answered that his name was J. D. and that thereupon he arrested him. The plaintiff demurred. And it was adjudged for the plaintiff, because the defendant ought, at his peril, to take notice of the party.” And in the case of *Thurbane, et al.*, Hardres, 323. Hale C. B. said obiter, “If a wrong man be taken, though he affirm himself to be the person against whom the commission (of rebellion) is awarded, yet the commissioners, having no warrant to take him by their commission, his affirming himself to be the person, will not excuse them in false imprisonment; as has been held upon the executing of a *capias*.”

(*d*) “*Scire facias* brought by John Legg and M. his wife [788] upon a judgment on a writ of dower against three several tenants, two made default, and the third came and said that he was tenant of the entirety, and said, that in the record he (i.e. the plaintiff) is named John Begge, and in the writ John Legge, and prays judgment of the writ. And because it was not said that he was another person, the writ was awarded good.” M. 27 E. 3, fo. 12, pl. 48.

“A. brings an action in C. P. against Julian Goddard, a feme sole. The parties are at issue, and a *venire facias* is awarded, and before the return of it, the feme takes to baron one Doiley, and after, upon special verdict found in the said suit, judgment was given in bank *pro prædictâ Julianâ* against A.; upon which judgment A. brings writ of error in B. R., and a *scire facias* is awarded against Julian Goddard as a feme sole, and she appears by attorney as a feme sole, by the assent of her baron; and after the judgment is reversed; and the judgment is entered *quod prædictus A. recuperet, &c. versus prædictam Julianam, &c.*, and costs and damages taxed, &c., upon which judgment A. sues a *capias ad satisfaciendum* against Julian Goddard, by force of which writ the sheriff takes the said Julian, who is called Doiley, she being the wife of Doiley; yet it is lawful; for the feme, so long as the judgment is of effect, is estopped to say that her name is other than Julian Goddard; and the sheriff, being the minister to execute the judgment, may take advantage of this estoppel.” 1 Roll. Abr. 869, 870. In that case the matter was fully disclosed by the plea. S. C. Cro. Jac. 323; *Rock v. Leighton*, 1 Salk. 310, 4th point.

Where a party enters into a bond by a wrong name he cannot be sued thereon by his right name; *Gould v. Barnes*, 3 Taunt. 504; and therefore where it appeared by a special verdict, that a bond purported that Sir John Clarke, knt., became bound to Thomas Manning, Esq. although the condition was for the repayment of a sum of money by the above bounden Sir Robert Clarke, knt., a judgment for the plaintiff in C. B., in an action brought by the executor of Manning against Sir Robert Clarke, was reversed in K. B. *Clark v. Istead*, 1 Lutw. 894.

Where a party who has entered into a bond by a wrong name, is sued by that name, it is said that if he plead misnomer in abatement, the plaintiff may reply the estoppel, but that if he does not appear, and is outlawed, the outlawry, being in a

[789] HILL, Clerk, v. RAMM. 1843.

[S. C. 6 Scott, N. R. 571 ; 12 L. J. C. P. 275.]

A memorandum, by which, in consideration that A. will withdraw a distress for a sum exceeding 20l., which B. admits to be due from him as tenant to A., until a future day, B. declares, that in case of default it shall be lawful for A. to enter and distrain, and to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp (vide post, 792 (b), 793 (b) ; *Cox v. Bailey*, T. T. 1843, post, vol. vi., p. 193.

Debt, for use and occupation.

Plea: nunquam indebitatus.

By the particulars of demand, the plaintiff claimed 11l. for a quarter's rent of a house.

At the trial before Coltman J. at the London sittings in Trinity term, 1842, the following facts appeared.

On the 28th of December 1840, the plaintiff distrained upon the house for 38l. 10s. alleged to be owing from the defendant to the plaintiff in respect of a year's rent due at Christmas. In order to prove that the defendant was the tenant of the premises, in which the defendant carried on his trade, though his mother occupied the house, it was proposed, on the part of the plaintiff, to shew that on the 29th the distress was withdrawn upon the defendant's signing the following memorandum, addressed to the plaintiff. "In consequence of your withdrawing, at my request, the distress upon the premises I hold of you, situate at No. 17, Clement's Lane, in the parish of St. Clement's Danes, in the county of Middlesex, as tenant thereof, for one year's rent due Christmas day last, at the rate of 44l. per annum (less 5l. 10s. allowed to me), and giving time for the payment of the said rent, which I [790] hereby acknowledge to be due unto you as the landlord of the said premises, until the 1st day of February next, I hereby authorise you, on default being made by me in such payment at the time aforesaid, to re-enter upon the said premises, and there distrain for the said sum of 38l. 10s., or any lesser sum thereof, then in arrear and unpaid, notwithstanding the withdrawal of the distress now made by you in respect of the said sum of 38l. 10s. And I hereby declare that your now withdrawing the present distress shall in no way prevent you from again distraining upon the said premises. And I hereby empower you to use and pursue all such powers and remedies for the recovery of the said rent as to you may seem advisable; and the distress now withdrawn, or any matter or thing done in consequence thereof, shall not be taken in bar thereof, or be pleaded in satisfaction or discharge thereto, nor shall you be deemed a trespasser or wrong doer in respect of such re-entry or second distress. Dated, the 29th of December 1840." It was objected by the defendant's counsel that this memorandum could not be received in evidence for want of a stamp. It was answered that a stamp was unnecessary, as the subject-matter of the memorandum was not of a value amounting to 20l., and that it reserved to the plaintiff nothing but what he would be otherwise entitled to by law. The learned judge admitted the document; and a verdict was taken for the quarter's rent.

wrong name, will be erroneous; *Dyer*, 279 b. in marg. And see *Gordon v. Austin*, 4 T. R. 611.

And see further as to misnomer in process, *Hedd and Chaloner's case*, 1 Leon. 146, Cro. Eliz. 176, 2 Roll. Abr. 42; *Clerk of Trustees of Taunton Market v. Kimberley*, 2 W. Bla. 1120; *Gardner v. Walker*, 3 Anstr. 935; *Wilks v. Lorch*, 2 Taunt. 399; *Smith v. Patten*, 6 Taunt. 115, 1 Marsh. 474; *Boswell v. Atkins*, 2 Chitt. 56; *Newton v. Maxwell*, 2 Tyrwh. 278, 2 C. & J. 215, 1 Dowl. P. C. 315; *Hinton v. Stevens*, 1 Harr. & W. 521; *Walker v. Willoughby*, [789] 6 Taunt. 530, 2 Marsh. 230; *Boughton v. Frere*, 3 Campb. 29; *Morley v. Law*, 2 Bro. & B. 34; 4 J. B. Moore, 309; *Lindsay v. Wells*, 3 New Cases, 777, 4 Scott, 471, 3 Hodges, 97, 5 Dowl. P. C. 618; *Rust v. Kennedy*, 4 M. & W. 586, 7 Dowl. P. C. 199; *Borthwick v. Ravenscroft*, 5 M. & W. 31, 7 Dowl. P. C. 393; *Kitchen v. Brooks*, 5 M. & W. 522, 8 Dowl. P. C. 232; *Wilde v. Keep*, 6 Carr. & P. 235.

Channell Serjt., in Hilary term last, moved for a new trial, on the ground that the memorandum had been improperly admitted.

A rule nisi having been granted,

Bompas Serjt. now shewed cause. The document in question was offered in evidence, not as proof of an [791] agreement, but as shewing that the defendant had admitted that he was the tenant of the house. In *Hill v. Johnson* (3 Carr. & P. 456) it was contended by the defendant, the drawer of a bill, that time had been given to the acceptor. The plaintiff produced a paper which the defendant had promised to sign, whereby the defendant consented to the plaintiff's using any means to obtain payment from the acceptor, without prejudice to his rights against the defendant as drawer. It was held that this paper did not require a stamp. Here, the memorandum contains no words of agreement, but merely a licence to re-enter in consideration of the plaintiff's withdrawing his distress. [Cresswell J. Does such a licence require any consideration?] It does not; for the plaintiff, without any licence, would be entitled to distrain again. [Tindal C. J. This is an admission that the defendant was tenant. Erskine J. The purpose for which the defendant admitted himself to be the plaintiffs' tenant, will not affect the admissibility of the document.] It amounts to no more than this, "If you will withdraw the distress, it shall be without prejudice." In *Forsyth v. Jervis* (1 Stark. N. P. C. 437) it was held, that part of an unstamped letter might be read for a collateral purpose, although the chief part of the letter related to an order for the making of a gun. So here, the plaintiff required that part only to be read, in which the defendant acknowledged that he was tenant to the plaintiff. In *Parker v. Dubois* (1 M. & W. 30, Tyrwh. & G. 243, 1 Gale, Exch. 366), a letter from A. in which he requested B. to pay a call upon some mining shares for him, was held to be admissible in evidence, to shew that A. was a shareholder, although a contract was inferred from that admission; which goes far beyond the present case.

[792] Channell Serjt. (with whom was Pigott), in support of the rule. A mere acknowledgment would require no stamp. Neither would an agreement, which gave no right which the parties did not possess before. But this is an agreement conferring new rights; and it, therefore, requires a stamp. [Tindal C. J. If it is an agreement, is it any thing more than an agreement on the part of the tenant to allow the landlord to avail himself of his legal rights? How can we know, whether the subject-matter of such an agreement is of the value of 20l.?] In *Mallett v. Hutchinson* (7 B. & C. 639, 1 Mann. & Ryl. 522) the first part of the paper which was received in evidence, was merely an acknowledgment; and the remainder, though called an agreement, contained nothing but what the law would have implied. Here, it must be taken that but for the agreement, the landlord would have had no right to re-enter. [Tindal C. J. Do you say that an action of trespass, or an action for a vexatious distress, would have lain?] It is not material whether the tenant's action would have been an action of trespass, or whether his remedy would have been by an action for a vexatious distress would have lain, if the landlord had entered without some such arrangement as is contained in this memorandum. Here, the landlord takes, by the consent of the tenant, the power of doing that which without such consent he could not lawfully have done. He purchases an indemnity against either an action of trespass, or an action on the case. [Coltman J. Does not a contract arise out of the independent fact of the withdrawing of the distress at the request of the defendant (b)?] It is submitted that it does.

[793] If the memorandum gives the plaintiff larger powers than he would have had without it, it is incumbent on the defendant to shew that the subject matter of the agreement is below 20l. *Sheppard v. Wheble* (8 Carr. & P. 534).

TINDAL C. J. I am of opinion that the memorandum in question does not amount

(b) By the memorandum the plaintiff agrees to give time for the payment of the rent until the 1st of February. No consideration for this forbearance appears on the face of the instrument, if the plaintiff acquired no new right under it. The security given for the rent would however be a sufficient consideration for such forbearance; and, though dehors the instrument, it would be available to support the promise to forbear.

In this view of the case the instrument would appear to require an agreement stamp, supposing "the matter thereof to be of the value of 20l. or upwards." Vide infra, note (b).

to a contract, but is merely a licence or authority to enter. There is nothing which the party contracts to do or to pay. It is therefore not an agreement, within the 55 G. 3, c. 184, Sched. Part I.

But supposing it to be an agreement, it by no means appears to be an agreement, the matter whereof amounts to 20l.; and Lord Tenderden has held that it lies on the party who takes the objection that the instrument is not stamped, to shew that there is a subject matter of the agreement amounting to 20l., it being a condition in the enacting part of the schedule itself, and not a qualification brought in by way of exception or proviso, or appearing in the form of an exemption. And, assuming this to be an agreement, neither the amount of rent nor the value of the goods distrained is the subject matter of the agreement, but the indemnity against an action for a second entry; the value of which indemnity may be very small (b)¹. This case comes within the principle of the cases of contracts to carry goods, in which the value of the safe carriage, and not the value of the goods, is [794] considered to be the subject matter of the contract; *Latham v. Rutley* (Ryan & Moo. 13).

COLTMAN J. The only thing which the memorandum professes to give to the plaintiff, is, a power to re-enter upon non-payment of the rent on the 1st of February, in consideration of his withdrawing from possession; a power which he was by law entitled to exercise, without any consent on the part of the defendant (b)².

ERSKINE J. I am also of opinion that this rule must be discharged. The memorandum appears to amount to nothing more than a licence to re-enter and to take a distress, the immediate enforcement of the right of distress being relinquished by the landlord at the request of the tenant. Though a contract might be raised upon this memorandum, namely, an undertaking on the part of the tenant not to bring an action of trespass for the re-entry, the same objection might be raised in every case of leave and licence; as it might be said that the leave and licence amounted to an agreement, on the part of the licensor, not to sue the licensee.

CRESSWELL J. concurred.

Rule discharged (c).

[795] DOE DEM. SIMPSON v. HALL. April 24, 1843.

Held, that it is competent to a judge at nisi prius to amend the declaration, &c. in ejectment by altering the date of the demise which was subsequent to that on which the right of entry accrued, but was a day which had not arrived when the action was brought, and when it was tried, to an earlier date without any thing to amend by beyond the necessity of the amendment to the maintenance of the plaintiff's right of action.—The regular service of a notice to quit was held to have been properly inferred from the circumstance of the tenant's speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant.

Ejectment.

At the trial before Parke B. at the last assizes for the county of York, the first question which arose was, whether a tenancy which had subsisted between the lessor of the plaintiff and the defendant, had been determined.

A notice was prepared by one Burland, purporting that he, Burland, as attorney

(b)¹ Quære, whether in a contract to give time for the payment of 38l. 10s., "the matter of the agreement" may not be said to be the sum agreed to be forborne.

(b)² As to the compromise of an unfounded claim, or the acquiescence in a contested right, being a sufficient consideration for an express promise, see *Longridge v. Dorville*, 5 B. & Ald. 117; 2 Roll. Abr. 23, pl. 28, 1 Vin. Abr. 209, pl. 28; *Penn v. Lord Baltimore*, 1 Ves. sen. 444, 450; *Griffith v. Sheffield*, 1 Eden, 73, 76; *Lofts v. Hudson*, 2 Mann. & R. 481; *Wilkinson v. Byers*, 1 A. & E. 106, 3 N. & M. 853; *Home v. Booth*, ante, vol. iii. p. 709; 2 Wms. Saund. 137 e. note (b).

(c) And see *Doe v. Avis*, at Nisi Prius, Chitt. Stat. 964. In that case Lord Tenterden C. J. said, "The words of the act are so ambiguous that the party objecting ought to make out the affirmative."

As to the admissibility of an unstamped document in evidence for collateral purposes, vide supra, 791; *Hawkins v. Warre*, 3 B. & C. 690; 5 D. & R. 512.

for Simpson, required the defendant to quit on the 6th of April 1842. A duplicate of this notice was delivered to a party to be served, but the service itself could not be proved. It was however shewn that on the 28th of March the defendant called on the landlord's attorney, and spoke to him respecting the notice; and that the defendant applied to a valuer to value his rights as outgoing tenant. It was objected that this evidence was insufficient to entitle the plaintiff to have the duplicate kept by the attorney read.

The objection was overruled, and the duplicate notice was read in evidence.

Parke B. having pointed out to the counsel that the demise was laid on the 30th of May in the sixth year of Queen Victoria, a day which had not arrived, it was contended on the part of the defendant, that the plaintiff ought to be nonsuited (a). The learned judge re-[796]-fused to direct a nonsuit to be entered, and ordered the declaration, issue, and record to be amended by inserting the word "fifth" instead of "sixth"; and a verdict was returned for the plaintiff.

Channell Serjt. moved for a new trial on the ground that the learned judge had no power to make the amendment, and that there was no sufficient evidence of a valid notice to quit.

In *Doe d. Edwards v. Leach* (ante, vol. iii. 229; 3 Scott, N. R. 509; 9 Dowl. P. C. 877), which will perhaps be relied on as a case in which an amendment was allowed to be made in the day of the demise, there was something to amend by; as the lease, giving the right of re-entry, was produced (b). Here, there was nothing [797] to amend by. To give the power to amend, there should be some variance apparent upon the production of the evidence. [Tindal C. J. Supposing no amendment to have been made,

(a) By the consent rule, the defendant is required and undertakes to confess the "lease" i.e. the demise of the tenements mentioned in the declaration, and to insist upon title only. By the latter part of the rule must, it is conceived, be understood absence of proof of title in the lessor of the plaintiff; the defendant not being bound to set up any title either in himself or in a third person, until the plaintiff has made out a *prima facie* title in his lessor, such as, if unanswered, would shew a right of possession in the lessor of the plaintiff at the time of the making of the demise. The penalty expressed in the rule attaches only where the defendant refuses to make the confession. Here, he confesses the demise, &c. as laid, but, without raising any question of title, he denies the existence of a right of action; he therefore does not insist upon title only; but, admitting the title to be in the lessor of the plaintiff, the defendant contends that a demise declared upon as already made, and therefore, in effect, alleged to have been made before action brought, though without a date, or, what is the same thing, with an impossible date, is not, with the also confessed entry and ouster, sufficient to support the action.

Quere, whether an attachment would lie against a party, who, having confessed lease entry and ouster, raised, and succeeded upon, an objection unconnected with any matter of title, in contravention of his undertaking to insist upon title only.

(b) The statute (3 & 4 W. 4, c. 42), s. 23, after reciting "that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances, as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot, in any case, be amended at the trial, except when the variance is between any matter in writing or in print produced in evidence and the record,—enacts, that it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital, or setting forth, on the record, writ or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars,—in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence,—to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in

could the absence of a date to the demise have been a ground of nonsuit?] The defendant asks only for a new trial. To this he is entitled if the judge had no power to make the amendment. In a case before Coltman J., that learned judge refused to order a similar amendment, saying, that either he had no power to amend, or, if he had, it was not a case in which an amendment ought to be allowed. (To this statement that learned judge assented.)

But supposing this to be a case in which an amendment could be properly made, there was no evidence to support the declaration. [Coltman J. The right of entry had accrued at the expiration of the notice.]

[798] TINDAL C. J., on a subsequent day, said, it appears from Mr. Baron Parke's notes, that the duplicate notice to quit, which was read in evidence, contained the proper day for the determination of the demise, and that after the period at which the notice was supposed to have been delivered, the defendant acknowledged to the agent of the landlord, that he had received notice to quit. The instrument, therefore, was properly admitted in evidence; and we think that it gave sufficient notice to the defendant to determine the tenancy. Consequently there is no ground for granting a new trial, as upon a verdict against evidence.

With respect to the question of amendment, we think that the amendment was properly made. It was a stronger measure in *Doe dem. Edwards v. Leach* to amend the declaration by inserting one possible day instead of another which was equally possible, than here, to substitute a possible for an impossible day.

Rule refused.

MEMORANDA.

Nathaniel Richard Clarke, of the Middle Temple, Esq., and afterwards John Barnard Byles, of the Inner Temple, Esq., having received writs, issued in Hilary vacation pursuant to 6 G. 4, c. 95, commanding them to take upon themselves the state and dignity of a Serjeant-at-law, severally appeared before the Lord Chancellor at Lincoln's Inn, and taking the oaths usually administered to persons called to that degree and office, became Serjeants-at-law sworn, agreeably to the provisions of the act. The former gave rings, with the motto, "Sapiens qui assiduus;" the latter, with the motto, "Metuit secundis."—In the same vacation Mr. Serjt. Wrangham received a patent of precedence to rank after Loftus T. Wigram, Esq., Q. C.

every other part of the pleadings which it may become necessary to amend, on such terms, &c."

In *Doe dem. Edwards v. Leach* the provision for re-entry,—the potential right of the landlord to re-enter,—appeared upon the face of the lease; but the actual right of re-entry was the result of the clause of re-entry in the lease, coupled with the act or default done or committed by the tenant. See *Jones v. Pope*, 1 Saund. 37, 38. It appears to be immaterial, with reference to the power of amendment, whether the right of re-entry accrues from an act done or default made, in contravention of a written contract, or from any other act or default.

**CASES ARGUED and DETERMINED in the COURT
of COMMON PLEAS. By JAMES MANNING,
Serjeant at Law, and T. C. GRANGER, of the
Inner Temple, Esquire, Barrister at Law. Vol. VI.
From Trinity Term, 1843, to Hilary Term, 1844,
both inclusive. London, 1845.**

**[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN
TRINITY TERM, IN THE SIXTH YEAR OF THE REIGN OF VICTORIA.**

The judges who usually sat in banco during this term were, Tindal Lord C. J.,
Coltman J., Maule J., Cresswell J.

GEORGE BEDFORD PIM AND THOMAS ROGERS v. JOSEPH REID AND OTHERS.
May 26, 27, 1843.

[S. C. 6 Scott, N. R. 982 ; 12 L. J. C. P. 299. Distinguished, *Sillem v. Thornton*, 1854,
3 El. & Bl. 886. See *Stokes v. Cox*, 1856, 1 H. & N. 533.]

The plaintiffs effected a policy of insurance against fire, subject (inter alia) to the following condition : " In the insurance of goods, &c. the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on, or any hazardous articles deposited, therein ; and if any person shall insure his goods or buildings, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force.—Held, that this condition was to be referred to the time when the policy was effected, and that, in the absence of fraud, neither by the general law of insurance nor by such condition, was the policy avoided by the circumstance that, subsequently to the effecting of the policy, a more hazardous trade had, without notice to the company, been carried on upon the premises.—Upon an issue taken on a plea traversing an allegation in a declaration that a specification of the particulars of a loss by fire had been delivered by the assured to the assurers, agreeable to a condition that that effect contained in the policy of insurance, it was held at nisi prius that the allegation was supported by evidence of a correspondence from which the jury might infer that the assurers had dispensed with the performance of such condition.—Held, that is too late for a defendant to move for a new trial after judgment for the plaintiff non obstante veredicto.—Where a cause went down to trial with seven issues, as to two of which (going to the whole cause of action) the jury found a verdict for the defendants, and as to the other five, for the plaintiffs without assessing damages ; and the plaintiffs obtained judgment non obstante veredicto upon the two issues found for the defendants, the court discharged, with costs, a rule obtained by the plaintiffs for issuing a writ of inquiry to assess damages, leaving it to the plaintiffs to issue such writ at their own peril.—Quære, whether a general allegation in a declaration that A. and B. (the plaintiffs) were interested

in the property insured, is supported by proof that A. was mortgagor and B. mortgagee of the premises.

Assumpsit on a policy of insurance against fire. The first count of the declaration set out the policy, dated the 12th of November 1840, which recited that [2] the plaintiffs had paid the sum of 7l. 10s. to the Imperial Insurance Company as a premium for the insurance to the 29th day of September 1841, on the property described in the policy, viz. "On their paper-machine, stuff-chest, and all gear-work communicating, thereto belonging, including fixtures in the machine-house marked G in surveyor's report, including 50l. on a small engine-yard, the sum of 500l. ; on a steam-engine in engine-house B, the sum of 150l., and on three paper-engines ; fly-wheel, with machinery belonging thereto, including fixtures in a mill-house marked A, the sum of 350l. ; in the whole amounting to 1000l. ;" it was by the policy declared that from the 8th of October 1840, and so long as the said assured should duly pay, or cause to be paid, the said premium to the said company, and the acting directors of the said company for the time being should agree to accept the same, the [3] capital stock or funds of the company should be subject and liable to pay to the assured all damage and loss which they should suffer by fire on the property mentioned in the policy, not exceeding 1000l., according to the tenor of their printed proposals and conditions accompanying the policy.

The declaration then set out the proposals and conditions accompanying the policy ; the principal of which were as follows :—

First. Persons desirous to make insurance on buildings, are to deliver into the office the following particulars,—viz. of what materials the walls and roof of each building intended to be insured, are composed—where situated—whether the same are occupied as shops or how otherwise ; also whether adjoining to, or in the risk of, any building or place in which any hazardous trade is carried on. Houses not duly separated by party-walls are deemed brick and timber. All manufactories which contain furnaces, kilns, stoves, coakels, or ovens, or otherwise use fire-heat, are chargeable at additional rates.

For the insurance of premises which contain any steam-engine, stove, coakel, kiln, or other implement, in or by which heat is produced (common fire-places excepted), the construction and circumstances of the same must be particularly described at the time of effecting the insurance, or, if subsequently introduced, due notice must be given to the company, and the same allowed by them ; otherwise the policy will be void ; or if more than one quarter hundred weight of gunpowder shall be deposited at any one time in any premises, on or in which an insurance is effected, such insurance shall be void. In the insurance of goods, wares, or merchandize, the building or place in which the same are deposited is to be described ; the quantity and description of such goods ; also whether any hazardous trade is carried on, or any hazardous articles deposited, therein. And if any person or persons shall insure his or their buildings or [4] goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent, or omit to communicate, any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force.

Third. No loss or damage by fire occasioned by invasion, foreign enemy, civil commotion, or any military or usurped power whatever, shall be made good ; neither will this company be answerable for loss or damage on stock of any kind occasioned by the misapplication of fire-heat, while under process of manufacture, or for loss or damage by explosion of any kind.

Fourth. Persons insuring property at this office must give notice of any other insurance made by them or on their behalf, on the same property, whether such other insurance shall be made previously, or subsequently, to that which is made at this office ; and such other insurance is to be indorsed on the policies subscribed on behalf of this company, and entered at their office, otherwise this company will not hold themselves liable to pay in case of loss ; and after such indorsement is made, this company will pay their ratable proportion of any loss or damage by fire subsequently sustained.

Sixth. Upon the death of any person insured at this office, the policy and interest therein may be continued to the heir, executor, or administrator respectively, or be

transferred to the person who shall, upon such death, be entitled to the property insured, provided such heir, &c., do procure his or her interest therein, to be indorsed on the policy at the office of this company.

That persons changing their dwelling-houses, shops, or warehouses may preserve the benefit of their policies if the nature and circumstances of the risk insured be [5] not altered; but in all such cases the policy is not to be considered as remaining in force, until due notice of the removal or alteration be given at the office of the company, and the same be allowed by indorsement to be made by the authority of the company on the policy.

Seventh. All persons insured by this company who shall sustain any loss or damage by fire, are forthwith (a) to give notice thereof to the company at their principal office in London, and as soon as possible afterwards are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and shall make proof of the same by their oath or affirmation, and produce such other evidence as the directors of this company may reasonably require, and, until such affidavit, affirmation, and account are produced, the amount of such loss or any part thereof shall not be payable or recoverable; and if there appear any fraud in the claim made to such loss, or false swearing or affirming in support thereof, the claimant shall forfeit his claim to payment thereof by virtue of his policy.

The declaration then averred that the defendants were members and the acting directors of the company; that they subscribed the policy; that the plaintiff paid the premium and stamp duty on the policy; that the defendants promised the plaintiffs that all things in the policy of insurance, proposals and conditions, on the part of the company to be performed and fulfilled, should be performed and fulfilled; that the plaintiffs caused the buildings, and the quality and description of the property therein to be truly described in the policy, and did not misrepresent, or omit to communicate, any circumstance which then was material to be made known to the company in order to enable them to judge of the risk so by them undertaken as aforesaid; that a certain other insurance for 1000l. had been made in another office, to wit, &c., and that the plaintiffs gave notice [6] thereof to the first mentioned company, who indorsed the same on the first mentioned policy. The declaration then alleged compliance, on the part of the plaintiffs, with other conditions in the policy (which are omitted as not material to the question discussed); that at the time of the making of the policy, and from thence until and at the time when the property was destroyed by fire as therein mentioned, the plaintiffs were interested in the assured property to the amount of all the moneys insured therein, to wit, 2000l., that is to say, in each of the items so insured in double the amount of the proportion of the sum of 1000l. so by the policy insured on the same, and that the value thereof was, &c. It then stated the destruction of the premises by fire upon the 19th of June 1841; that the plaintiffs forthwith gave account of such loss and damage to the company, and did also deliver to the company as soon as possible afterwards, to wit, on, &c., as particular an account in writing of their said loss and damage as the nature of the case would admit, and then made proof of the same by their affirmation. Breach: that the defendants had not paid their ratable proportion or reinstated the property.

There was a second count for money had and received. Damages, 2000l.

Pleas: First: non assumpsit; secondly (to the first count), that the plaintiffs were not interested, modo et formâ; thirdly (to the same), that they did not, after the loss, give notice of such loss modo et formâ; fourthly (to the same), that they did not, as soon as possible after the loss, or after giving notice of such loss, deliver in a particular account in writing of their loss, modo et formâ. Upon each of these pleas issue was joined.

Fifthly (to the same), that before and at the time of effecting the policy, &c., a certain implement, other than a common fire-place, and in and by which implement heat was produced, to wit, a furnace, had been introduced into, and fixed upon, the premises wherein the said loss and damage happened, for the purpose of being used therein, and at the time of the plaintiff's proposing to effect the insurance, and from thence, &c., was used therein, with the privity and by the sufferance of the plaintiff: that this was a circumstance material to be made known to the company, in order to enable them to judge of the risk they were required by the proposed policy

(a) As to this word forthwith see *Grace v. Clinch*, 4 Q. B. 606, 610.

to undertake; nevertheless, the plaintiffs did not communicate the fact to the company, and the policy was effected without any knowledge by the defendants or the company of the fact; whereby the policy became void. Verification.

Sixthly (to the same), that before and at the time of the making of the policy and effecting of the insurance the plaintiffs carried on upon the premises, wherein, &c., the business of paper makers, and used the said premises as and for a paper manufactory, whereof the plaintiffs, at the time of the effecting the said insurance, gave notice to the company; and that afterwards and before the happening of the said loss or damage, to wit, on the 1st of April 1841, the plaintiffs discontinued, and thence until the happening of the said loss or damage did discontinue, to carry on the said business upon the said premises, or to use the same as or for such manufactory as aforesaid. That thereupon one Henry Butler, by the sufferance and permission of the plaintiffs, after the making of the insurance, and before the happening, &c., to wit, on, &c., and from thence until and at the time of the happening, &c., carried on, in and upon the premises and near to the insured property, a certain hazardous trade not carried on therein or thereon at the time of the effecting of the insurance, to wit, the trade of a cleaner and dyer of cotton-waste, for the purpose of making cotton-wadding; whereby the risk of the insured property becoming damaged by fire, after [8] the effecting of the said insurance, and before the happening, &c., became greatly increased; that the carrying on of the said hazardous trade in and upon the premises, during all the time aforesaid was a circumstance material to be made known to the company, in order to enable them to judge of the risk they had so undertaken, as in the first count mentioned; but that, as well the plaintiffs as the said Henry Butler, at all times until the happening, &c., omitted to communicate the same to the company, nor had the company or the defendants, at any time before the happening, &c., any notice or knowledge that the said hazardous trade was so carried on in and upon the premises, or that the risk was so increased as aforesaid. And further, that, by means of the premises in this plea mentioned, the policy and insurance became void. Verification.

Seventhly (to the same), that after the making of the policy, &c., and before the happening, &c., to wit, on, &c., and on divers other days, &c., divers, to wit, ten tons of cotton-waste (being respectively hazardous articles within the intent and meaning of the said conditions) were deposited, with the knowledge and consent of the plaintiffs, in and upon the premises wherein the said loss or damage happened, and remained and were so deposited, therein, at the time of the happening, &c. That the depositing of the said hazardous articles as aforesaid, greatly increased the risk of the insured property being damaged by fire, and was, during all the time aforesaid, a circumstance material to be made known to the company, in order to enable them to judge of the risk they had undertaken. Nevertheless the plaintiffs did not, at any time, communicate the said circumstance to the company, nor had the company any notice thereof until the happening, &c.; and the said cotton-waste remained from thence continually, until the happening, &c., upon the said buildings, with [9] the knowledge and consent of the plaintiffs, but without the knowledge or consent of the company; whereby and by means of which, &c., the risk undertaken by the company was, during all the time aforesaid, increased. Verification.

Replication to the fifth, sixth, and seventh pleas, *de injuriâ*; whereupon issue was joined.

At the trial, before Tindal C. J., at the sittings for London after last Hilary term, the following facts appeared:—

The plaintiff Pim, in November 1840, carried on the business of a paper-maker upon the premises in question, and on the 12th of that month, together with the other plaintiff, Rogers, the mortgage of the premises, effected an insurance thereon with the Imperial Insurance Company, subject to the conditions set forth in the declaration. About four months after the making of the policy, Pim, being in difficulties, ceased to carry on the trade of a paper-maker upon the premises. Soon afterwards Henry Butler, Pim's brother-in-law, came upon the premises with his family,—it did not appear under what circumstances,—and brought a large quantity of cotton-waste, which was cleaned and dyed there. At the time of the fire, some of the cotton-waste was in the mill; and several witnesses proved that it is a material liable to spontaneous ignition; and it appeared that insurance offices generally decline to insure premises where it is kept or used. There was however no evidence to shew how the fire originated. The fact of the cotton-waste being cleaned and dyed upon

the premises had not been communicated to the company. It was also proved that cotton-waste is used, in large quantities, in the manufacture of certain sorts of paper.

Upon this evidence it was objected by Sir T. Wilde and Manning Serjts. and F. Robinson, for the defendants, that the plaintiffs had failed to establish the affirmative of the issue taken by the second plea. That the allegation in the declaration traversed by the second plea was that the plaintiffs were interested in the property, which in law amounted to an allegation of a joint interest (a); whereas the interest of the plaintiff Pim, was that of a mortgagor, and the interest of Rogers was that of a mortgagee. It was answered by Sir W. Follett for the plaintiffs, that the insurance having been effected by both Pim and Rogers, they were properly made co-plaintiffs as co-promisees, and that any interest was sufficient to satisfy the statute. The Lord Chief Justice upon the objection being taken, was disposed to nonsuit the plaintiffs, but after hearing Sir W. Follett, his lordship held that the description of the interest was sufficient; whereupon a bill of exception was tendered on behalf of the defendants.

In order to support the affirmative of the third and fourth issues, the plaintiffs gave evidence of a notice of loss, and shewed that afterwards a correspondence took place between the insurance office and the plaintiffs, which, it was contended, amounted to a dispensation with the obligation to deliver a particular account of the loss.

It was objected for the defendants, that even supposing the correspondence to amount to a waiver of the condition, which, it was contended, it did not, still the defendants were entitled to a verdict upon the fourth issue, which was formally taken upon the precise allegation of a delivery of a particular account of the loss, as required by the conditions, as alleged in the declaration, and as traversed by the fourth plea. The learned judge overruled the objection.

Upon the sixth and seventh pleas, his lordship told the jury that the questions for their consideration were—first, whether Butler came upon the premises, and [11] carried on the alleged hazardous trade there, by the sufferance and permission of the plaintiffs; and, secondly, whether the trade carried on by him was, in fact, of a more hazardous description than that which was carried on by the plaintiffs upon the premises, at the time the policy was effected.

The jury returned a verdict for the plaintiffs upon the first five issues, and for the defendants upon the sixth and seventh.

Channell Serjt., on behalf of the plaintiffs in Easter term (24th April), obtained a rule nisi for a new trial (upon the ground that the verdict was against evidence), or for judgment non obstante veredicto on the sixth and seventh issues, or for a venire de novo. In support of the second branch of his rule he contended, that the condition in the policy did not require notice of any alteration in the risk subsequent to the time when the policy was effected, and during the current year over which it extended. He cited *Shaw v. Robberds* (6 A. & E. 75, 1 N. & P. 279).

Manning Serjt. (with whom was F. Robinson) now shewed cause. It may be assumed, upon the evidence, that the plaintiff Pim, even if he did not exercise a control over the business carried on by Butler upon the premises, at least knew of, and assented to, its being carried on there. It is not necessary that there should have been any specific assent to that effect; it would be sufficient if Pim knew, or had the means of knowing, that the business was carried on, and did not prevent it. In 1 Roll. Abr. tit. Action on case (B.) (translated in 1 Vin. Abr. tit. Actions (B.) for fire), there are several cases collected shewing to what extent a party was liable to his neighbour at common law, [12] before the stats. 6 Ann. c. 31, and 14 G. 3, c. 78, for an injury by fire; and they establish that if the fire was occasioned by the act of a party who was upon the premises with the assent or knowledge of the owner, the owner was liable. [Cresswell J. But if that party was a tenant?] No demise to Butler was shewn in this case; and if there were one, it was a fact within the knowledge of the plaintiffs and not of the defendants. If a party demise without any restriction as to carrying on a noxious or dangerous trade, and the tenant do carry on such a trade, the landlord is liable. In *The King v. Pedley* (1 A. & E. 822, 3 N. & M. 627), it was held, that if the owner of land let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occurs for want of such care on the part of the tenant, the owner is liable to an indictment for such nuisance.

(a) And see *Edwards v. The Bishop of Exeter*, 5 N. C. 660.

[Tindal C. J. In that case it would appear that the buildings complained of had been erected by the owner himself (b).]

But supposing Butler was not the tenant of Pim, and that he came on the premises as his guest or merely by his sufferance, the rule laid down in *Rolle* clearly applies. If then the risk was changed, with the knowledge of the insured, the policy was vitiated under the last clause of the first condition, which provides that "if any person insure his buildings, and shall cause [13] the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force;" which must mean that it shall be void ab initio. [Maule J. Your construction would amount to this: that if a policy were effected for a year, and the risk remained unchanged for eleven months, and the goods were then damaged by fire, and afterwards a trade were carried on upon the premises, without notice to the insurance company before the expiration of the year, the policy would be avoided, and the insured could not recover for the previous damage.] That might or might not be. In such a case the right of action would have vested; and it may be that the policy would not be avoided retrospectively; but it is sufficient to say that the case supposed is not this case. [Maule J. The pleas do not allege that a reasonable time for communicating the alteration in the risk had elapsed before the loss, and that no notice was given.] It would have been more technical to have inserted such an allegation—but it is mere matter of form. [Maule J. It seems to me more like substance. It is not inconsistent with the pleas that the plaintiffs had taken all diligent means to communicate the alteration in the risk, but that the loss occurred before they could do so.] Here, the words "omit to communicate" in the declaration and the pleas, after pleading over and verdict, must be taken in the same sense. [Maule J. To omit to do something, has reference to something that a party could do; how is it shewn here that the thing could be done? The condition in the policy is not that the insured shall communicate the alteration in the risk before loss. But the defendants take a particular event, which is not [14] mentioned in the condition, and say that the plaintiffs did not communicate before then. The allegation in the pleas is not even a general allegation of omission to communicate.] The term "omission" means something more than the mere not doing an act. It means the not doing something which the party ought to have done, and had the power of doing. [Maule J. It seems to me that the allegation in the pleas is the same as if the defendants had said, that the plaintiffs did not communicate before the loss; and they might as well have said that they did not communicate before their birthday, or the fire at the Royal Exchange.] The reference to the loss is merely for the purpose of shewing that it happened after the alteration in the risk, and the omission to communicate it. [Tindal C. J. Suppose the assured had given notice to the company: how would it have benefited them? They would not have set people to watch the premises.] It might have had this effect; that the extra-risk having been incurred, the office might have refused to renew the policy at the lower rate of premium; or the extra-risk may be considered as resembling a deviation in the case of a sea-policy, in which case even notice would not have availed the plaintiffs.

At any rate the defendants will be entitled to a new trial upon the fourth issue. [Channell Serjt. That application cannot be entertained now; *Deacon v. Stodhart* (ante, vol. ii. p. 317, 2 Scott, N. R. 557); it should have been made as a cross motion within the proper time, or the point should have been mentioned when the present rule was obtained. The application now would be in effect a cross-rule.] *Deacon v.*

(b) This would be so according to the marginal note of that case in 1 A. & E. 822; which runs thus: "If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term."

From this note, what is above suggested by the Lord Chief Justice would appear to be a necessary inference; but, from the case itself, as stated in both reports, it will be seen that the nuisance complained of (common necessary-houses) had been constructed and used by the tenants of the premises before the time at which the defendant became interested in the property by purchasing the reversion.

Stodhart was decided upon the rule of H. 2 W. 4, reg. I. s. 65, the terms of which were not adverted to, and which was supposed, in that case, to apply to motions for new trials. But the rule speaks expressly of the less or-[15]dinary case of motions in arrest of judgment, and for judgment non obstante veredicto, studiously excluding motions for new trials (a). The reason why a motion for a new trial must be made within the first four days of term is, that the successful party may not be delayed beyond the time at which he is entitled to sign judgment, except when the court has reason to doubt the propriety of the verdict. That reason does not apply, when from some cause, the party is otherwise prevented from signing judgment. Here, however, the plaintiffs having obtained a rule in which, as one of the alternatives, they pray for a new trial, the defendants are at liberty to urge any topic shewing which of the several alternatives, embraced by the motion, the court ought, under all the circumstances of the case, to adopt. The defendants are therefore entitled, under the present rule, to shew that there ought to be a new trial, as well on the ground of misdirection, as because the finding upon the fourth issue is directly contrary to the evidence; and, if not, the court will grant them a rule to shew cause why a new trial should not be had on these grounds. [Cresswell J. You have been shewing cause against my brother [16] Channell's rule; and are not called on to move now. A new trial is what the other side have moved for.]

Channell Serjt. (with whom were Byles Serjt. and E. James), in support of the rule. The sixth and seventh pleas do not set up any defence, arising either from the ordinary law of insurance, or from the terms of the particular policy. Fraud or misrepresentation, or the suppression of any fact existing at the time of the contract being entered into, are defences of the first class; but none such are set up in this case. The defendants, therefore, must depend upon the express terms of the policy. And they are bound to bring the case clearly within the condition which they allege has been broken. As observed by Tindal C. J. in the case of *Borradaile v. Hunter* (ante, p. 689, 5 Scott, N. R. 418), two classes of conditions are usually inserted in policies of insurance: the first, pointing to the time of the contract; the second, to things which may occur at a time subsequent. Policies that contain the latter class of conditions usually require an indorsement to be made upon the policy. In the first condition of the present policy it is expressly stipulated, that if any steam-engine, stove, &c. be "subsequently introduced, due notice must be given to the company, and the same allowed by them, otherwise the policy will be void." There are several other conditions in the policy, whereby notice, and indorsement, of things done subsequently are required. In these cases the policy would be for a year, defeasible by a breach of the condition. But the condition under discussion is not of this nature. The only words that raise any doubt are these: "or shall misrepresent, or omit to communicate any circumstance which is material to be made known to the company, in order to enable them [17] to judge of the risk they have undertaken, or are required to undertake;" but looking at the whole condition, it clearly refers to time present. "Misrepresentation" must necessarily do so; and the term, "omit to communicate," which merely points to a suppression of facts, as contradistinguished from misrepresentation, cannot be referred to a different period. Where there is a clear allusion to time subsequent,—as in the instance of the introduction of steam-engines, &c.,—a notice to the company, and an allowance by them, are required; but neither is mentioned in this instance. [Coltman J. According to your construction,

(a) There is a general heading of "New trial—Motion in arrest of judgment:" but the sixty-fourth section relates to the former, the sixty-fifth to the latter. The sixty-fourth merely regulates the practice as to the allowance of the costs of the first trial in cases of motions for a new trial. It was reasonable to limit strictly the period for application for rules in arrest of judgment, or for judgment non obstante veredicto, because the same matters would be open to the parties upon a writ of error, and might, and ought to have been made the subject of a demurrer to the declaration or to the plea; but the party who is aggrieved by a misdirection, and has omitted to tender a bill of exceptions, has no remedy but by a motion for a new trial.

In framing the above rule of H. 2 W. 4, it seems to have been considered that it would be unreasonable to tie up the hands of the court from granting relief against that which might otherwise,—and not the less so by reason of the abolition of the writ of attain, (post, 26)—become an irreparable injustice.

the assured would not be bound to give notice of such an alteration of risk at the renewal of the policy.] Certainly not, till then. Probably they might be required to do so then, as a renewal would be tantamount to a new contract. The argument on the other side must go this length, that if a dangerous trade were carried on upon the premises for one day or one hour, and the fact was not communicated to the company, the policy would be avoided, although no fire had occurred. In *Shaw v. Robberds* (6 A. & E. 75, 1 N. & P. 279), the plaintiff insured premises against fire, by the description of a granary, &c., and "a kiln for drying corn, in use," communicating therewith. By the conditions of insurance, the policy was to be forfeited unless the buildings were accurately described, and the trades carried on therein specified; and if any alteration were made in the building, or the risk of fire increased, the alteration, &c. was to be notified and allowed by indorsement on the policy, otherwise the insurance to be void. The plaintiff carried on no trade in the kiln except that of drying corn; but, on one occasion, he allowed the owner of some bark, which had been wetted, to dry it gratuitously in the kiln; and this occasioned a fire, by which the premises were destroyed on the third day after the drying of the bark commenced. Drying bark is a distinct trade from drying corn, and more hazardous, and insurers charge a higher premium for bark-kilns than corn-kilns; and it was held that the assured was not precluded from recovering, either on the ground of an alteration of risk, or (in the absence of fraud) because the fire had arisen from his negligence. There, the fire took place in consequence of the very act complained of; which was not proved to be the case in the present instance. In that case two conditions were under consideration; the third, which related to the nature of the building and the trade carried on therein at the time the policy was effected; and the sixth, which referred to alterations or additions made afterwards; and the court adopted the distinction between conditions as to time present, and conditions as to time subsequent (a). A policy is often [19] made out in point of fact after the premium has been paid, and that may account for the introduction of the words, "the risk they have undertaken." The contract is executory in the first instance, and is completed when the policy is drawn up. The conditions contemplate a tender in writing. The words "have undertaken" refer to the policy executed; and the words, "or are required to undertake," to the executory nature of the contract before the policy is effected. It is consistent with the statement in these pleas, that after the change in the trade some one was sent to give notice thereof to the company, and that the fire happened before he arrived at the office. Each allegation in the plea is hampered by the terms of the allegation as to the point of time. It has been said that the increase of risk was like a deviation in a sea-policy; but, in such a case, the insurance is upon a particular ship for a particular voyage; it is like an insurance upon goods in a particular house; in which case the insurance is upon the goods, and not upon the house, although the policy is at an end if the goods are removed. [Maule J. The argument on the other side is, that any increase of risk would vitiate the policy.] According to the condition and the terms of these pleas, it must be such an increase of risk as was material to be made known to the company.

(a) It may be observed that the judgment in that case proceeds upon the ground that there had been no misdescription of the premises, within the third condition of the policy, and no alteration in the business, by the fact of the gratuitous drying the bark, within the sixth. But the latter condition does not mention an alteration in the business. It speaks of an alteration in the building (which there clearly had not been) and it also provides that if "the risk of fire to which such building is confined be by any means increased, notice shall be given." The jury found that drying bark was more dangerous than drying corn; and the result clearly shewed that the risk of fire had been increased. It was, however, increased by that which, although injurious to the insurers, yet, being temporary, would not be capable of becoming the subject of "allowance by indorsement," unless such allowance was contended to be retrospective as well as prospective. The case was probably considered to be one of hardship on the plaintiff, who had permitted the owner of the wetted bark to use his premises for drying it. If, however, neither the permission nor the result could affect the policy, the propriety of the course taken by the plaintiff in increasing the chances of destruction by fire, without the knowledge of those by whom the additional risk was to be borne, would appear to be questionable.

(He was then proceeding to argue upon the effect of the evidence when he was stopped by the court.)

TINDAL C. J. It appears to me that the plaintiffs are entitled to judgment, notwithstanding the verdict upon the issues raised by the sixth and seventh pleas. (His lordship read the pleas in question.) I am of opinion that, on general principles, a policy of insurance is not avoided by an alteration in the trade carried on upon the premises. *Shaw v. Robberds* is an authority [20] upon that point (a). Then, the question is whether the present policy is avoided by the terms of the condition under consideration. We are to put a fair and reasonable construction upon that condition; and it would be neither a fair nor reasonable construction that the policy should be avoided under the circumstances stated in these pleas. The party insured is "to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken;" but how can an alteration in the business after the policy has been effected be material to be made known to the company, to enable them to judge of the risk they have undertaken? This condition seems to refer to a state of circumstances anterior to the policy. There is a material distinction between matters to vitiate the policy, arising subsequently to the execution thereof, and such matters existing at the time the policy is effected. The statement in the first condition in this policy, that "in the insurance of premises which contain any steam-engine, &c. or other implement in or by which heat is produced (common fire-places excepted), the construction and circumstances of the same must be particularly described at the time of effecting the insurance;" is followed by these words: "or, if subsequently introduced, due notice must be given to the company, and the same allowed by them, otherwise the policy will be void." There is therefore a specific declaration that if the mode by which heat is produced is subsequently altered, the policy is to be void, unless notice thereof has been given to the company. Then [21] comes the clause upon which the present question arises: "In the insurance of goods, &c. the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on or any hazardous articles deposited therein; and if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent, or omit to communicate, any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force." Now it would be obvious that the whole of this clause would be applicable to the state of circumstances before the policy was executed, but for the words "in order to enable them to judge of the risk they have undertaken or are required to undertake." But I think the explanation of the words given by my brother Channell is the correct one; and that they refer, in the first place, to the case of a policy that has been effected, and in the second to a tender before the policy has been effected; and that the condition does not contemplate any change after the execution of the policy.

Upon these grounds, I am of opinion that the defendant is entitled to judgment upon the sixth and seventh issues, non obstante veredicto. It is therefore unnecessary to consider the allegation of notice.

COLTMAN J. I am of the same opinion. Independently of the conditions, there is nothing contained in the policy from which we can say that it would be vacated by a mere change of business. It is effected upon a paper-machine and other property therein described; and the circumstance of cotton-waste [22] having been lodged on the premises, and the danger of fire having been thereby increased, must be provided against by a specific condition; otherwise, upon the authority of *Shaw v. Robberds*, the policy would not be avoided. As regards the present case no answer has been given to the observation of my brother Maule, that, at any rate, the policy would not be avoided, unless a reasonable time had elapsed for the communication to be made by the assured to the company, and that the pleas do not allege that such reasonable time

(a) In *Shaw v. Robberds* the court of Queen's Bench held that there had been no alteration in the trade carried on upon the premises, although it is true that the question, whether there had been such an alteration or not, was immaterial in that case, the conditions being silent as to such alterations, and referring to no alterations except alterations in the building. (Vide supra, p. 18 (a).)

had elapsed. It has been argued that after verdict the allegation in the pleas,—that the plaintiffs omitted to communicate the loss to the company—must be taken to mean that the plaintiffs omitted to do what they had an opportunity of doing; but the allegation is, that they omitted to make the communication before the loss happened, which may have occurred five minutes after the alteration took place. I am of opinion, for these reasons, that the pleas are bad in substance.

MAULE J. I also am of opinion that the sixth and seventh pleas are bad. It has been endeavoured to support them: first, upon the general principles of the law of insurance; and, secondly, upon the special conditions of this policy. As to the first point it has been argued that, independently of the express provisions of the policy, if hazardous articles or a hazardous trade were introduced upon the premises with the knowledge or assent of the assured, after the policy was effected, it would be thereby avoided. But I conceive the law to be otherwise; and that, in the absence of fraud, such an alteration would not vitiate the policy; and that the insurers must pay for any loss, notwithstanding such alteration, unless by some condition in the policy they have provided against it. Upon general principles, therefore, I think the present policy has not been [23] avoided; and this disposes, in my opinion, of the pleas under consideration, as far as they are contended to be good, independently of the conditions in the policy.

But it is argued, in the second place, that the pleas bring the case within the first condition of this policy; which, it is contended, requires that if any change has taken place in the risk after the policy has been effected, such change shall be communicated to the company. This question depends upon the words of the condition itself, and also upon those of the pleas. Now in the pleas the defendants have selected the time down to which they say the plaintiffs were required to give notice of the alteration of the risk; namely, down to the time of the loss. But it appears to me that this has no connection with the matter in hand; and that they might as well have said that the plaintiffs were to communicate the alteration within ten minutes next ensuing, or before the Sunday next following. Independently of this, however, I agree with my lord as to the construction of the first condition in this policy. It states, first, what shall be enumerated in the proposal to insure; and mentions that manufactories containing furnaces, stoves, &c. are chargeable at additional rates. It then provides for the subsequent introduction of steam-engines, stoves, &c. In the proposals to be delivered in as to the insurance both of buildings and goods, the description of the trade carried on, is required to be stated; which clearly refers to the time when the proposals are made. Then comes the provision that if the party shall misdescribe the buildings or goods, or shall misrepresent, or omit to communicate, any circumstance to the company, the insurance is to be void. The whole argument on the part of the defendants may be said to rest upon the words in the latter part of this provision—"to enable them to judge of the risk they have undertaken;" and it is said that this points to something to take place after the policy has been ef-[24]-fected. But that which is to be done after the policy has been effected is, not a representation by the insured, but a judging of the risk by the insurer. I think full effect will be given to the condition by reading it in this way;—"In the particulars delivered in, the party desirous of making an insurance, shall rightly describe the building and goods to be insured, and shall not misrepresent, or omit to communicate, any circumstance material to be made known to the company, in order to enable them to judge, before they execute the policy, of the risk they will incur after they have executed it." I think, therefore, that these pleas could not be made good, inasmuch as no defence is given by these conditions which the defendants did not possess under the general law of insurance.

CRESSWELL J. I quite agree with the rest of the court. Supposing that an alteration of the circumstances under which the business had been previously carried on upon the premises had been made without fraud, I think that the policy would not have been vitiated by the conditions; and certainly would not have been by the general law of insurance. As to the condition in question, to adopt the language of the judgment of the court in *Shaw v. Robberds*, I think that "it points to the description of the premises given at the time of insuring; and that description was, in this instance, perfectly correct. Nothing which occurred afterwards, not even a change of business, could bring the case within that condition, which was fully performed when the condition first attached." Indeed, it seems to be agreed that the present condition would

have no bearing upon the question as to the change of risk, but for the words "they have undertaken." I think it clear, however, that these words do not apply to any thing to take place during the current year. The policy is to be valid from the 8th of October 1840, and so long [25] as the assured shall duly pay or cause to be paid the premium to the company, and the acting directors of the company for the time being shall agree to accept the same. No fresh proposal appears, therefore, to be expressly required on either side at the end of the first year; but it may then be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance. I do not, however, disagree with the view taken by the rest of the court of the words in the condition; and I quite concur in the technical view taken of the pleas.

Rule absolute.

Manning Serjt. then moved for a new trial on the third issue, and submitted that the motion was in time. [Cresswell J. Can you have a new trial after judgment?] The judgment remains ambulatory during the term. Judgment has been arrested formerly even after execution issued (a)¹. As yet there is no judgment of the court, though the judges have pronounced an opinion. [Tindal C. J. Why did you not make a cross motion, or state at the time the plaintiffs obtained their rule nisi, that you meant to take advantage of the objections?] The defendants were not bound to know any thing about that motion till they were served with the rule. By the issue taken on the replication, the plaintiffs admitted that his action was barred by the pleas, if the facts stated in those pleas were true. [Maule J. You were bound to know that you had got a verdict on bad pleas. Cresswell J. The defendants had no right to speculate upon the success of one motion before they made another.]

[26] The learned serjeant therefore took nothing.

Channell Serjeant, on a subsequent day (13th June), moved for a writ of inquiry to assess the damages for the plaintiffs. Undoubtedly in *Clement v. Lewis* (3 Bro. & Bingh. 297, 7 J. B. Moore, 200), where the jury had found for the defendant on six out of eight pleas comprehended in the last of two issues, and for the plaintiff on the residue of those pleas and on the first issue, without assessing damages, and the plaintiff had, pursuant to the decision of the court below, entered up judgment non obstante veredicto as to the pleas found for the defendant, with an award of a writ of inquiry, and final judgment for the damages found by the inquisition, &c., a court of error reversed the judgment of the court below, as to the award of the writ of inquiry and the final judgment thereon, and remitted the record to the court below, directing that court to award a venire de novo to try the first issue and the last, as far as related to the pleas found for the plaintiff; holding, that the verdict found for the plaintiff on both issues, was void, because no damages had been assessed. *Clement v. Lewis* however appears to have been decided upon the old rule,—that in all cases, when any point was omitted whereof attaint lay, the omission should not be supplied by a writ of inquiry of damages, but by a writ of venire de novo. As the writ of attaint is now abolished, by the 6 G. 4, c. 50, s. 60, that rule no longer applies. He also referred to *Eichorn v. Lemaitre* (2 Wils. 367).

A rule nisi having been granted,

Wilde and Manning Serjts. two days afterwards, shewed cause. They contended that if the plaintiffs conceived that they were entitled to a writ of inquiry [27] they ought to issue it at their own discretion; and they submitted that, as the motion was a speculative one, the rule should be discharged with costs.

Channell Serjt. was heard in support of the rule.

Per curiam. The plaintiffs must take upon themselves the risk of issuing the writ of inquiry.

Rule discharged with costs (a)².

(a)¹ In *Wood v. Gunston*, Style, 466, the judgment upon the first verdict was ordered to stand as a security for what might be recovered on the second.

(a)² The writ of error upon the bill of exceptions (ante, p. 10), and upon the judgment for the plaintiffs non obstante veredicto, was not proceeded with, the action being settled, by payment of the amount of the loss without costs.

JAMES BOYNE M'COMBIE v. GEORGE ANTON. May 27, 1843.

The plaintiff obtained a judge's order for a commission to examine witnesses. The parties having agreed upon A. and B. as commissioners, the plaintiff obtained another order to examine witnesses upon interrogatories before A. and B., without describing them as commissioners, and without referring to any commission. The defendant afterwards withdrew the name of B., his commissioner, and declined to proceed with the examination, upon the ground that the second order was informal. The plaintiff then obtained a further order to examine witnesses before A. on interrogatories, *ex parte*:—Held, that the examinations taken under the last order, were admissible in evidence, although the defendant had received no notice of the time and place of taking the examinations.

Assumpsit. The declaration, after reciting that the banking company of Aberdeen had consented to open an account with William Anton to the extent of 1000*l.*, upon a bond of credit to be signed by W. Anton, and the defendant and three others, stated that, in consideration that the plaintiff "would sign the said Scotch instrument in writing, called in Scotland aforesaid a bond of credit, along with G. A., G. D., M. W. A., and J. E. A., to the said banking company, for a cash account to be kept with the said bank, in the name of the said William Anton, and to be opened in the branch [28] office of the said bank in Banff aforesaid, to the extent of 1000*l.* sterling, the defendant promised the plaintiff to indemnify and hold him harmless of and from his responsibility under the said bond, to the extent of 250*l.*

Plea: non assumpsit.

At the trial before Maule J. at the first sittings for Westminster in last Easter term, a point was raised as to the admissibility of the examination of certain witnesses taken under a commission.

It appeared in evidence that on the 10th of January, Cresswell J. made an order, in the following terms:—

"*M'Combie v. Anton*.—Upon hearing the attorneys, &c. &c. I do order that a commission or judge's order issue in this cause, directed to certain commissioners in Scotland to examine certain witnesses in this cause, necessary and material on the part of the plaintiff, and that the costs of the same be paid by the defendant."

On the 12th of January, the plaintiff's attorney served a notice on the defendant's attorney, proposing the commission, naming one William Watson, as the commissioner on the part of the plaintiff, and requiring a commissioner to be named on the part of the defendant, and stating that the plaintiff would otherwise apply for an *ex parte* commission.

On the 17th of January, the plaintiff's attorney received a notice from the defendant's attorney, naming one Alexander Stronach, as the commissioner on the part of the defendant.

An order was afterwards (a) made by Cresswell J. in the following terms:—

M'Combie v. Anton.—Upon hearing the attorneys, &c. &c. I do order that the plaintiff shall be at liberty to examine, upon oath or affirmation, upon interrogatories, certain witnesses at Aberdeen, in Scotland, respecting [29] certain documents specified in a notice served by the plaintiff's attorney on the defendant's attorney, dated, the 16th of December 1842, and other matters in this cause, before William Watson, sheriff's substitute in Aberdeen, on the part of the plaintiff, and Alexander Stronach, advocate at Aberdeen, on the part of the defendant; and that the plaintiff's attorney shall deliver to the defendant's attorney, a copy of the proposed interrogatories in chief, who shall, within five days from the receipt thereof, return the same with a copy of the proposed cross-interrogatories, to the plaintiff's attorney, who shall transmit them forthwith with this order to the commissioners above named, who shall on the receipt thereof, immediately proceed to such examination and cross-examination of such witnesses as shall be produced before them, and reduce such examination and cross-examination into writing: and I further order, that the said interrogatories and the depositions taken thereon, together with this order, may be transmitted under the

(a) This order was dated the 10th of January; but it was obviously drawn up after the above communications between the attorneys for the respective parties had been made.

seals of the said commissioners, who have taken the same, to my chambers, Rolls Garden, Serjeants' Inn, London, without delay: and I further order that office-copies of the same be given and received in evidence on the trial of this cause, saving all just exceptions.

On the 28th of January, copies of the last above-mentioned order, and of the interrogatories, were delivered by the plaintiff's attorney to the defendant's attorney.

On the 1st of February, the copies of the last-mentioned order and interrogatories were returned by the defendant's attorney, upon the ground that the order was irregular; and notice was given to the plaintiff's attorney that the defendant's commissioner, Alexander Stronach, was withdrawn, and that the defendant would have nothing to do with the commission.

On the 3d of February, the plaintiff's attorney gave notice to the defendant's attorney, that he should apply for an order for a commission *ex parte*.

[30] On the 6th of February, Cresswell J. made the following order:—

"*M'Combie v. Anton*.—Upon hearing, &c. &c. I do order that the plaintiff shall be at liberty to examine upon oath or affirmation upon interrogatories *ex parte*, certain witnesses at Aberdeen in Scotland, respecting certain documents specified in a notice served by the plaintiff's attorney on the defendant's attorney, dated the 16th day of December 1842, and other matters in this cause, before William Watson, sheriff's substitute in Aberdeen, on the part of the plaintiff (the defendant having refused to join in the examination). And I further order that, on the receipt hereof, and of the said interrogatories, the said William Watson do proceed to examine such witness or witnesses as shall be produced before him, and reduce such examination into writing, and transmit the interrogatories and depositions taken thereon under the hand and seal of the said William Watson, to my chambers, &c. without delay, and that office copies of the same may be read, &c."

It was objected, on the part of the defendant, that the examinations could not be received, as they had been taken *ex parte*, and the defendant had received no notice of the time and place of holding the examinations; and *Steinkeller v. Newton* (a) was cited.

(a) 1 Scott, N. R. 148; 8 Dowl. P. C. 579, Easter term, 1840. May 7. This was an action upon a contract to deliver a quantity of spelter, in which issue was joined in November 1837. The defendant on the 2d December obtained a judge's order in the following terms:—"I order that this cause be made a remanet to the sittings after next Hilary term, the defendant depositing in the hand of the prothonotary certain wine-warrants, to abide the event of the cause. And I further order that a commission issue for the examination, on interrogatories, of witnesses on behalf of the defendant residing at Hamburg and elsewhere, the defendant paying the costs (if any) occasioned by such postponement." Notice was given to the plaintiff that the order had been obtained, but he declined to share the expense of the commission. Whereupon the defendant's attorney, on the 24th May 1838, without further notice, and without sending a copy of the interrogatories to the opposite party, issued the commission, returnable in November following, and proceeded to examine the witnesses.

At the trial before Tindal C. J., at the sittings for London after Michaelmas Term 1838, it was objected on the part of the plaintiff, that the examinations, taken under this commission, were inadmissible, as the commission was *ex parte*. They were, however, received by the lord chief justice; and the plaintiff recovered a verdict.

Bompas Serjt. obtained a rule nisi for a new trial, upon the ground that the examinations had been improperly received.

Kelly and Martin in Easter term 1740 (7th May) shewed cause. They contended that, by the practice of the courts, each party was required to pay the costs of a commission in the first instance, though ultimately the unsuccessful party paid the whole; and that if the opposite party refused to pay his share of the expense, the party who obtained the commission proceeded to examine the witnesses without further notice. [Tindal C. J. That seems to be a very unfair practice. If a party examines his own witnesses he ought to pay his share of the expense, but not if he only cross-examines the witness of the other party. It is generally provided, by the form of the order, that the opposite party shall have the liberty to cross-examine the witnesses for the party who has obtained the commission; but it is not so in this order. (His lordship

[31] The learned judge admitted the examinations ; and a verdict was returned for the plaintiff.

Murphy Serjt., in last Easter term, obtained a rule nisi for a new trial, upon the ground that the examina-[32]-tions had been improperly received, or to arrest the judgment. The learned serjeant produced an affidavit which stated the orders above set out, and some portion of the communications between the respective attorneys ; and also that the defendant did not, nor did any one on his behalf, ever receive a copy of the said commission, or any information as to the contents thereof, before the day of the trial ; that no notice of the names of the witnesses to be examined under the commission, or of any day or place appointed for their examination, had ever been given to the defendant, and the defendant had had no opportunity afforded him of attending the execution of the commission, so as to ascertain that the same was duly and properly executed, or of cross-examining the witnesses thereunder ; that witnesses were examined under the commission, not mentioned in the affidavit on which the order was obtained ; that the commission did not provide for the cross-examination of any witnesses by the defendant, and that, although the defendant, by reason of the supposed irregularity of the order, refused [33] to join in the commission, it was not intended thereby to refuse to join in the examination under any commission properly issued ; and the witnesses would have been cross-examined on the part of the defendant, if notice had been given that a commission had issued. [Erskine J. If the commission authorised you to attend, you might do so, although it was not mentioned in the judge's order for issuing the commission.]

The ground upon which the defendant submits that he is entitled to a rule nisi for arresting the judgment is this—that no sufficient consideration appears upon the face of the instrument declared on. The declaration states that, in consideration the defendant would sign the said bond of credit to the said banking company for a cash account to be kept with the said bank by W. A., the defendant promised the plaintiff to indemnify him from his responsibility under the bond. [Cresswell J. The undertaking is, to indemnify against a future bond, not against a present agreement to execute the bond. When the bond is given the consideration arises, and the defendant's promise to indemnify attaches.]

A rule nisi for a new trial having been granted,

Bompas Serjt. (with whom was Hugh Hill) now shewed cause. The first order of the learned judge was perfectly regular under the 1 W. 4, c. 22, s. 4 (a) ; and [34]

referred to Lush's Prac. p. 450, and *Bridges v. Fisher*, 1 N. C. 510.) Bosanquet J. A good deal may be gathered from the form of the order usually made at chambers, which directs, that a copy of the interrogatories shall be delivered to the opposite side. Tindal C. J. There is at any rate this irregularity in the case. The order is, that the cause shall be made a remanet till the sittings after Hilary term ; and the defendant, in the May following, issues the commission without any fresh order or authority. The order must surely mean that the commission is to issue in the meantime.] The order was quite general in its terms as to issuing the commission.

Bompas Serjt., in support of the rule, cited *Doe d. Thorn v. Phillips*, 1 Dowl. P. C. 56 ; and 1 Will. 4, c. 22, s. 4, and contended that there had been mala fides on the part of the defendant.

Tindal C. J. It appears to me that the commission in this case was obtained by an irregularity committed by the defendant's attorney. The intention of the judge's order is clear, that the cause shall be tried at the sittings after Hilary term ; and it was an implied condition that the commission should issue in the meantime. But this commission is not issued until May. It is not necessary to go any further than to say that the commission issued irregularly, without entering into the question of mala fides. I think the rule must be made absolute ; the costs to be costs in the cause, and the defendant to be at liberty to apply for a new commission.

Bosanquet J. I am of the same opinion. The commission issued without the authority, although under the seal, of the court. The order itself, I may observe, omits to specify several of the circumstances which the statute requires.

Coltman and Erskine JJ. concurred.

Rule absolute, accordingly.

(a) Which authorises the courts at Westminster, Lancaster, and Durham, and the

if there was any irregularity in the other orders, it was waived by the subsequent conduct of the defendant in nominating a commissioner, though he afterwards withdrew his name, and refused to have any thing to do with the commission. The commission itself is in the correct form, according to Tidd's Pract. Forma, p. 292, Chitt. Forms, 139. *Steinkeller v. Newton* is not quite accurately reported; but it has no application to the present case.

Murphy Serjt. (with whom was Jervis) in support of the rule. Admitting the first order to be formal, the others, which were in a more expanded form, were irregular. But neither of them corresponds with the act, and discriminates between the examination of witnesses within and out of the jurisdiction of the court. It ought to have clearly appeared that the witnesses intended to be examined were out of the jurisdiction; *Norton v. Lord Melbourne* (a). The last two orders do not mention any commission. [Maule J. Are we not bound to look at the commission itself?] The argument is that the last two orders being irregular, the defendant was not bound to attend to them. [Maule J. The first order mentions a commission; the second and third are merely subsidiary to it.] At any rate notice to the defendant of the time and place where the examinations were to be held was absolutely necessary. Besides, there was no authority to the defendant to [35] cross-examine witnesses. In *Steinkeller v. Newton*, Tindal C. J. says, "I always have understood the practice to be, that if one party obtains a commission, and the other joins in it, the latter is entitled to examine his own witnesses; but that he may cross-examine his opponent's witnesses without joining: if the practice be otherwise, I must say I think it very unreasonable. In equity the party certainly has notice of every step." In that case the plaintiff had declined to join in the commission. [Bompas Serjt. But the defendant issued it without notice to the plaintiff, and after the time to which he was limited by the effect of the judge's order. In the present case the examination was on interrogatories, and the defendant might have delivered cross-interrogatories.] At any rate the commission is informal in not giving the power of cross-examination; and the defendant was entitled to notice. [Coltman J. Of what use would notice have been to him? As the examination was upon interrogatories, he could not have asked any questions, even if he had been there.] He might have watched the proceedings, and have ascertained whether the examinations were fairly and properly conducted.

TINDAL C. J. *Steinkeller v. Newton* does not apply to the present case: for here, the defendant, by his own voluntary act, has renounced the power of examination.

The other judges concurred.

Rule discharged.

[36] WILKES v. HOPKINS AND NICHOLLS. June 7, 1843.

A plea to a declaration for the non-performance of a promise to pay a bill drawn by the plaintiff for the accommodation of the defendant, and to indemnify the plaintiff

several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination as well within the jurisdiction of the court wherein the action shall be depending as without, and all the matters and circumstances connected with such examinations as may appear reasonable and just.

(a) 3 New Ca. 67, 3 Sc. 398; S. C. per nom. *Norton v. Lamb*, 5 Dowl. P. C. 181; where it was held that an affidavit to support an application for issuing a commission to examine a witness out of the jurisdiction of the court (at Dublin) need only state the name of the witness—that he is a material witness for the party applying for the commission—that the trial is expected to take place about a particular time—and that the witness is out of the jurisdiction of the court.

against the bill,—that the defendant duly paid the bill, and that the plaintiff was not damnified (a)—should conclude to the country.

Assumpsit. The declaration stated that, in consideration that the plaintiff would, for the accommodation of the defendants, draw a bill of exchange on them for 121l. 10s., and would indorse and deliver the same to them, the defendants promised the plaintiff that they would duly pay the said bill when due, and would indemnify the plaintiff against the payment of the said 121l. 10s., and all charges and expenses which he should bear or sustain, or to which he might be put, in respect thereof. Averment; that the plaintiff, relying, &c. afterwards, to wit, on the 25th of June 1825, drew a bill of exchange on the defendants, and thereby requested them, two months after the date thereof, to pay to his order 121l. 10s., value received, and at their request indorsed the bill and delivered it to them; that the defendants, negotiated the same; and that afterwards, to wit, on the 23d of August, 1825, when the bill became due, the defendants were required to pay the same. Breach; that the defendants did not, nor would, then or at any other time, pay the same, but wholly refused so to do; by reason whereof the plaintiff, as the drawer of the bill, was compelled to pay, and did pay, to the holder of such bill 10l. for interest and charges thereon, and paid also 10l. for costs and charges incurred by the plaintiff on occasion of his being sued by such holder, and for other costs and charges.

Plea, by the defendant Nicholls, that the defendants did duly pay the bill when it became due; and that the plaintiff did not bear, nor was he put to, any costs or [37] charges by reason of his drawing such bill, *modo et formâ*: concluding with a verification.

To this plea the plaintiff demurred specially, assigning for cause, that it ought to have concluded to the country.

Dowling Serjt., in support of the demurrer, submitted that the plea concluded improperly, as it contained a direct denial of the breach of contract alleged in the declaration.

Talfourd Serjt., *contra*, referred to *Ensall v. Smith* (1 C. M. & R. 522, 5 Tyrwh. 141) and *Goodchild v. Pledge* (1 M. & W. 363, 5 Dowl. P. C. 89. And see *Moses v. Levy*, 4 Q. B. 213) as authorities that a plea of payment must conclude with a verification. [Maule J. This is not a plea of payment in discharge of the cause of action (c).] The plea contains an affirmative (d) allegation. [Tindal C. J. So, in an action for

(a) Such a conclusion to a plea of non damnificatus, in an action upon any indemnity bond, would be proper only where a breach of the condition was assigned in the declaration.

(c) In the ordinary plea of payment, the defendant alleges new matter occurring after a breach,—payment and acceptance in discharge of the breach. Here, the payment negatives the breach itself.

(d) At common law, a plea, replication, or subsequent pleading, which contained new affirmative matter, concluded with a verification—an assertion of the ability of the pleader to prove the matter alleged, (though without actually producing his secta, as in declaring, which he might not be prepared to do)—and a prayer of judgment, by which the adverse party was invited to answer him.

Secondly. Where the affirmative in the plea, &c. merely traversed a negative allegation of the adverse party, the conclusion was to the country.

Thirdly. Where the plea, &c. contained new negative matter, it concluded with a prayer of judgment; but without a verification, there being nothing for the party pleading such a plea, &c. to prove. (See *Bodenham v. Hill*, 7 M. & W. 274, *supra*, 36, n.)

Fourthly. Where negative matter in the plea, &c. merely traversed affirmative matter in the declaration, &c. the plea, &c. concluded to the country.

In the principal case the former part of the plea belongs to the second, the latter part to the fourth, of these divisions.

In framing the new rules of pleading (H. 4 W. 4, 3 Nev. & M. 5, 10 Bingh. 467), the judges, when they discarded the prayer of judgment, appear to have considered that the termination of every pleading would still be distinctly marked either by tendering a verification or by praying a jury, and to have left pleadings coming within the third of the above classes unprovided for.

breach of cove[nant] to repair, a plea, that the defendant did repair, is affirmative, but it concludes to the country (a).] The promise laid in the declaration is, not merely to pay the bill, but also to indemnify the plaintiff against the payment thereof, and all charges and expenses to which he may be put. [Cresswell J. If the defendants, by the original contract, had not been bound to pay the bill, but merely to indemnify the plaintiff, a plea of payment would not have been a mere traverse.]

TINDAL C. J. The declaration contains a direct denial that the defendants paid the bill. The plea states that they did pay it. That is therefore simply a traverse of the allegation in the declaration.

Talfourd Serjt. then prayed, and obtained,
Leave to amend.

THE EASTERN COUNTIES RAILWAY COMPANY v. ROBERTSON. June 7, 1843.

[S. C. 6 Scott, N. R. 802; 1 D. & L. 498.]

Debt for two calls of 11. each upon 200 shares in an incorporated joint-stock company. The particulars claimed 330l., viz. 150l. in respect of a first call upon 150 shares, and 180l. in respect of a second call upon 180 shares. The defendant pleaded payment. The cause being referred, the defendant proved payment of more than 400l.; it was shewn that he was proprietor of 640 shares at the first call, and 1200 at the second; and the arbitrator awarded in favour of the plaintiffs.—Held that the arbitrator, by receiving evidence in respect of more than 200 shares, had not exceeded his authority, but had, at the most, received improper evidence; and a rule for setting aside the award was refused.

Debt, for calls upon shares. The company was incorporated by the 6 & 7 W. 4, c. cvi. The first count of the declaration, founded upon the 162d section of the act, claimed 400l. in respect of two calls of 11. each, on 200 shares. There were also counts for money [39] had and received and on an account stated. The particulars of demand claimed 330l., being in respect of a first call upon 150 shares, and of a second upon 120 shares.

Pleas: nunquam indebitatus, payment, and set-off.

The cause was referred to a barrister. It was proved before the arbitrator that the defendant was the proprietor of 640 shares at the date of the first call, and of 1200 at the date of the second. The defendant called upon the plaintiffs to point out what particular shares they went for; and he proved payment of more than 400l. in respect of shares generally. The plaintiffs contended that they were entitled to recover in respect of all the defendant's shares upon which he did not prove the calls to have been paid up. The arbitrator assented to this view, and made his award in favour of the plaintiffs upon all the issues.

Talfourd Serjt. now moved to set aside the award, upon the ground that the arbitrator had exceeded his authority. [Tindal C. J. The objection seems addressed to the merits. It was an open case before the arbitrator.] He had power to deal only with the matters in the cause. The declaration is limited to 200 shares, but he has entered into matters de hors the cause. [Tindal C. J. I suppose the arbitrator had all the books and matters fairly before him.] It is submitted that he ought not to have received evidence relating to other shares. [Cresswell J. The action is brought in respect of calls upon 200 shares. The defendant has pleaded payment. You say the arbitrator ought not to have received evidence relating to other shares; that we cannot now enter into. Maule J. It may be as you say; but the objection would only amount to reception of improper evidence. The plaintiffs might have new-assigned. Tindal C. J. Or the defendant might have obtained better particulars of the plaintiffs' demand.]

Rule refused.

(a) So, non infregit conventionem, which is a double negative, equivalent to tenuit conventionem, is, in the few cases where this plea is allowed, properly concluded to the country.

[40] MAILLARD v. THE DUKE OF ARGYLE. June 9, 1843.

In assumpsit by A. against B., B. pleaded, as to the sum of 250l. parcel, &c., that he made the promises jointly with C. and D.; that before the commencement of the suit C. and D. for themselves, and B. delivered to A. divers bills of exchange amounting to 250l.; which bills were so delivered by C. and D. to A., and by A. taken and received for and on account of the said sum of 250l. parcel, &c. and in payment thereof; that A. afterwards indorsed the bills to E., who at the time of the commencement of the suit was and still is holder thereof for value.—Held, on special demurrer, that the plea was not double, inasmuch as the word “payment,” taken with the context, did not import payment in satisfaction.

Assumpsit, for work and materials, goods sold and delivered, money lent, money paid, and money found due on an account stated.

Plea,—as to the sum of 250l., parcel of the moneys in the declaration mentioned,—that the defendant made the said promises in the declaration mentioned as to the said sum of 250l., parcel as aforesaid, jointly with Richard Brown and T. Rolph; and that after the making thereof, and before the commencement of the suit, to wit, on the 15th of December 1842, the said Brown and Rolph, for themselves and the defendant, delivered to the plaintiff divers bills of exchange for sums amounting in the whole to the sum of 250l., to wit, one bill of exchange, bearing date, to wit, the day and year last aforesaid, for the sum of 50l., payable at one month from the date thereof, drawn by the said Brown upon and accepted by the said Rolph, and by the said Brown indorsed in blank; two other bills of exchange bearing date respectively, to wit, the day and year last aforesaid, for 50l. each, payable at two months from the dates thereof respectively, and respectively drawn by the said Brown upon and accepted by the said Rolph and by the said Brown, then respectively, indorsed in blank; and two other bills of exchange, bearing date respectively the day and year aforesaid, for 50l. each, payable at three months from the dates thereof respectively, and respectively drawn by the said Brown upon and accepted by the said Rolph, and by the said Brown then respectively indorsed in blank, which several bills of exchange were so delivered by the said Brown and the said Rolph to the plaintiff, and by him then taken and received for and on account of the said sum of 250l., parcel as aforesaid, and in payment thereof; and the said Brown and Rolph respectively then became and were and still are liable to pay the said several sums of money in the said bills of exchange respectively specified, according to the tenor and effect thereof; that the plaintiff afterwards, and before the commencement of the suit, to wit, on the day and year last aforesaid, indorsed the said several bills of exchange respectively to divers persons to the defendant unknown; and that such persons respectively and not the plaintiff, at the time of commencing the suit, were, and still are, the holders thereof respectively for value, and entitled to sue the said Brown and Rolph respectively thereon. Verification.

Special demurrer, assigning, among other causes, that the plea contained no legal answer or defence to so much of the declaration as it was pleaded to, inasmuch as it disclosed no agreement on the part of the plaintiff to accept the liabilities of the said Richard Brown and T. Rolph on the bills of exchange therein mentioned in lieu of the liability of the defendant in respect of the said sum of 250l., parcel, &c., as aforesaid, nor any agreement on the part of the defendant; that the plea was double in this, to wit, that in stating that the said bills were taken and received for and on account of the said sum of 250l., parcel, &c., as aforesaid, and in payment thereof, and in afterwards stating that the said bills were, at the time of the commencement of the suit, in the hands of indorsees for value, other than the plaintiff, the plea disclosed two defences to the said sum of 250l., parcel, &c., to wit, that the said bills were given for [42] and on account of the sum of 250l., and at the time of the commencement of the suit were outstanding in the hands of the indorsees for value other than those of the plaintiff; and also that the said bills were taken in payment (which, if it meant any thing, must mean—in extinguishment and satisfaction) of the said debt; that the plea was uncertain, and did not state with sufficient particularity and certainty how, or for what purpose, the said bills were delivered; that the plea was repugnant, and contained two statements wholly at variance with, and inconsistent with, each other in this, to wit, that it stated therein that the said bills were taken

for and on account of the said sum of 250l., parcel, &c., and also that they were taken in payment thereof; whereas it was impossible that the said bills should have been taken for and on account of the said sum of 250l.; in which case the original liability of the defendant would revive on the dishonour of the said bills; and also in payment of the said sum of 250l.; in which case the original liability of the defendant would, on the delivery and acceptance thereof, be utterly extinguished and discharged; that the plaintiff could not safely take issue on the plea; that it was an informal plea of accord and satisfaction, &c.

Joinder in demurrer.

Byles Serjt. in support of the demurrer. This plea is both double and uncertain. It alleges that five bills were delivered by Brown and Rolph to the plaintiff, and were received by him "for and on account of the said sum of 250l., parcel," &c., and in payment thereof. Had the plea stopped there, it might have been good, so far as this objection is concerned; but it proceeds to state that the bills were outstanding in the hands of third persons, holders thereof for value. Where a bill of exchange is given for a debt, it may be received in one of two ways. Where it is delivered merely on account of the [43] debt, if the bill be not paid, the original debt revives; but when it is given in satisfaction of the debt, the original debt will not revive, notwithstanding the nonpayment of the bill; for the transaction amounts to a sale of the bill. If any meaning can be given to the words here, the plea imports that the bills were delivered in satisfaction of the debt; and if so, it is double. There have been two decisions on the words "for and on account of." In *Kearslake v. Morgan* (5 T. R. 513), which was assumpsit for goods sold, &c., a plea that the defendant, the payee of a promissory note, indorsed it to the plaintiff "for and on account of" the debt, and that the plaintiffs "accepted and received the note for and on account of" the said debt, was held good on general demurrer. The point was recently before this court in *Mercer v. Chess* (ante, vol. iv. 804). There, to assumpsit for work and materials, &c., the defendants pleaded that the promises were made by them jointly with T. M.; and that before action brought the plaintiff, for and on account of the sum due, and of the promises of the defendants and T. M., drew a bill on T. M., which he accepted and delivered to the plaintiff, who received the same for and on account of the said sum, and of the said promises. It was held that the plea was good, as raising a *prima facie* defence; and that it lay on the plaintiff to shew that the bill was overdue and unpaid, or had been negotiated. These two cases, therefore, are authorities, that if the present plea had stopped at the words "for and on account of," &c., it would have been good. The question is, whether the plea, by proceeding to allege that the plaintiff received the bill in payment of the 250l. does not raise two defences on the record. In *Sard v. Rhodes* (Tyrwh. & G. 298, 1 M. & W. 153), which was assumpsit on a bill of exchange for 43l., the question turned upon an allegation in the plea, that the defendant had de-[44]-livered a promissory note for 44l. to the plaintiff "in full satisfaction and discharge" of the bill, and the plaintiff then received the said note "in full satisfaction and discharge" of the bill. It was held that the plaintiff's only remedy was upon the note. Parke B. there says to the plaintiff's counsel, "Your agreement is, to take the note for better or worse." Supposing that this plea had contained the two allegations, that the bills were received for and on account of the 250l., and also that they were taken "in full satisfaction and discharge," it is clear that the plea would have been double. [Tindal C. J. What you have to make out is, that the words, "in payment thereof," taken with the context, amount to an averment of satisfaction.] If the words may admit of two meanings, inconsistent with each other, the plea is bad for uncertainty. It is submitted, however, that the words, taken in connection with bills payable to bearer, mean satisfaction. [Maule J. The question is, whether the sentence is to be so understood when it is capable of another construction.] This being a special demurrer, if the words may be understood in two senses, they should be taken in that most unfavourable to the party pleading them; and, *prima facie*, the words in payment mean in satisfaction. [Maule J. Those words serve to explain the word "delivery," and shew that the bills were delivered to the plaintiff, not as a bailee or messenger, but in payment for and on account of the 250l. Cresswell J. Could you plead the delivery of a bill for a smaller sum, in payment of a larger sum? Not in payment, but in satisfaction. [Cresswell J. If that be so, then it shews that here, the word payment cannot mean—in satisfaction.] The plaintiff is not bound to prove that the words mean satisfaction; it is sufficient if they may bear that signification;

for that renders the plea uncertain. [Maule J. A bill cannot be said to be paid until it reaches maturity, and is duly honoured.] That [45] is only the popular meaning of the word. [Maule J. Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises. When you speak of paying in cash, that means in satisfaction, but when by bill, that does not import satisfaction, unless the bill is ultimately taken up. You may support a plea of payment, by shewing that a person agreed to accept a horse from another in satisfaction, and the same as to goods, provided the agreement was, to take the articles as money (a).] There is another objection to the plea. It contains no allegation that the bills belonged to the defendants, Brown and Rolph, who delivered them over to the plaintiff, or that they had any authority from the defendant for so delivering them over; all that is stated is, that the bills were drawn by Brown and accepted by Rolph. [Maule J. If Brown joins that is enough: it is sufficient if, among them, they have a title to the bills.]

Channell Serjt., *contra*, was stopped by the court.

TINDAL C. J. I do not see why we should go out of our way, and give a forced construction to the word payment as used in this plea. In *Stedman v. Gooch* (1 Esp. N. P. C. 5) Lord Kenyon says the law is clear, "that if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable, and default is made in the payment; but that if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses to accept it, in such case he may consider it as waste paper, [46] and resort to his original demand and sue the debtor on it;" thereby implying that the word "payment" does not necessarily mean payment in satisfaction and discharge, but may be used, as there, in its popular sense.

Per curiam. Judgment for the defendant.

Byles Serjt. applied to amend, by taking issue on the plea; which was granted on the usual terms.

TURNLEY v. MACGREGOR. June 14, 1843.

In case, by A. against B., the declaration stated that C. had requested A. to advance him 2500l. on the security of an assignment of the benefit of a claim which C. alleged he had against the government; that A. was willing to advance the said sum; that C. had referred A. for information on the subject of the said claim to B. as being, and as in fact B. was, an officer in the service of government, and as being able, from the means of knowledge possessed by him, to afford such information; that A. applied to B., and that the latter falsely and fraudulently represented to A. that the claim was entertained by government, and was sure to be paid; whereupon A. advanced the said 2500l. to C. upon an assignment of the said claim. Plea, that B. was not an officer in the service of government, nor able, from the means of knowledge possessed by him, to afford information, *modo et forma*.—Held that both branches of the plea were bad; the first as being a traverse of an immaterial allegation; and the second, because it was a traverse of matter not alleged in the declaration.—Another plea stated that the representation was not in writing signed by B., according to the 9 Geo. 4, c. 14, s. 6, and that it was verbal only, and made after the passing and coming into effect of that act.—Held bad, as amounting to the general issue, being an argumentative denial of the representation charged in the declaration.—*Quære*, whether the representation set out in the declaration, was a representation relating to the credit or ability of C. within the 9 Geo. 4, c. 14, s. 6?

Case. The declaration stated that before and at the time of the committing of the grievances thereafter mentioned, one Sir Joseph Abraham Douglas had re-[47]-quested the plaintiff to advance and pay to him the said Douglas the sum of 2500l., upon the security of an assignment by the said Douglas to the plaintiff, of the benefit

(a) Vide *Barclay v. Gooch*, 2 Esp. N. P. C. 571; *Nightingall v. Devisme*, 2 W. Bla. 684, S. C. 5 Burr. 2592; *Jones v. Brinley*, 1 East, 1; *Taylor v. Higgins*, 3 East, 169; *Fitch v. Sutton*, 5 East, 230.

of a certain claim which the said Douglas had then alleged to the plaintiff that he the said Douglas then had against Her Majesty's government, for a large sum of money, to wit, a sum of between 19,000*l.* and 20,000*l.*, and which claim the said Douglas had then alleged to the plaintiff to be a just claim, and to have been entertained by the said government, and to be sure to be paid; and thereupon the plaintiff, before and at the time of the committing of the said grievances, was willing to advance and pay to the said Douglas the said sum of 2500*l.* upon the security of such assignment as aforesaid of the benefit of the said claim, if, on inquiry of the defendant before advancing and paying the said sum on such security, it should appear from the representations of the defendant, that the said claim was well founded and was entertained, and would be satisfied by the said government; of all which premises the defendant before and at the time of the committing of the said grievances had notice; that also before and at the time of the committing of the said grievances, the said Douglas had referred the plaintiff for information on the subject of the said claim to the defendant, as being, and as in fact the defendant before and at the time of the committing of the said grievances was, an officer in the service of the said government, to wit, at the Board of Trade, and as being able from the means of knowledge possessed by him to afford such information; and thereupon the plaintiff, to wit, on the 1st of February 1842, applied to the defendant for such information as aforesaid, and then informed the defendant that such application was made with reference to the validity of the said claim and the sufficiency of the said security; whereupon, and before the commencement of the suit, to wit, on the day and year [48] last aforesaid, the defendant, craftily intending to deceive the plaintiff in this behalf, and to induce him to advance the said sum of 2500*l.* to the said Douglas on the said security, falsely and fraudulently represented to the plaintiff that the said claim was entertained by the said government, and that although not actually admitted, the same claim was sure to be paid, and that the amount thereof ought to have been paid long before, and that it was a disgrace to the said government that payment thereof had been so long delayed, and that the amount of the said claim would be paid in a few months from the time of the making by the defendant of the said representations, and, as he the defendant believed, within a period not exceeding three months from the time last aforesaid; and that he the defendant did not know why payment had been delayed so long, unless the then recent exchequer-bill fraud, and the change in the government, had occasioned that delay; and that the treasury would take notice of a charge on that claim, as had been done in a case of his, the defendant's, while he was a consul abroad: the declaration then averred, that thereupon afterwards, to wit, on the 24th of February 1842, the plaintiff advanced and paid to the said Douglas, upon the security of an assignment by the said Douglas to the plaintiff of the benefit of the said claim, the sum of 2500*l.*, and the said Douglas then made, and the plaintiff then accepted, such assignment as a security for the repayment of the said sum of 2500*l.*, with interest thereon at and after the rate of 5*l.* per centum per annum; that the plaintiff was induced to advance and pay as aforesaid the said sum of 2500*l.* to the said Douglas upon such security as aforesaid, and to accept the said assignment as such security, by the representations so made to him as aforesaid by the defendant; and that he the plaintiff advanced and paid the same sum to the said Douglas upon such security as afore-[49]-said, and accepted the said assignment as such security as aforesaid, upon the faith of the said representations, and believing that the same were true; whereas in truth and in fact, and as the defendant at the time when he made the said representations as aforesaid well knew, the said claim was not then entertained by the said government, nor was the same, although not actually admitted, then sure, or likely, to be paid within a few months from the time of the making by the defendant of said representations, or within a period not exceeding three months from the time last aforesaid, or at any other time, and the defendant had no reason for believing, nor was it then true, that there was then any intention on the part of the said government to satisfy the said claim, or pay any sum of money in respect thereof at any time; and whereas in truth and in fact, and as the defendant at the time of making the said representations well knew, the officers of the said treasury would not take notice of a charge on the said claim; that although the period of three months next after the time of the making by the defendant of the said representations elapsed long before the commencement of this suit, and although the plaintiff had always since the making of the said assignment, been ready and willing to receive payment from the

said government of the amount of the said claim or any part thereof, and although the plaintiff before the commencement of the suit, to wit, on the day and year last aforesaid, endeavoured to render the said security available, and to cause the said assignment to be noticed by the officers of the said treasury as a charge on the said claims, yet the amount so claimed as aforesaid, and on the security of the said assignment of the benefit whereof the said sum of 2500l. was so advanced and paid as aforesaid, had not, nor had any part thereof, been paid by the said government, nor was the same amount, or any part thereof, likely to be paid by the said government, nor did [50] nor would any of the officers of the said treasury take notice of the said assignment as a charge on the said claim, nor has the same or any part thereof ever been admitted, entertained, or in any way recognized by the said government. By means whereof the said assignment, for securing the repayment of the said sum of 2500l. with interest as aforesaid, was of no use or value whatsoever to the plaintiff, and he the plaintiff had wholly lost the said sum of 2500l. so by him advanced and paid as aforesaid, and all the interest, benefit, and advantage which would otherwise have arisen to the plaintiff from the possession and use thereof, amounting in the whole to a large sum of money, to wit, the sum of 300l., and all benefit and advantage of an available security for the same, and had incurred, fruitlessly and without benefit, divers expenses, amounting in the whole to a large sum, to wit, the sum of 300l., in and about the procuring and obtaining of the said assignment, and in about the endeavouring to render the same, and the security therein expressed, available.

The defendant pleaded, thirdly, that he the defendant was not an officer in the service of the said government, nor able, from the means of knowledge possessed by him, to afford information, in manner and form as the plaintiff had above alleged—concluding to the country.

Fourthly, that the said supposed representation in the declaration mentioned was not, nor was any part thereof, in writing signed by the defendant, according to the form of the statute rendering a written instrument necessary to the validity of certain promises and engagements, made and passed in the ninth year of the reign of His late Majesty King George the Fourth, and that the supposed representations were verbal only, and were made after the making, passing, and coming into effect and operation of the same statute. Verification.

Special demurrer to the third plea, assigning for [51] causes,—that the same plea took issue on matter not alleged or implied in the count, in this, to wit, that whereas the count alleged, not that the defendant was able from the means of knowledge possessed by him to afford information, but that the said Douglas had referred the plaintiff to the defendant as being able, from the means of knowledge possessed by him, to afford such information; and although the silence of the count touching the ability, in fact, of the defendant to afford the information which he was referred to as being able to afford, while expressly stating that the defendant in fact was, as well as that the said Douglas had referred to him as being, an officer in the service of government, prevented any implication of any assertion that the defendant was in fact able to afford such information, yet the plea stated that the defendant was not able from the means of knowledge possessed by him to afford such information, in manner and form as the plaintiff had (as the plea stated) alleged, and therein took a traverse which followed neither the words nor the meaning of the allegation to which it purported to be applied—that although the plea stated and introduced new matter, to wit, that the defendant was not able, from the means of knowledge possessed by him, to afford information, yet it concluded to the country; whereas the same ought to have concluded with a verification (*sed. vide ante*, 37 (*d*) third point),—that the plea tendered an immaterial issue—that the plea, if available in substance in bar of the action, was circuitous, and amounted to a plea of not guilty—that the plea shewed no valid defence, since even if it were true that the defendant was not an officer in the service of government as alleged, nor was, when he was referred to by Douglas, able, from the means of knowledge possessed by him, to afford information, still, under the other circumstances stated in the count, and [52] not denied in the plea, the defendant was liable, &c. Joinder in demurrer.

Demurrer to the fourth plea, assigning for causes—that it did not appear in or by the count, nor was it alleged or shewn by the plea, that the action was brought to charge the defendant upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings

of another person, to the intent or purpose that such person might obtain credit, money, or goods upon, within the true intent and meaning of the statute in the plea mentioned—that the plea, if valid in substance to bar the action, was circuitous, and amounted to a plea of not guilty—that the plea stated what was only matter of evidence, and did not offer or tender any sufficient issue of fact—that the plea neither traversed, nor sufficiently confessed and avoided, the matter of the count—that the plea circuitously and informally denied the representations stated in the count to have been made by the defendant—that the plea, while it in effect traversed the making of a representation sufficient to support the action, concluded with a verification, whereas the same ought to have concluded to the country, &c. Joinder in demurrer.

Channell Serjt. (with whom was J. Henderson) in support of the demurrer. The third plea alleges that the defendant was not an officer in the service of government, nor able, from the means of knowledge which he possessed, to afford information. The latter fact is neither alleged in, nor to be implied from, the declaration. It is not averred that the defendant was able to afford information, but only that Douglas had represented him to be able, to give it.

The next objection to the third plea is, that this plea, in denying that the defendant was an officer of the [53] government, raises an immaterial issue. The plea of not guilty puts in issue both whether the defendant made the representation, and whether he knew it to be false. If the plaintiff failed to establish either of these facts at the trial, he could not succeed. If he made them out, the rest of the declaration, not traversed, would disclose a sufficient cause of action. The traverse of the allegation that the defendant was a government officer, is therefore wholly immaterial. If not, it amounts to not guilty, and is bad on that ground. [Cresswell J. Suppose the verdict on such a traverse to be, that the defendant was an officer, but was not able to give the information.] The plaintiff would be entitled to judgment non obstante veredicto. If the issue raised on such a traverse were to be held material, it could only be so on the ground that the want of means of knowledge might go to disprove that the defendant was aware of the falsity of the representation; so that it is clear that the traverse is either immaterial, or amounts to not guilty.

The fourth plea is bad both in form and in substance. The objection in point of form is, that this plea also amounts to—not guilty. The defence which it attempts to set up, namely, that the representation was not in writing, signed by the defendant,—to bring the case within the 9 G. 4, c. 14,—was, in *Lyde v. Barnard* (a), given in evidence under not guilty. *Leaf v. Tulon* (10 M. & W. 393. Vide post, 54, note (b), 56, note (c)) is a distinct authority upon this point. There, in assumpsit for goods sold, the defendant pleaded that at the time when the defendant became indebted to the plaintiff as in the declaration mentioned, he became so indebted upon a contract for the sale of the goods therein mentioned, for a price exceeding 10l.; that the defendant, being the buyer thereof, did not accept or actually re-[54]ceive the goods, or any part thereof, or give or pay any thing in earnest, or to bind the bargain, or in part of payment, nor was any note or memorandum in writing of the bargain made and signed by the defendant or by his agent thereunto lawfully authorized; and the plea was held bad, on special demurrer. Parke B. in delivering the judgment of the court says, “*Buttemere v. Hayes* (5 M. & W. 456) decided that the general issue,—which, under the new rules, is ‘a denial, in fact, of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged, is implied by law,’—is a denial that the requisites of the statute of frauds have been complied with, in cases where the statute applies (b); and on an issue on that plea, the plaintiff must prove the affirmative. The plea of the non-compliance with the statute of frauds is therefore nothing but an argumentative denial of the contract, or of the facts from

(a) Tyrwh. & Gr. 250, 1 M. & W. 101; 1 Gale, Exch. 388. In that case the barons were equally divided.

(b) On the ground that the production of a note in writing could be necessary only to support some allegation in the declaration, and that it supported none but that of the making of the contract. In a case upon the seventeenth section,—which *Leaf v. Tulon* was, though *Buttemere v. Hayes* was not,—this would appear to be so; as that section avoids the contract. But with reference to the fourth section, the object of the proof would seem rather to be, to shew that the plaintiff was not, by reason of the non-observance of certain prescribed forms, precluded from suing upon that which,

which it is implied by law. . . . *Maggs v. Ames* (4 Bingh. 470, 1 M. & P. 294) was decided without sufficiently adverting to that distinction. At all events, since the decision in *Buttemere v. Hayes*, that case cannot be supported." The 9 G. 4, c. 14, ought to receive the same construction as the statute of frauds; and there is no distinction, with respect to this point, between case and assumpsit.

[56] The objection to the substance of the plea is, that it is an attempt to bring this case within the 9 G. 4, c. 14, s. 6. The representation here is not a representation as to the credit or ability of another, within that statute. Upon this point the learned serjeant referred to the judgments of Parke and Alderson BB. in *Lyde v. Barnard*; and he sought to distinguish the case from *Haslock v. Fergusson* (7 A. & E. 86, 2 N. & P. 269) and *Swan v. Phillips* (8 A. & E. 457, 3 N. & P. 447).

Bompas (with whom was Cowling) for the defendant. If the latter part of the allegation traversed by the third plea be immaterial, the court will reject it; *Palmer v. Gooden* (8 M. & W. 890, 1 Dowl. N. S. 673); and then the question will be whether the first part of the plea, which denies that the defendant was an officer in the service of the government, is not good, as being a traverse of what is, substantially, alleged in the declaration.

The objection in point of form to the fourth plea is not free from difficulty. *Maggs v. Ames* however is a distinct authority in support of the plea. There, a plea that the undertaking of the defendant was for the debt of another, without writing and without consideration, was held good, notwithstanding the facts might have been given in evidence under the general issue. That case was grounded on *Carr v. Hinchliffe* (4 B. & C. 547, 7 D. & R. 40). [Tindal C. J. That case was decided before the new rules. In *Buttemere v. Hayes* the court of Exchequer point out the distinction between defences which amount to an unqualified denial of the facts alleged, and those which avoid the contract for some matter that is the subject of proof on the part of the defendant.] Here, the plea admits what is stated in the declaration, but seeks to avoid it by shewing [56] that the representation was not in writing. In *Devaux v. Steinkeller* (6 N. C. 85, 8 Sc. 202) this defence was pleaded; and no objection was taken to the form of the plea (et vide ante, 54 (b)). *Maggs v. Ames* is not inconsistent with *Buttemere v. Hayes* and *Eastwood v. Kenyon*; at any rate those were actions of assumpsit; whereas this is in case. In *Barnett v. Glossop* (1 N. C. 639, 1 Sc. 621), which was also an action of assumpsit for a dramatic piece composed by the plaintiff and sold by him to the defendant, it was held that a defence on the ground that there was not an assignment in writing must be specially pleaded.

On the point as to whether the representation was within the 9 G. 4, c. 14, s. 6, the learned serjeant referred to *Eyre v. Dunsford* (1 East, 318), *Tapp v. Lee* (3 Bos. & P. 367), *Swan v. Phillips*, and *Lyde v. Barnard*.

Channell Serjt. in reply. As to the third plea, the matter rejected in *Palmer v. Gooden* was not only immaterial, but insensible; and all that was there decided is, that it should not avoid the issue. With regard to the technical objection to the fourth plea, there is no distinction, as to this point, between case and assumpsit. In *Hayseldon v. Staff* (g), a plea to a count for work and labour, that the work was done under an agreement that the plaintiff should receive no remuneration for his services, if, as the event was, they should prove unsuccessful, was held bad on special demurrer, as amounting to the general issue. Lord Denman there says in giving the judgment of the court: "There is a great distinction between the case of a plea, which amounts to the general issue, and that of a plea which merely discloses matter which may be given in evidence under the general issue. In the latter case, though, as has [57] been observed in the earlier part of this judgment, the various things enumerated may be given in evidence under the general issue, independently of any of the new rules, yet it is incorrect to say that these things amount to the general issue: they only defeat the contract; but what, in correct language, may be said to amount to the

although the requirements of the statute may not have been satisfied, is not the less a subsisting contract; 5 Taunt. 788; ante, vol. i. 773.

In *Reed v. Nash*, 3 Wentw. Plead. 102, S. C. 1 Wils. 305; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Wakeman v. Sutton*, 2 A. & E. 78, 4 N. & M. 114; *Devaux v. Steinkeller*, post, 56, the statute was pleaded.

(g) 5 A. & E. 160, 6 N. & M. 659. In that case, as in *Leaf v. Tuton*, there was no contract; secus, in *Buttemere v. Hayes*.

general issue, is a plea containing an allegation, that for some reason specially stated, the contract does not exist in the form in which it is alleged; and where that is the case, the plea, instead of a direct denial, presents an argumentative denial of the contract, which, according to the established rules of pleading, is not allowed." It is clear that declarations upon contracts within the statute of frauds do not, and need not, set out any agreement in writing. Here, the plea is a denial, not of any thing contained in the declaration, but of a matter of evidence required by law.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. The plaintiff has demurred specially in this case to the third and fourth pleas of the defendant.

The question as to the third plea is, whether the traverse in that plea, is the traverse of a material allegation in the declaration; and we are of opinion that it is not.

The defendant in his plea traverses that he was an officer in the service of the government, and that he was able by means of knowledge possessed by him to afford information as alleged by the plaintiff, and concludes to the country. Now the subject of the first branch of this traverse,—that the defendant was an officer, was altogether an immaterial allegation. The plaintiff alleges in his declaration that one Douglas had referred him, the plaintiff, to the defendant, for information on the subject of a claim which Douglas had on the government, as being an officer, and as being able, from his means of knowledge, to give information. It is true the declaration goes on [58] to allege that the defendant was in fact an officer of the government; but this is an immaterial allegation. Douglas had stated him to be an officer; but whether Douglas had made a true or a false statement on that point, could not have the remotest bearing on the complaint of the plaintiff, which is, that the defendant made a false representation to him. The first part of the traverse is therefore bad, as being the traverse of an immaterial allegation. And the latter part of the traverse, viz. that "he the defendant was not able, from the means of knowledge possessed by him, to afford information," is a bad traverse, because the plaintiff has never alleged that the defendant was able to give the information. All that the declaration states is, that Douglas represented to the plaintiff that such was the fact. This plea therefore is bad upon special demurrer (a).

And as to the fourth plea, we think this case is governed by the decision of the court of Exchequer on *Leaf v. Tuton* (b), where a plea to a declaration in assumpsit, that the contract declared upon was not made in writing,—although it was brought within the description of contracts mentioned in the statute of frauds, and therefore the action was not maintainable thereon,—was held to be bad on special demurrer, as amounting to an argumentative denial of the contract; and we think that the present case cannot be distinguished from that decision.

Judgment for the plaintiff on the third and fourth pleas.

[59] SUSANNA KING v. SARAH GREENHILL. June 9, 1843.

[S. C. 6 Scott, N. R. 869; 12 L. J. C. P. 333; 7 Jur. 604.]

Upon a mortgage from B. to A., the mortgage-deed, dated the 13th of February, 1834, recited that, "as an inducement to A. to advance the money, C. had agreed to covenant for the due payment of the interest," B. covenanted to pay the principal, and interest for the same after the rate of 5 per cent., on the 13th of February, 1835, and C. covenanted "that B. and C., or one of them, would, during the continuance of the mortgage security, pay the interest to become due in respect of the said principal sum after the rate of, &c., by two even half-yearly payments, on the 13th of August and the 13th of February." The indenture also contained a power of sale, on six months' notice, in default of payment of principal and interest, with

(a) Quære, whether a plea traversing an immaterial allegation, and also matter neither expressly nor impliedly alleged, would not be bad on general demurrer.

(b) The decision in that case,—which was a case within the seventeenth section of the statute of frauds,—proceeded not, as it might have done, on the words of that section, but upon the authority of a former case (*Buttmere v. Hayes*) within the fourth section, the words of which appear to be susceptible of a different construction, and more nearly to resemble those of the 9 G. 4, c. 14, s. 6.

authority to A., out of the proceeds, to pay herself the principal and interest, "or so much thereof as shall be then due." Held, that C.'s covenant was not limited to the payment of the first two half-years' interest, but was a covenant for payment of the interest so long as the principal remained unpaid.—The breach assigned was, that on a certain day which had elapsed before the commencement of the suit, to wit, on the 13th of August 1842, there became and was, and still was due and owing for and in respect of divers, to wit, six half-years' interest of and upon the said principal sum, a large sum of money, to wit, 90l., which had not been paid. Held, sufficiently certain, on special demurrer.

Covenant. The declaration stated that heretofore, to wit, on the 13th of February 1834, by an indenture then made between John Greenhill of the first part, the defendant of the second part, and the plaintiff of the third part [profert], after reciting, amongst other things, that the said John Greenhill had applied to the plaintiff to lend him the sum of 600l., at interest, upon the security of a certain mortgage in the said indenture mentioned, and also an assignment of certain personalty as a collateral security, which the plaintiff had agreed to do, and that as a further inducement to the plaintiff to advance the said 600l. the defendant had agreed to covenant for the due payment of the interest,—the defendant covenanted with the plaintiff that she the defendant and the said John Greenhill, or one of them, their, or some or one of their heirs, executors, administrators, or assignus, should and would, during the continuance of the said mortgage security, well and truly pay or cause to be paid unto the plaintiff the interest to be [60] come due in respect of the said principal sum of 600l. after the rate of 5 per cent. per annum, by two even half-yearly payments, on the 13th of August and the 13th of February, free from all deductions whatsoever; as by the said indenture fully appeared. Breach: that although the said mortgage security had been from the making thereof to the commencement of the suit, and was still, in continuance, and the said principal sum of 600l. had never been paid, and that on a certain day which had elapsed before the commencement of the suit, to wit, on the 13th of August 1842, there became and was and still was due and owing for and in respect of divers, to wit, six half-years' interest of and upon the said principal sum of 600l., a large sum of money, to wit, 90l., yet no part of the said 90l. had ever yet been paid, &c.

The defendant craved oyer of the indenture, which was set out. It purported to be an indenture made the 13th of February 1834, between John Greenhill of the first part, Sarah Greenhill (the defendant) of the second part, and Susanna King (the plaintiff) of the third part. After reciting the will of William Greenhill, the father of the said John Greenhill, whereby he devised and bequeathed all his real and personal property to certain trustees, upon trust,—after the death of his wife, to whom a life interest therein was given,—for his six sons and daughters in equal shares, among whom was John Greenhill; and reciting a codicil to the said will, whereby the said testator appointed John Greenhill a co-executor and trustee with his other executors and trustees; and stating the death of the said testator, and that the said will and codicil were duly proved in the Prerogative Court of Canterbury, the deed proceeded as follows:—And whereas the said John Greenhill hath applied to, and requested, the said Susanna King to lend him the sum of 600l., at interest, upon the security of a mortgage of all his interest under his said deceased [61] father's will, and also an assignment of certain personalty as a collateral security, which the said Susanna King has agreed to do: and whereas, as a further inducement to the said Susanna King to advance the said 600l., the said Sarah Greenhill has agreed to covenant for the due payment of the interest: now this indenture, &c. It was then witnessed that, in consideration of 600l. by Susanna King to John Greenhill paid, he, the said John Greenhill granted and conveyed unto Susanna King, all John Greenhill's share in the real and personal estate of the said testator, under his said will and codicil: habendum, to Susanna King, her heirs, executors, &c., subject to the proviso for reconveyance and redemption of the same premises therein contained, and also subject to an indenture of assignment, bearing date, &c., whereby the one-fourth of the produce of the share and interest of John Greenhill of and in the real and personal estates of the said testator, was assigned upon the trusts therein mentioned, and also subject to a certain indenture of mortgage, bearing date the 4th of November 1833, whereby the said share of John Greenhill under the said will, was assigned to secure the sum of 2000l. and interest. This was followed by a proviso for the redemp-

tion of the mortgaged premises on the payment by John Greenhill, his heirs, executors, &c. to Susanna King, her executors, &c. of 600l. and 5l. per cent. interest, "on the 13th day of February now next ensuing," after which was a power of attorney from the mortgagor to the mortgagee, for better enabling her to receive the share, &c. thereby assigned. "And the said J. Greenhill doth hereby for himself, his heirs, executors, &c. covenant with the said S. King, her executors, &c. that he the said J. Greenhill, his heirs, executors, &c., or some or one of them shall and will well and truly pay, or cause to be paid, unto the said S. King, her executors, &c. at or in her or their dwell-[62]-ing-house or place of abode for the time being (and of any change or changes of abode, she or they from time to time shall give notice to the said J. Greenhill, his executors or administrators), the full and just sum of 600l. of, &c., with interest for the same after the rate at the time and in manner in and by the above written proviso mentioned and appointed for payment of the same, according to the true intent and meaning of these presents. And the said S. Greenhill doth hereby for herself, her heirs, executors, &c. covenant, with the said S. King, her executors, &c., that they the said S. Greenhill and J. Greenhill or one of them, their, or some one of their heirs, executors, &c. shall and will, during the continuance of the present mortgage security, well and truly pay or cause to be paid unto the said S. King, her executors, &c. the interest to become due in respect of the said principal sum of 600l., after the rate of 5l. per cent. per annum, by two even half yearly payments, on the 13th of August and the 13th of February, free from all deductions whatsoever." The deed then contained a power of sale of the said share, &c., "if default shall happen to be made of or in payment of the said sum of 600l., or of any part thereof, or the interest thereof, or of any part thereof, at the day and time, and in manner, hereinbefore appointed for payment thereof, &c., and if Susanna King shall give six months' notice in writing for the payment of the 600l. and interest." The trusts of the proceeds of the sale, after payment of the expenses and of the first mortgage debt of 2000l. and interest, were declared to be, "to pay to herself the said Susanna King, her executors, &c., the said principal sum of 600l. and interest intended to be hereby secured, or so much thereof as shall be then due," with an ultimate trust of the residue, for J. Greenhill, his executors, &c. After a clause enabling the mortgagee to foreclose upon default, and another, limiting her responsibility to money [63] actually received, &c., and covenants by J. Greenhill to concur in conveyance, &c., to do any act for confirming such sale, &c., and that he had good title to convey, &c., the indenture contained a covenant, by him, for quiet enjoyment by S. King "at all times after default shall be made in payment of the said principal sum of 600l. and interest or any part thereof respectively;" and lastly, a covenant also by the said J. Greenhill for further assurance "from time to time and at all times after default shall be made in payment of the said sum of 600l. and interest, &c."

Which being read and heard, the defendant said that the said declaration was not sufficient in law,—assigning for causes—that although six half-years' interest was claimed in the declaration, it did not appear thereby that more than two were secured by the covenant of the defendant, and that it did not appear that any part of the sum of 90l. in the declaration mentioned, was any part of the interest by the defendant so covenanted to be paid, or of the two half-yearly payments of interest in the declaration mentioned; that the contrary thereof appeared, inasmuch as it was alleged that the said interest became due on the 13th of August 1842—that it did not appear how the said mortgage security continued, as in the declaration alleged—that it was not shewn how the said sum of 90l. or any part thereof became owing, or when the said sum of 90l., and the several portions thereof became due and payable, or in respect of what half-years—that six half-years' interest was alleged to have become due on one day, which was impossible—that there was no proper or specific or traversable breach of covenant in the declaration in this—that there was no specific and distinct averment that the defendant and the said John Greenhill, or one of them, did not pay any particular supposed sum of interest, or that they or he did not pay the same on the day when [64] it became due, nor was the declaration so framed that the defendant could plead performance, &c.

Dowling Serjt. (with whom was Bramwell), in support of the demurrer. The question is, to what extent the defendant is liable, as the surety of the mortgagor, for the payment of the interest; whether for an indefinite time, or only for the period mentioned in the covenant of the mortgagor, namely, for a year. The latter, by

reference to the proviso for redemption, covenants to pay the principal sum and interest on the 13th day of February then next ensuing,—just one year from the date of the mortgage deed. It is clear, therefore, that the mortgagor has only covenanted to pay one year's interest. [Tindal C. J. Although he has covenanted to pay no more than one year's interest, yet after a lapse of ten years, the interest for the last nine years might be recovered as damages for the breach of the covenant to pay the principal at the end of the first year.] That may be so; but it makes all the difference in this case, that the interest for the nine years could not be recovered as interest. *Atkinson v. Jones* (2 A. & E. 439), *Watkins v. Morgan* (6 Carr. & P. 66). *Prima facie* a surety will be only liable to the same extent as his principal. [Tindal C. J. Where do you find the word "surety" in this deed?] The defendant stands, to all intents and purposes, in the situation of a surety; and the court will require very explicit language to be used before they will extend her liability, beyond that of the mortgagor. [Maule J. The indenture recites that "as a further inducement to the said S. King to advance the said 690l., the said S. Greenhill has agreed to covenant for the due payment of the interest."] The cases shew that this recital must be read as limited by the subsequent covenant into which the de-[65]-fendant enters. She thereby covenants that they the said S. Greenhill and John Greenhill or one of them, &c. "shall and will during the continuance of the present mortgage security" pay the interest to become due, &c., after the rate, &c., "by two even half-yearly payments on the 13th of August and the 13th of February." She does not undertake to pay the interest "every year" or "annually." Also she does not covenant that she will pay, but that she or the mortgagor will; shewing that she considered the liability of the two to be co-extensive; and, if that be not so, she has covenanted that her principal shall do more than he had bound himself to do. [Tindal C. J. In one respect the defendant clearly has covenanted to do more than the mortgagor; for she has covenanted to pay the interest half-yearly, and he, only at the end of the year. A surety may make a different bargain from the principal.] The words "the interest" in the defendant's covenant must be understood to refer to the interest previously mentioned. The other side will rely on the expression "during the continuance of the present mortgage security." [Maule J. Those words give rise to another difficulty, for the declaration contains no averment that the mortgage security has expired.] To ascertain the construction of this deed, the court cannot look to the practice of courts of equity, or refer to the 7 Geo. 2, c. 20, which confers an equitable power on courts of law. The mortgage security, in strictness, only lasts down to the time appointed for the payment of the principal and interest; after that period the conveyance becomes absolute; and even if that be not so, the words in question are restrained by the express covenant of the mortgagor. *Lord Arlington v. Merricke* (2 Saund. 411 a.) is in point. That case was referred to by Lord Ellenborough in *The Liverpool [66] Waterworks Company v. Atkinson* (6 East, 507) as being on all fours with the latter, in which it was held that the condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for twelve months," and afterwards stipulating that "at all times thereafter, during the continuance of such his employment, and for so long as he should continue to be employed," he would justly account and obey orders, &c., confined the obligation to the period of twelve months mentioned in the recital. *Hassell v. Long* (2 M. & S. 363) also shews that general words are restricted by the intention of the parties, and is a much stronger case than the present. Here, after the expiration of the year, the mortgagor may, if she thinks proper, enter into a new arrangement as to the payment of the interest. Is the defendant to be bound to pay the interest according to such new arrangement, or would she be thereby discharged? The mortgagee, by the payment of a year's interest, has got all she bargained for by the deed; and afterwards she might have exercised her power of sale, and so have repaid herself both principal and interest (c). It could never be intended that the liability of the surety was to exceed that of the principal, and to continue for an indefinite period; for she has no power to compel the mortgagee to act upon the power of sale, or to foreclose, according to the option given to the latter by the deed. This case has already been before the court of Queen's Bench (d). There, the plaintiff brought an action of debt for the interest; to

(c) A buyer being found and the price being sufficient.

(d) It has not been reported.

which the defendant pleaded the payment of the first two half-years' interest, and had a verdict; but the case being turned into a special case, judgment was given for the plaintiff non obstante veredicto. It is said that one reason given by Lord Denman for the decision in [67] the plaintiff's favour was, that the court must look at the prevailing practice as to mortgages, and use that as a key to the construction of the words "during the continuance of this present mortgage security." It is submitted that a court must construe the deed by its contents alone, and cannot look to any usage that prevails as to mortgages out of doors, or to the rules of the courts of equity. [Maule J. Although we may not be at liberty to look at the practice which prevails of allowing mortgagors to remain in possession of the lands mortgaged after default in payment of principal and interest, are we restricted from contemplating the possibility of such an occurrence? Tindal C. J. We are bound to give a meaning if we can to the words "during the continuance of this present mortgage security." Maule J. Do you say that it appears on the declaration, that the mortgage security is not continuing?] Yes. In the case before the Queen's Bench, Coleridge J. is said to have grounded his opinion on the ultimate trusts of the money to arise by any sale; which, he considered, furnished a key to the meaning of the parties. The trusts are, after payment of the expenses, and the principal and interest due on the first mortgage, to pay to the plaintiff the 600l. and interest, "or so much thereof as shall be then due;" and that learned judge thought, from those words, that the parties contemplated that the mortgage should extend over a longer period than a year. The words "then due," however, do not necessarily bear that construction, and moreover, the defendant was no party to the stipulations in the power of sale.

Manning Serjt. (with whom was Butt), for the plaintiff. It is argued that the court are to look merely at the words of the deed, and not at the practice which prevails as to mortgages. But the ordinary rule of [68] construction is, to interpret deeds according to the situation and circumstances of the parties. [Maule J. What extrinsic evidence is there here?] The well known practice that the mortgage money and interest are not paid on the day named, the appointing of which is a mere matter of form. At any rate it is admitted, that the deed is to be construed according to the intention of the parties. Here, the property to be mortgaged was of an uninviting and unsatisfactory nature, upon which no prudent person would make an advance without having some collateral security; and it is expressly recited, that it was an inducement to the plaintiff to lend the money that the defendant should "covenant for the due payment of the interest." The natural conclusion from those words is, that the defendant was to pay all the interest that might become due. Here, the covenant of the mortgagor is, in the ordinary form, to pay the principal money and interest on the day mentioned in the proviso; and it would have been inconsistent with such proviso had he covenanted to pay more than a year's interest. It is clear, however, as already observed, that he would be liable for the interest accruing subsequently by way of damages for breach of covenant, if the action were in covenant, or if the action were in debt, as for damages for the detention of the debt. The mortgagee therefore has a sufficient remedy against the mortgagor should his circumstances render it worth her while to avail herself of such remedy; and it is unreasonable to say that the defendant would, if made to pay the subsequent interest, be subjected to a liability which did not extend to the mortgagor. If the words "the interest" in the defendant's covenant had stood alone, they would have been merely equivalent to "the said interest" mentioned in the mortgagor's covenant; but the words which follow, namely, "during the continuance of the present mortgage security" must convey to every one the meaning that [69] the defendant was answerable for the payment of the interest half-yearly, so long as the principal remained unpaid and the property continued to be liable to its payment; and whether so liable at law or in equity, is immaterial. The power of sale is not to be exercised until after default at the end of the year, and six months' notice in writing; and can it be contended that the mortgage security does not at any rate continue up to the time of sale? According to the notes on the brief of the plaintiff's counsel in the action in the Queen's Bench, Lord Denman expressly said that he decided the case upon what appeared on the face of the deed; and all the other judges concurred in the view taken by the Lord Chief Justice. Looking at the whole of this instrument, it is quite clear that the defendant covenanted to pay the interest until the security should, by a sale of the property or otherwise, cease.

Dowling, Serjt. in reply. The fact that six months must have elapsed before the power of sale could be exercised, can have no weight in determining the question as to the amount of the interest for which the defendant has rendered herself liable. Also the words in the recital which have been relied on, namely, "the interest," are quite general; so that the point turns, at last, on the construction to be put on the defendant's covenant, taken in connection with the proviso for redemption and the covenant of the mortgagor.

Supposing, however, the court to be against the construction put by the defendant upon her covenant, it is submitted that the declaration is defective in not sufficiently alleging when the interest became due. All it states is that "on a certain time, which had elapsed before the commencement of the suit, to wit, on the 13th of August 1842, there became and was and still was due and owing for and in respect of divers, to wit, six half-years' [70] interest of and upon the said principal sum of 600l. a large sum of money, to wit, 90l." The time covered by the declaration extends over eighteen or nineteen half-years; and the defendant is entitled to know for what particular half-years the plaintiff is proceeding; for otherwise she is prevented from discharging herself from liability, by pleading *solvit ad diem*. On this point the learned serjeant cited *Pye v. Brereton* (3 Mod. 70), *Umble v. Fisher* (Cro. Eliz. 702), Com. Dig. Pleader (2 W. 14).

Manning Serjt. as to this objection. It is sufficient to allege, as done here, that six half-years' interest became due on a particular day. The breach is in as precise a form as that adopted in an avowry for rent and the court will give to the words a reasonable construction. [Maule J. The objection is, that the six half-years may be half-years dispersed over the whole period. The last half-year is perhaps sufficiently averred to have fallen due on the 13th of August; but consistently with the rest of the allegation the other half-years may be unconnected with each other.] If that were so the allegation would not be true; besides, if it were understood as importing that the other half were scattered over the whole period, there would be equally a breach of the covenant. [Maule J. You say that if the last half-year's interest is due, it is not cause of special demurrer, that it does not appear when the other five half-years became due and payable.] In *Henniker v. Turner* (4 B. & C. 157, 6 D. & R. 72) in covenant on a lease, by one of five tenants in common, for rent payable on the four most usual days of payment in the year, the breach assigned was, that on the 24th of June a large sum of money, to wit, the sum of 21l. 15s., one fifth part of the rent for three quarters of a year then elapsed, became due and was in arrear from the [71] defendant to the plaintiff; and it was held on special demurrer, that this breach was well assigned. Abbott C. J. there says, "The form of action here is covenant, which, even in ancient times, was always treated with more liberality than actions of debt, therefore the rules of pleading cited by Mr. Chitty do not apply to it, they are confined to actions of debt. We must however give such a construction to these words as will fairly render them consistent with the previous parts of the sentence; and, as it is alleged, that on the 24th of June rent became due for three quarters of a year, we may, I think, notwithstanding the words 'then elapsed,' take that to be rent due for three quarters immediately preceding the 24th of June." That case shews, that the same strictness is not required in covenant as in debt. Here, the reasonable intentment from the allegation is, that the 90l. is due for the last six half years, and this is a thing within the knowledge of the defendant, of which she is bound to take notice. This is not a covenant to pay in case of default by the mortgagor, but an absolute covenant. The defendant, therefore, is bound to know whether the interest alleged to be due has been paid or not. The presumption is, that the 90l. is due for the last six half years, and the defendant might have pleaded payment: and if so, the plaintiff might have been driven to new assign. [Cresswell J. referred to *Barnard v. Duthy* (5 Taunt. 27), where, in covenant for seven quarters' rent, a plea shewing a surrender before the last four of the seven quarters' rent accrued, was held bad on demurrer, inasmuch as it did not go to the whole breach, and the breach was not entire, but part of it might be proved.]

TINDAL C. J. It appears to me that *Henniker v. Turner* is an answer to the objection which has been [72] taken to the declaration in point of form. In effect, when we look at the breach assigned, it is clear that, if the day be material, it is equally so whether laid under a *videlicet* or not. It is stated that, on the 13th of August, a large sum of money became due for interest; that is therefore, substantially,

a complete breach, in non-payment of one half-year's interest. As to what has been said of the hardship upon the defendant in not knowing precisely for what particular half-years the plaintiff is proceeding, it rather seems to me that the plaintiff has incurred the chance of a difficulty being imposed upon herself; for the defendant might have pleaded payment of six half-years' interest, which in fact she has paid, and so have compelled the plaintiff to new-assign. With respect to the main objection, that the defendant only covenanted for payment of two half-years' interest, let us look at the terms of her covenant. [Here, his lordship read the covenant.] On the part of the defendant it is contended, that the concluding words limit her responsibility to the payment of the interest on the two days therein mentioned. For the plaintiff it is insisted, that the words "during the continuance of this present mortgage security," extend the period until the principal and interest shall have been satisfied; and that appears to me, looking at the instrument, to have been the real intention of the parties. It is a very unlikely thing that the mortgagee should be content to have security for the payment of the interest for only two half-years. Then look at this recital, which, after stating that John Greenhill had requested the plaintiff to lend him 600*l.* upon the security mentioned, proceeds to say, that "as a further inducement to the said Susannah King to advance the said 600*l.*, the said Sarah Greenhill had agreed to covenant for the due payment of the interest"—not at all restricting such covenant to any particular time. The two [73] days named appear capable of either of the meanings which have been suggested; and if it appears that interest must necessarily become due after the expiration of a year, I think the parties must be taken to have intended that the interest accruing after that time should be paid. Now, by the next clause, containing the power of sale, the mortgagee, before he can exercise it, is required to give six months' notice in writing for the payment of the 600*l.* and interest, "or so much thereof as shall be then due." These words evidently contemplated that there may be interest accruing due at the expiration of the notice. And the same inference arises from the repetition of those words in the clause directing the application of the proceeds of the sale. If the parties therefore clearly seem to have thought that interest might become due after the expiration of the year, there is no ground for giving to her covenant the limited construction which has been contended for on behalf of the defendant.

COLTMAN J. I am of the same opinion. With respect to the first point, the breach assigned must be looked at as an allegation that on the 13th of August 1842, there was due for six half-years' interest the sum of 90*l.* Although the breach does not specify when the half-years' interest became due, the defendant is placed in no difficulty, for she had only to answer for the last six half-years. If those half-years had in fact been paid, but some preceding half-years remained owing, the plaintiff would have been driven to make a more precise statement by new assigning. As the breach is laid, it seems to me sufficiently certain. With regard to the other point which has already been before the court of Queen's Bench, it is sufficient to say, that I concur in the judgment pronounced by that court. Looking at the recitals and the whole deed, it is obvious [74] that so long as the money remains out on mortgage, the defendant covenants to pay the interest on the days specified.

MAULE J. I agree, for the reasons already given, in thinking that the construction put upon the deed by the court of Queen's Bench is right. With respect to the formal objection, I think that the breach assigned in the declaration is sufficient, whether on general or special demurrer. No authority has been cited, shewing that it is insufficient; but it has been suggested that the defendant might be embarrassed by not knowing to what particular half years the breach applied. If that be a difficulty, it is one which entitles the defendant not to demur, but merely to plead such a plea as will put the plaintiff to a new assignment. If the objection were well founded, it would follow that in all cases where a defendant compels a plaintiff to new assign he might have demurred; but that is clearly not the law.

CRESSWELL J. I concur with the rest of the court on both points.
Judgment for the plaintiff.

[75] THOMAS ARCHARD AND ANOTHER, Executors, &c. of Thomas Halliday,
v. WILLIAM COULSTING. May 27, 1843.

By a deed of separation, A. and B. were named trustees for the wife. B. never executed the deed, but promised to do so, and on two occasions instructed an attorney to enforce the deed against the husband. B. (who survived A.) having died, the wife brought an action upon the deed in the name of the executors of B. against her husband, the proceedings in which action were stayed by a judge's order; the court, on the application of the wife, set aside the order upon payment of the costs of the application, and giving security to the executors against the costs of the action, to the satisfaction of the master.—The court subsequently refused to interfere with the discretion of the master as to the amount of the security.

Covenant by the executors of a surviving trustee under an indenture of separation between the defendant and Mary Anne, his wife, bearing date the 25th of September 1826, to recover 760l. the amount of arrears of an annuity due to the wife under the covenant of the defendant.

The defendant, after setting out the indenture upon oyer, pleaded that before any of the moneys sued for became due, he and his wife cohabited together by mutual consent; whereby the indenture was avoided (*a*).

On the 12th of the same month the plaintiffs obtained an order of Coleridge J. to stay proceedings in the cause upon payment of 30s. costs, upon the ground that it had been commenced without their privity or consent, by an attorney on behalf of Mrs. Coulsting; and that the testator, Thomas Halliday, though named one of the trustees in the indenture, had never in fact executed it.

Manning Serjt. in last Easter term, obtained a rule nisi on behalf of Mrs. Coulsting, to rescind the judge's order, and that upon giving security for costs, to be approved of by the master, she might be at liberty to con-[76]-tinue the proceedings in the name of the plaintiffs. An affidavit of Mrs. Coulsting, which had been produced before the learned judge, and was again used upon the present occasion, stated that Mr. Halliday, who was Mrs. Coulsting's uncle, though he had not in fact executed the deed of settlement, had fully concurred in it, and had consented to become a trustee under it, and repeatedly promised to execute it; and that on several occasions he had employed one Cornish, an attorney, to compel payment of arrears of the annuity from the defendant. It was suggested that the plaintiffs were now colluding with the defendant to prevent Mrs. Coulsting from recovering the money.

Bompas Serjt. now shewed cause upon an affidavit of the plaintiffs, which stated (*inter alia*) that they had reason to believe, and did believe, that Halliday refused to become trustee under the deed of separation, and that he never directly or indirectly concurred or acted as such trustee therein; that, in December 1839, Mary Ann Coulsting, by William Beattie her next friend, filed a bill in Chancery against William Coulsting and the deponents, for the recovery of the like sum of money for which this action is brought; that the deponents put in their answer to the bill, and the cause came on to be heard by Shadwell Vice-Chancellor in March 1841, when the bill was dismissed with costs to be paid by William Beattie; that the deponents had been informed and believed that the bill was so dismissed in consequence of satisfactory proof having been given that William Coulsting had in February 1838, obtained a divorce against the said Mary Ann on the ground of adultery committed by her; that the application made to Coleridge J., on or about the 19th of August last, was made by the deponents for their own protection only, and not at the instigation or request of William Coul-[77]-sting; and that the costs directed by that order to be paid to the deponents had not been paid.

A court of common law will not compel executors to carry on an action which has been brought in their name without their consent. [Tindal C. J. in *Emery v. Mucklow* (10 Bingh. 23, 2 Moo. & Sc. 384, 2 Dowl. P. C. 735), where one of several plaintiffs dissented to the action being brought, the court refused to interfere, there being no suggestion of fraud. There are several cases in Archbold's Practice (see 7th ed. p. 996), where the court has refused to stay the proceedings on the application of trustees &c., where they have been indemnified. (His lordship particularly referred

(*a*) See *Scholey v. Goodman*, 8 J. B. Moore, 350, 1 C. & P. 36; *Durant v. Titley*, 7 Pri. 577.

to *Spicer v. Todd* (2 Tyrwh. 172, 2 C. & J. 165, 1 Dowl. P. C. 306) and *Whitehead v. Hughes* (2 C. & M. 318, 2 Dowl. P. C. 258).] *Prima facie*, undoubtedly, a court of equity would appear to be the proper tribunal to apply to. Halliday did not execute the deed of trust, and therefore was not a trustee in fact; and the court cannot make him a trustee against his will; still less can they authorise another party to use his name in an action as trustee. The executors ought, at least, to be paid the costs of the bill in equity, before they are subjected to the incurring of further costs at law. The wife may apply to equity to appoint new trustees.

Manning Serjt., in support of the rule. The latter step suggested is objectionable, not only as involving the wife in considerable expense, but also on the ground that new trustees would be liable to the covenants in the old deed.

There are two distinct questions in the case—first, whether the testator was a covenantor under the deed; secondly, as to the propriety of the action proceeding in [78] the name of his representatives. As to the first point, it is clear that a covenant will enure in favour of a covenantor, whether he executes the deed or not, and he may sue upon the covenant. [Tindal C. J. The question here will be, whether or not Halliday accepted the trust. If you can shew that he did, his executors would undoubtedly be in a situation to sue. But if that fact is left in doubt, the court will not interfere. The proof of the affirmative of that proposition lies upon you.] It is sworn, not only that Halliday consented to accept the trust, but that on more than one occasion he acted as trustee by employing an attorney to sue the present defendant upon the deed. The present plaintiffs cannot be injured by the action going on, as they will be indemnified by the wife. *Spicer v. Dodd* and *Emery v. Mucklow* are distinct authorities for the present application. [Maule J. If a party covenants with A. and B. and B. knows nothing about the matter, it seems hard upon him that he should be bound to lend his name as a plaintiff in an action, even upon an indemnity.] He might himself take advantage of the covenant. Or if he wished to exonerate himself he might disclaim the trust by deed. [Cresswell J. At whose expense? Are the court to assume that a party is trustee and compel him to lend his name in an action, unless he will be at the expense of a deed?] A devisee, if he finds the property devised to be *damnosa hæreditas*, he may disclaim by matter of record (Vide 4 M. & R. 190, ante, vol. ii. p. 701, n. (a), vol. iii. p. 733, n. (d)), or he will be liable to be sued as devisee. The present plaintiffs are in a situation to release the action. [Tindal C. J. The question then would be whether the release was given in collusion with the husband.] (b)

[79] TINDAL C. J. *Spicer v. Todd* is an authority in point, and shews that, where trustees have accepted the trust, the court will interfere and compel them to allow their names to be used as plaintiffs in an action on the deed, upon an indemnity being given to them. The question therefore in this case is, whether Halliday, whose personal representatives the plaintiffs are, had, in fact, accepted the trust. Upon this point the affidavit of Mrs. Coulsting is precise; it shews a promise to execute the deed, and acts done in pursuance of the trust by the employment of an attorney to compel the payment of the annuity by the husband. If the facts were not as she has stated them, the plaintiffs might have set up a stronger answer than they have done. I think, therefore, that the testator stood in the condition of a person who had accepted the trust; and that upon payment of the costs directed to be paid by the order of Coleridge J. and the costs of this application, and an indemnity, to the satisfaction of the master, being given to the executors for the costs in this action as well of the plaintiffs as those of the defendant, in case the plaintiffs should be called upon to pay any such, the cause should proceed.

The other judges concurring,

Rule absolute accordingly.

On the 6th of June interlocutory judgment was signed for want of a plea.

Dowling Serjt., on a subsequent day in this term (13th June), applied, on behalf of the defendant, to set aside the judgment for irregularity, upon affidavits stating that, on the 16th of August 1842, a summons had been taken out before Coleridge J. to set aside the defendant's plea as not being issuable (the defendant being under terms to plead issuably), which summons was dismissed; [80] that the rule of this court of the 27th of May, which had been drawn up by Mary Ann Coulsting, had not been served upon the defendant or his attorney; and that she had not paid the costs, or given the indemnity, required by the last-mentioned rule.

(b) See the observations of Tindal C. J. in *Emery v. Mucklow*, 10 Bingh. 23.

A rule nisi having been granted, it was afterwards (15th June) made absolute.

The master having fixed 300l. as the amount of security to be given by Mrs. Coulsting,

Gaselee Serjt. in Michaelmas term (8th November) moved that the master might be directed to review his decision. His affidavit suggested collusion between the plaintiffs and the defendant. The learned serjeant submitted that, in the wife's circumstances, to require such an amount of security was a denial of justice.

The court, however, declined to interfere; and the learned serjeant took nothing.

[81] HARRISON AND OTHERS v. HENRY HEATHORN, JOSEPH LIDWELL HEATHORN, MAGNUS, TAIT, HART, HENRY BLUNDELL, JOSEPH BLUNDELL, COHEN, ISAACS, HARRIS, NEUMAGEN, LONGSTAFF, AND MUSKETT. May 6, 1843.

[S. C. 6 Scott, N. R. 735; 12 L. J. C. P. 282. See *In re Mexican and South American Company*, 1859, 4 De G. & J. 320.]

A joint-stock company, the shares in which are represented to be transferable at the will of the holder, is not necessarily illegal.—Attending, in the character of a shareholder, a meeting of the members of a joint-stock company, is sufficient *prima facie* evidence that the party is a shareholder, to charge him with an engagement entered into by a majority of the shareholders present at a subsequent meeting which he does not attend.

Assumpsit. The declaration contained a special and three *indebitatus* counts, as already stated (*ante*, vol. v. p. 322).

The defendants Magnus, Cohen, Isaacs, Harris and Neumagen, suffered judgment by *nil dicit*, Longstaff, Hart, the Heathorns, Tait, Muskett, and the Blundells, pleaded *non assumpsit*. Joseph L. Heathorn, besides his fifth and sixth pleas upon which the plaintiffs obtained judgment on demurrer (*ib.*), pleaded, secondly, to the first count, that the plaintiffs were not before, or at the time of the making of the agreement and promise in that count mentioned, partners or shareholders in the company or association called the Anglo-American Gold Mining Association, *modo et formâ*; concluding to the country; thirdly, to the first count, that the plaintiffs did not take up or discharge for the honour of the drawer, the bills of exchange in the said first count mentioned, or any of them, or any amount thereof, or incur the said costs and expenses or any part thereof, as in that count alleged; concluding to the country; fourthly, to the first count, that the bills of exchange in that count alleged to have been taken up by the plaintiffs were not, nor were, nor was any of them, drawn by Penman upon H. Blundell on account of the company; nevertheless, the plaintiffs did not give notice to the company and the directors, or to any of them, three calendar [82] months before the commencement of the suit, to pay, and that the plaintiffs required payment of, the sum so alleged to have been advanced by them on taking up the said bills, and the said interest for the same, and the amount of the said costs and expenses of the plaintiffs, or any of them or any part thereof, *modo et formâ*; concluding to the country; eighthly, to the whole declaration, that the company or association in the said first count mentioned, was and is an illegal company, association or partnership, consisting of divers persons shareholders therein, formed for the alleged purpose of working gold mines in the United States of America, and the reduction and sale of the said precious metals and other valuable products of the said mines, and presuming to act as if they had been and were a corporate body, without any legal authority or any act of parliament or charter from the Crown for so doing; and also presuming and pretending, without any legal authority, act of parliament, or charter from the Crown, for so doing, to raise, and being constituted and formed with a view to raise, and with provisions for raising, a transferable and assignable stock and capital to a large amount, to wit, 6000l. sterling, to be considered as divided into sixty shares of 100l. each, with power for the shareholders of the company, at a special meeting to be called for that purpose, at any time and from time to time to increase the capital of the company to any amount that might be agreed upon, by creating an additional number of 100l. shares, and all which several shares, as well original as additional, were to be, and are, transferable and assignable from the holders thereof by deed or will, or otherwise, to

any other person or persons at the discretion of the holders thereof, to the common grievance, prejudice and inconvenience of the liege subjects of His late Majesty King William the Fourth, and our Lady the Queen, in their trade, com-[83]-merce, property and lawful affairs; that before and at the time of the making of the agreement and promise in the said first count mentioned, and at the times the plaintiff lent and paid the respective monies in the second and third counts mentioned, the plaintiffs had notice of the several premises in this plea mentioned; that the said loans and advances and payments in the second and third counts mentioned, were respectively made by the plaintiffs for the purpose of taking up and paying the said bills of exchange under the said agreement in the first count mentioned, and that the said agreement was made and entered into, and the payments in the first count mentioned, and the loans, and advances, and payments in the second and third counts mentioned were respectively made by the plaintiffs, and the said costs and expenses in the first count mentioned attending such bills were incurred, in order, and for the purpose, and with intent, to support and continue the said company or association, and for furthering, countenancing, and proceeding in, the said undertaking and attempt; to the common grievance and nuisance of the liege subjects of His said late Majesty and our Lady the Queen; whereby the said agreement was and is void in law; and that the account in the said last count mentioned was stated solely of and concerning the payments in the said first count mentioned to have been made by the plaintiffs of and concerning the said monies in the said second and third counts alleged to have been lent and paid by them respectively, and not of or concerning any other monies or matters, and the sum in the last count mentioned to have been found due, was so found due in respect of, and was and is the amount of the sums so paid as in the first count mentioned, and so lent and paid as in the second and third counts mentioned respectively; and which several payments and loans were made upon and for the illegal [84] purpose and consideration in this plea before mentioned. Verification.

Ninthly, to the whole declaration, that the said company and association was and is an illegal company, association or partnership, consisting of divers persons, shareholders, therein presuming to act as if they had been and were a body corporate, without any legal authority, or any act of parliament, or charter from the Crown, for so doing, and also presuming and pretending, without any legal authority, act of parliament, or charter from the Crown for so doing, to raise a large transferable and assignable stock in shares transferable at the will of the holders thereof, for the pretended object or purpose of working gold-mines in an immense and extensive territory in parts beyond the seas, to wit, the United States of America, and the reduction and sale of the said precious metals and all valuable products of the said mines: whereas, in truth and in fact, at the time of the formation of the said company or association, and for a long time afterwards, no gold-mines in the said United States had been or were discovered by the persons who projected, formed, or constituted the said company or association, or by any of them, or by any person or persons on behalf of the said company, nor had any gold-mine in the said United States been purchased or hired by or on behalf of the persons who projected, formed, and constituted the said company or association, or by or on behalf of the said company or association, or by or on behalf of the said company, nor were such persons or the said company possessed of any such gold-mine, nor in negotiation for the purchase or hire thereof; and the locality or particular nature of the situation for communicating and carrying on the operations of the company remained to be discovered and selected; and the objects of the said company were and are fanciful, visionary, and uncertain, and delusive, fraudulent, and [85] deceptive, and the company or association was and is by reason of the several premises, an undertaking, association, and attempt tending and calculated to cheat and defraud the subjects of His said late Majesty King William the Fourth and of our Lady the Queen respectively, of their moneys, tending to the common nuisance, grievance, prejudice, and inconvenience of the liege subjects of His said late Majesty King William the Fourth and our Lady the now Queen respectively, in their trade, commerce, and other lawful affairs. That before and at the time of the making of the agreement and promise in the first count mentioned, and at the time the plaintiff lent and paid the respective moneys in the second and third counts mentioned, the plaintiffs had notice of the several premises in this plea mentioned. That the loans and advances and payments in the second and third counts mentioned were respectively made by the plaintiffs for the purpose of taking up and paying the

said bills of exchange under the agreement in the first count mentioned, and that the said agreement in the first count mentioned was made, and the said payment and loans and advances in the first, second, and third counts mentioned were made, by the plaintiffs, and the said costs and expenses in the first count mentioned attending such bills were incurred, in order and for the purpose, and with intent, to support and continue the said company or association, and for furthering, countenancing, and proceeding in the said undertaking and attempt; to the common grievance and nuisance of the subjects of His said late Majesty and our Lady the Queen; whereby the said agreement was and is void in law; and that the said account in the last count mentioned was stated solely of and concerning the payments in the first count mentioned to have been made by the plaintiffs, and of and concerning the said moneys in the said second and third counts alleged to [86] have been lent and paid by them respectively, and not of or concerning any other moneys or matters; and that the sum in the last count mentioned to have been found due was so found due in respect, and was and is the amount, of the sums so paid as in the first count mentioned, and so lent and paid as in the second and third counts mentioned respectively; and which several payments and loans were made upon and for the illegal purposes and consideration in this plea before mentioned.—Verification.

Tenthly, as to the sum of 2000l., parcel of the said monies in the said fifth and last counts mentioned, payment and acceptance of that sum in full satisfaction and discharge of the said sum of 2000l., parcel, &c., and the causes of action in respect thereof. Verification.

Tait pleaded, secondly, to the first count, that the defendants were not partners or shareholders in the company or association called the Anglo-American Gold Mining Association, *modo et formâ*; concluding to the country.

Thirdly, to the first count, that the plaintiffs did not at the several days and times in that count mentioned, or at any other days or times, pay, lay out, or expend the said sums of money in the first count mentioned, or any of them, or any part thereof, in or about taking up and discharging, for the honour of the drawer, the bills of exchange in the declaration mentioned, or any of them, or incur such costs and expenses as in that behalf in the first count mentioned, or any part thereof, *modo et formâ*; concluding to the country.

Fourthly, to the first count, that the plaintiffs did not, nor did any of them, give the said notice to the company and directors to pay the said sum of 5500l., or the other sums of money in the first count respectively mentioned, or any other sum or sums of money, or require payment [87] thereof, or of any part thereof, *modo et formâ*; concluding to the country.

Fifthly, to the first count, that the plaintiffs, on the 10th of March 1836, became, and were, and thenceforth had been, and still were, shareholders and partners in the company, and that they, on the said 10th of March 1836, duly elected to take the said sixty shares according to the said agreement, and gave the company and the directors due notice thereof; without this that the plaintiffs gave due notice to the company and to the directors, that they, the plaintiffs, declined to take the said sixty shares in, or to become members of, the company, and then elected not to take, and had not taken, such shares and become such shareholders as in the first count of the declaration mentioned, *modo et formâ*; concluding to the country.

Sixthly, to the first, second, and third counts, that the company in the first count mentioned, before and at the time of the making of the agreement in the first count mentioned, and before and at the respective times of the lending and paying in the said second and third counts respectively mentioned, was, and thence always hitherto had been, and still was, a company and partnership between the defendants and divers and very many other persons, to wit, during all the time aforesaid, presuming to act and acting as if they were and are a corporate body, and pretending to raise a transferable and assignable stock without any act of parliament, or any legal authority, and without any charter from the Crown, for so doing; of all which several premises in this plea mentioned the plaintiffs, before and at the time of making the agreement in the first count mentioned, and before and at the respective times of lending and paying the said sums in the said second and third counts respectively mentioned had notice, and at those respective times well knew the same, and [88] the plaintiffs, to wit, then entered into the said agreement in the said first count mentioned, and lent and paid the money in the said second and third counts respectively mentioned, with

such full knowledge as aforesaid; and for the purpose of furthering, continuing, and proceeding in the said company, partnership and undertaking, and with a view of assisting and supporting the same; and the said agreement in the first count mentioned was entered into by all the parties thereto, and the sums in the second and third counts mentioned were lent and paid, for the furthering, continuing, and proceeding in the said company, partnership, and undertaking, and with such notice and knowledge as aforesaid.

Seventhly,—to the first, second, and third counts,—that the said company and partnership in the said first count mentioned, before and at the respective times of making the agreement in the first count mentioned, and the lending and paying the said sums in the second and third counts respectively mentioned, was, and from thenceforth had been, and still were, a new and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience of great numbers of the liege subjects of this realm in their trade and commerce, that is to say, an undertaking for the purpose and object of purchasing and working mines, and of raising metal ores, and of smelting, refining, and manufacturing and selling, and disposing of the said metal to be obtained and raised from such mines; and which undertaking, before and at the time of making the agreement in the first count mentioned, and before and at the respective times of lending and paying the respective sums in the second and third counts respectively mentioned, and thenceforth had been, and still was, a public undertaking then and during all the time last aforesaid, and still relating to affairs in which the trade, and welfare, and [89] commerce of great numbers of the liege subjects of this realm had been, during all the time last aforesaid, and still were concerned; and which undertaking, at the time of making the agreement in the first count mentioned, and at the times of the lending and paying in the said second and third counts respectively mentioned, and thenceforth had been, and still was, a common nuisance to the liege subjects of this realm; of all which several premises in this plea mentioned the plaintiffs, before and at the time of making the said agreement in the first count mentioned, and before and at the said respective times of lending and paying the said sums in the second and third counts respectively mentioned, had notice, and at all times well knew the same; and the plaintiffs then entered into the said agreement and lent and paid the respective sums with such knowledge as last aforesaid, and for the purpose of furthering, continuing, and proceeding in the said company, partnership and undertaking, and with a view of assisting and supporting the same and the illegal objects thereof; and the said agreement was entered into by all the said parties thereto, and the sums in the said second and third counts mentioned were respectively lent and paid by the plaintiffs for the furthering and proceeding in the said company, partnership, and undertaking in this plea mentioned, and with such full knowledge of the premises in this plea mentioned as aforesaid.—Verification.

Eightily, as to so much of the fourth count as related to 2000l. parcel of the sum of money in the fourth count mentioned, and therein supposed to have been received to the plaintiffs' use; that the said sum of 2000l. was a sum formerly, and before the said supposed receipt thereof, paid, by the plaintiffs, to the said company in the said first count mentioned, as the consideration for the purchase of a certain tract of land [90] sold to the company by and under a certain written agreement, which was afterwards, and before the receipt of the said 2000l., to wit, on the day and year last aforesaid, rescinded, and that the plaintiffs claimed the same as so much money received to their use on and by reason of the rescission of the said agreement, and on the implied promise supposed to arise in law upon such rescission, and in no other way and on no other ground whatsoever; nor was there any express promise to pay the same, or any part thereof. That the company before and at the time of the making of the last-mentioned agreement and the payment of the said 2000l., was and from that time always had been, and still was, a company and partnership between the defendants and divers other persons, during all the time last aforesaid presuming to act, and acting, as if they had been and were a corporate body, and pretending to raise a transferable and assignable stock, without any act of parliament, or any legal authority, and without any charter from the Crown, for so doing; of all which several premises the plaintiffs before and at the time of the making of the last-mentioned agreement and the payment of the said 2000l. had notice, and then well knew the same, and the plaintiffs then entered into the last-mentioned agreement, and paid the said 2000l. with such knowledge as last aforesaid, and for the purpose of furthering, continuing,

and proceeding in the company, partnership and undertaking in that plea mentioned, and with a view of assisting and supporting the same. Verification.

Ninthly, as to so much of the fourth count as related to 2000l. parcel, &c. That the said 2000l. was a sum formerly paid by the plaintiffs to the company, as the consideration for the purchase of a certain tract of land sold to the company by and under a certain written agreement, which was afterwards, and before the receipt of the said 2000l., to wit, on, &c. rescinded, and that [91] the plaintiffs claimed the same as money received to their use on and by reason of the rescission of the last-mentioned agreement, and on the implied promise supposed to arise in law upon such rescission, and in no other way whatsoever, nor was the same or any part thereof due in any other way whatsoever, nor was any express promise ever made to pay the same, or any part thereof. That the company before and at the time of the making of the last-mentioned agreement and the payment of the said 2000l., was and from that time always had been, and still was, a new and unlawful undertaking tending to the common grievance, prejudice, and inconvenience of great numbers of the liege subjects of this realm, in their trade and commerce, that is to say, an undertaking for the purpose and object of purchasing and working mines, and of raising metal and ores, and smelting, refining, and manufacturing, and selling and disposing of the metal to be obtained and raised from such mines; and which undertaking before and at the time of making of the last-mentioned agreement, and the payment of the last-mentioned 2000l., was and thenceforth had been and still was a common nuisance to the liege subjects of this realm; of all which premises the plaintiffs before and at the time of making the last-mentioned agreement, and the payment of the said 2000l. as last aforesaid had notice, and then well knew the same, and the plaintiffs then entered into the last-mentioned agreement, and paid the said 2000l. as last aforesaid, and for the purpose of furthering, continuing, and proceeding in, the said company partnership and undertaking, and with a view of assisting and supporting the same and the illegal object thereof. Verification.

The plaintiffs joined issue on the first, second, third, fourth, and seventh pleas pleaded by Joseph L. Heathorn, [92] replied *de injuriâ* to the eighth and ninth, and traversed the payment alleged in the tenth.

The plaintiffs also joined issue on the first, second, third, fourth, and fifth pleas of Tait.

To the sixth, the plaintiffs replied that the company in the first count mentioned at the time of making the agreement in that count mentioned, and at the respective times of the lending and paying in the second and third counts respectively mentioned, was not, nor had it been, nor was it, a company and partnership between the said defendants and divers other persons presuming to act and acting as if they were a corporate body, and pretending to raise a transferable and assignable stock, *modo et formâ*; concluding to the country.

To the seventh plea the plaintiffs replied, that the company and partnership in the first count mentioned at the respective times of making the said agreement in the first count mentioned, and the lending and paying the said sums in the second and third counts respectively mentioned, was not, nor had it been, at any part of the time in the seventh plea mentioned, nor was it still, a new and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience of great numbers of the liege subjects of this realm in their trade and commerce; nor was the same undertaking at the time of making the said agreement in the first count mentioned, and before and at the respective times of lending and paying the respective sums in the second and third counts respectively mentioned, an undertaking for the purpose and object in the plea mentioned; nor was it a public undertaking then or at any part of the time in the seventh plea mentioned, or still relating to affairs in which the trade and welfare and commerce of great numbers of the subjects of this realm were concerned; nor was the same undertaking, at the time of making the agreement in the first count mentioned, and at the [93] times of the lending and paying in the second and third counts respectively mentioned, nor thenceforth had it been, nor was it still, a common nuisance to the liege subjects of this realm, *modo et formâ*; concluding to the country.

To the eighth plea the plaintiffs replied, that the company, at the time of the making of the agreement in that plea mentioned, and the payment of the said 2000l. therein mentioned, was not, nor from that time had it been, nor was it still, a

company and partnership between the defendant and divers other persons presuming to act and acting as if they were a corporate body, and pretending to raise a transferable and assignable stock, *modo et formâ*; concluding to the country.

To the ninth plea the plaintiffs replied, that the company, at the time of making the agreement in that plea mentioned, and of the payment of the said 2000*l.* in that plea mentioned, was not nor from that time had it been, nor was it still, a new and unlawful undertaking, tending, &c.; nor was the same undertaking, at the time of making the last-mentioned agreement and the payment of the said 2000*l.* in that plea mentioned, nor thenceforth had it been, nor was it, a common nuisance to the liege subjects of this realm, *modo et formâ*; concluding to the country.

At the trial before Tindal C. J. at the London sittings after Michaelmas term, the signatures of the defendants to the agreement of the 24th of December 1835, were proved, and it was shewn that the plaintiffs had paid bills drawn by Penman on Henry Blundell to the amount of 5500*l.*; that they declared their intention not to take shares in the company; and that they gave notice that they required to be reimbursed the amount of their advances with interest and costs.

The plaintiffs then put in the deed of settlement of [94] the association, bearing date the 1st of November 1833, between Penman of the first part, Muskett of the second part, the defendants Henry Blundell and six other persons, of the third part, and Bridges of the fourth part, by which, after reciting that the several parties thereto of the first, second, and third part, had then lately agreed to form a company for the purpose of working gold mines in the United States of America, and that they were desirous that such deed of settlement should be made and executed for the purpose of ascertaining, defining, and settling their respective rights, interests, and liabilities in the undertaking, it was thereby declared and agreed by and between the said several parties, *inter alia*, in manner following:

1. That the several parties hereto of the first, second, and third parts, and all persons who shall hereafter become subscribers to, or interested in, the capital of the company hereby intended to be formed under the provisions hereinafter contained (and who are hereby described as shareholders), shall, so long as they possess any sum or share of the capital of the company, be and continue, until dissolved under the provisions hereinafter contained, a company or partnership under the name of "The Anglo-American Gold Mining Association."

2. That the object of the company shall be the working of gold mines in the United States of America, and the reduction and sale of the precious metals and all other valuable products of the said mines.

4. That the present capital of the company shall consist of 6000*l.* sterling, which shall be considered as divided into sixty shares of 100*l.* each, all which shares have been taken and subscribed for by the parties hereto of the first, second, and third parts in the several numbers and proportions agreed upon between them.

5. That it shall be lawful for the shareholders of the company, at a special meeting of shareholders to be [95] called for that purpose, in manner hereinafter mentioned, at any time, and from time to time, to increase the capital of the company, to any amount that may be agreed upon, by creating an additional number of 100*l.* shares.

11. That each shareholder (as well the present as all future additional shareholders and all persons becoming entitled to shares upon any change of ownership as hereinafter provided for) shall, upon application to be made by him to the trustee and treasurer of the company, be entitled to receive for every share to which such shareholder shall appear by the book called the "Share Register Book" hereinafter particularly mentioned to be entitled, a certificate signed by the said trustee and treasurer, in the words and figures, or to the effect, following:

"Anglo-American Gold-Mining Association.

"Shareholder's Certificate.

"This is to certify that A. B. of, &c., is the proprietor of the share No. _____, in the capital of this association, as established by deed of settlement bearing date the 1st day of November 1833; that the said share stands in _____ name in the 'Share Register Book,' as the proprietor thereof; and that the sums specified in the margin

hereof have been paid on account of the said share. Given, under my hand, in London, this _____ day of _____.

"Signed, G. A. MUSKETT.

"Trustee and Treasurer.

"N. B. The holder of this certificate will not be entitled to any of the privileges of a shareholder until the share has been transferred to him in the books of the company."

12. That a sufficient number of printed forms of shareholders' certificates shall be provided by the [96] trustee and treasurer, and kept by the solicitor, of the company for the time being; and such certificate shall be filled up and delivered by the solicitor to the shareholders entitled to the same upon their application, provided nevertheless that the shareholders' certificate shall be evidence of the title to the share mentioned therein, of that person only who shall therein be stated to be the proprietor thereof in the "Share Register Book," and such certificate shall not entitle any other person who may be the holder thereof (whether for valuable consideration or otherwise) to any right or interest in, or lien upon, the share to which the same relates, or in any way give to such holder a right to participate in the profits or advantages of the company, or to interfere with or be concerned in the management of the affairs thereof.

15. That the shares in the company, as well original as additional, may be assigned or disposed of by deed, or will, or otherwise, to any other person or persons, at the discretion of the holder thereof; but that no share shall be divisible into any fractional part.

16. That upon any change taking place in the ownership of any share in the company, whether such change be effected by act of the law or by act of the parties, the party or parties claiming to be entitled to any share or shares in respect of any such change, shall produce his, her or their title to such share or shares to the solicitor of the company for his examination and approval; and such solicitor, upon being satisfied of the sufficiency of such title, shall cause the name, place of residence, and occupation of the party or parties so making out title as aforesaid, together with the number of shares to which a title shall be so made out, and the number of such shares respectively, to be entered in the "Share Register Book."

19. That the entries contained in the "Share Register Book" shall, for all the purposes of the company, and [97] these presents, be conclusive as to the parties entitled to shares, their places of residence, and occupation, the number of shares held by them respectively, and the respective numbers of such shares.

20. That no person shall be entitled to any of the rights or privileges of a shareholder, or be in any way interested or concerned in the management of the affairs of the company, in respect of any share or shares, his title to which shall not have been duly examined and entered in the "Share Register Book."

21. That any person upon ceasing to be a shareholder and payment and discharge of all money, and other liabilities charged upon, or due in respect of, the shares possessed by him, shall, if he require it, receive from the trustee and treasurer of the company a certificate, in the words and figures, or to the effect, following:—

"Anglo-American Gold-Mining Association.

"Certificate of Discharge.

"I do hereby certify that A. B. of, &c. has ceased to be a shareholder in the above-named company, and that he is discharged from all liabilities on account of the shares formerly held by him. Witness, my hand this _____ day of _____."

38. That John Penman shall be the present superintendent of the company, and shall be subject to, and bound by, the several rules, regulations, and provisions next hereinafter contained; that is to say,

First, as the said parties hereto of the second and third parts have been mainly induced to become shareholders in the company upon the statements and representations of Penman that there are gold-mines in various parts of the United States of America, which may be taken, and profitably worked, by the company, and [98] that

he is competent and willing to superintend and conduct the actual working of the said mines and the general management of the affairs of the company in America, it is hereby agreed between the parties hereto, and Penman doth hereby for himself, his heirs, executors and administrators, expressly covenant with the said G. A. Muskett, his executors and assigns, that he Penman will, as soon as conveniently may be after the execution of these presents, repair to the United States of America; and upon his arrival there, use his best endeavours to discover, with as little delay as possible, some situation eligible and advantageous for carrying on the operations of the company.

Secondly. That Penman shall be unfettered in his judgment as to the locality or particular nature of the situation to be selected by him for commencing and carrying on the operations of the company, and to that end, shall be at liberty to engage one or more situation or situations containing gold mines, either opened or unopened, and either to make arrangements for the entire working of the said mines, or only for the smelting and reduction of the ore, the main object of the company being the obtaining and sale of gold ore; and it being expressly agreed by the parties hereto of the second and third parts, that it shall be left to the discretion and judgment of Penman to advance and effectuate such object in such manner, and in all respects, as he shall think most advisable. Provided nevertheless, that it shall be lawful for the shareholders at any half-yearly, or special, meeting, to be held in manner hereinafter directed, to prescribe all such directions and regulations as to the working of any mines to be taken by Penman, and the management by him of the affairs of the company in America, as they shall, from time to time, resolve and agree upon; and which directions and regu-[99]-lations, when duly made and forwarded to Penman, he shall observe, conform to, and be bound by.

Thirdly. That Penman shall be at liberty to contract for the occupation of any situation for the purposes of such company, for such period as, in his judgment, shall be sufficient to try the eligibility thereof; and the terms of such contract shall be left entirely to his discretion, except that he shall not be at liberty to make any contract for the absolute purchase of any situation without the express authority of the shareholders, to be given at a half-yearly meeting to be held for that purpose in manner hereinafter directed.

Fourthly. That in case any directions or instructions shall at any time be given to Penman as to making any further contracts for the occupation or purchase of mines in pursuance of the provisions in that behalf hereinafter contained, Penman shall, in all things, observe such directions and instructions and immediately use his best endeavours to do, or procure to be done, every act necessary to the perfect completion of such contracts respectively, according to the laws and municipal regulations of the particular state or territory in which the subject matter of such contracts respectively shall be situate.

Fifthly. That in case any lands shall at any time be purchased by Penman on behalf of the company, in pursuance of directions or instructions for that purpose as aforesaid, and the laws or municipal regulations of the particular state or territory in which such lands shall be situate, shall prevent or forbid the conveyance of such lands being taken or held in the name of the company, such conveyance shall be made to Penman, but nevertheless to be held by him his heirs and assigns in trust for the company.

Sixthly. That when and so soon as Penman shall have arranged for the occupation of any situation or [100] situations for commencing the operations of the company, he shall hire all such workmen and servants, and provide all such machines, implements and stores, and do all such other acts whatsoever, as may be necessary or proper for commencing such operations as speedily and efficiently as possible.

Seventhly. That when and as soon as Penman shall have entered into such contract for occupation as aforesaid, he shall draw up a report containing an accurate and detailed description of the premises to be occupied, and their probable means of profit and advantage to the company, and transmit such report, together with a copy of such contract, to the trustee and treasurer of the company for the time being.

Fifteenthly. That for the purpose of enabling Penman to commence the operations of the company, the trustee and treasurer thereof may forthwith advance to Penman any sum not exceeding 600l.: and, in order to carry on such operations,

Penman may be at liberty to draw upon the trustee and treasurer thereof, by bills at not less than sixty days' sight, for such sums as he shall from time to time require; and the amount of such bills shall be applied by Penman in payment of the expenses of promoting the operations of the company.

39. That Muskett shall be the present trustee and treasurer of the company, and shall be bound by the rules, regulations and provisions next hereinafter contained, one of which was, that the said trustee and treasurer shall apply the moneys from time to time in his hands belonging to the company in payment of such bills or drafts as the superintendent, in pursuance of the powers and provisions hereinbefore in that behalf contained, shall draw upon him.

45. The fourteen days' notice of the time and place of holding all meetings of shareholders, as well half-yearly as special, shall be given by a circular, to be sent to each [101] shareholder of the company at his place of residence as entered in the "Share Register-Book;" such circular, as to half-yearly meetings, to be signed and sent by the trustee and treasurer of the company for the time being; and such circular, as to special meetings, to be signed and sent by the party or parties respectively calling the same, and to state the particular business to be taken into consideration thereat.

52. That any shareholder may vote by proxy, such proxy to be in writing held by some other shareholder, except in the case of the superintendent, whose proxy may be held by a stranger.

54. That all questions and resolutions shall be decided at the meetings, as well half-yearly as special, by the majority of the votes of shareholders appearing in person or by proxy.

55. That at the special meetings of the shareholders no other business shall be discussed and resolved upon besides the particular matters of business stated in the circulars calling the same.

57. That the shareholders of the company may, at any time, and from time to time as often as they shall think proper, by resolutions to be passed at special meetings, to be duly held and convened for that purpose, according to the regulations hereinbefore contained, alter and vary the regulations of the company and the rights and interests of the shareholders therein, and prescribe and establish any new or other mode of management of the affairs of the company as they shall from time to time think proper or expedient; and such new or altered rules, regulations and provisions, shall, so long as they remain in force, be as binding upon all the shareholders as though all had concurred therein, or the same had been introduced into, and formed part of, these presents.

59. That an absolute and entire dissolution of the company may take place by a resolution of the majority [102] of the shareholders present at three successive meetings, to be held for that purpose, the last of which meetings shall appoint three of the shareholders, of whom the trustee and treasurer for the time being shall be one, for the purpose of carrying such dissolution into effect, and the affairs of the company shall be thereupon wound up; and the assets of the company, after satisfying their debts and liabilities, shall be divided among the shareholders in proportion to their shares, and any special meeting of the shareholders duly convened for that purpose, may declare the accounts of the company finally closed, and the assets fully administered, and the superintendent, trustee and treasurer, and all other parties released and discharged from all future liabilities and engagements, actions, suits, claims and demands under or by virtue, or in consequence, of the deed, or of any other deed or engagement entered into by them in connection with, or reference to, the affairs of the company; and that the superintendent, trustee and treasurer, and all other parties, shall be released and discharged according to such resolution, and on the terms and under the modifications thereof.

On the 29th of September, 1834, the defendant Henry Blundell and two others were appointed trustees and treasurers instead of Muskett.

The several defendants attended several meetings, and otherwise took part in the proceedings of the company, with the exception of J. L. Heathorn. The only evidence to connect him with the undertaking was that, on the 17th of December, 1835, he attended a special meeting of the association. It was not shewn whether a sufficient number of shareholders was present, without reckoning J. L. Heathorn, to transact the business for which they were convened.

At this meeting, the following resolution was passed :—

[103] 17th of December, 1835.

Anglo-American Gold-Mining Association.

"At a special meeting of this Association, held this day at, &c. in London, in pursuance of a circular, dated 1st of December, 1835.

Present.	Shares.	Proxies.	Shares.
"Henry Blundell . . .	26	David Wilson . . .	6
James Magnus . . .	47	Henry Heathorn . . .	5
William Smith . . .	10	Israel Isaacs . . .	5
John Tait . . .	6	Joseph Blundell . . .	12
Solomon Cohen . . .	7	George D. Longstaff . . .	7
Abraham Hort . . .	11		
Samuel Magnus . . .	6		
Joseph L. Heathorn . . .	1		
Leopold Neumagen . . .	1		
Abraham Harris . . .	2		

"Henry Blundell, Esq. in the chair.

"The circular convening this meeting, and the correspondence of Mr. Penman, and letters from Dr. E. S. Blundell, and Messrs. Samuel Hicks and Sons & Co. having been read,

"It was unanimously resolved—

"That the contract entered into by the directors for the sale of the Henderson mine and saw mill to Mr. Harrison and others, be confirmed.

"That in case the directors shall not be able to effect the sale of the Alexander mine in the course of the present week, they be authorised to sell any number of new or additional shares, not exceeding 100, as may be necessary for enabling them to repay their respective advances, and to pay the bills drawn by Mr. Penman upon Mr. Blundell.

"That Mr. Penman having failed to make the monthly reports to the directors, as provided by the deed of settlement, and having, on the 29th of June last, written [104] to Mr. Magnus, as one of the directors of the company, that he had then drawn on Mr. Blundell, in favour of Mr. H. W. Olcott, on account of the company, bills to the amount of 3500l.; whereas he had given to Mr. Olcott such bills to the amount of 5500l., and having, until they were presented for acceptance, wholly suppressed the fact that the additional bills of 2000l. had been drawn; and having, by his said letters of the 29th of June last, and another addressed to Mr. Magnus of the same date, led the directors to believe that 3500l. would be all he should have occasion to draw on them for on account of the company, and having since drawn on Mr. Blundell, and given to Mr. Olcott, Messrs. Hick and Sons and Dr. E. S. Blundell, bills to the extent of 9500l.; and having thereby drawn on Mr. Blundell, on account of the company, bills of exchange far exceeding the amount of the subscribed capital, and also having expressed his intention of withholding the company's property unless an exorbitantly large sum of money shall be paid to him,—the appointment of Mr. Penman as a director, and superintendent, &c. are hereby revoked, &c."

At a special meeting of the association held on the 9th of April 1836, which was attended by all the defendants, except J. L. Heathorn, Isaacs and Harris, a report of the directors, dated the same day, was received, read and entered on the minutes. The report stated that

"At the December meeting 100 new shares were created, the sale of which the directors hoped would enable them to meet all the exigencies of the company." "Of these shares sixty were offered to S., F., and H. (the plaintiffs); but those gentlemen at that time refused to make an absolute purchase of them, and they proposed to retire, for the honour of the drawer, bills then outstanding drawn by Penman on Mr. H. Blundell to an amount not exceeding 6000l., the directors and shareholders being made jointly and individually responsible [105] for their reimbursement, with interest, and all costs attending such bills, at any time after the 1st of October next, unless they should make their election to accept of shares at par in lieu of being repaid in money."

"With the sanguine picture before them of the company's prospects which Penman had drawn, and which would have been destroyed if the bills in question had been returned to America protested, the directors did not hesitate, on behalf of the company, to give the undertaking required by S., F., and H., who, accordingly, retired bills to the amount of 5500*l.*; and the time is now at hand when they are to exercise their option; and this forms one of the large items of debt which it is necessary to be prepared to repay."

A verdict was taken for the plaintiffs, subject to the questions, whether J. L. Heathorn was a shareholder and proprietor at the time the contract was entered into with the plaintiffs—whether it was made with his authority—and whether the association was illegal; with power to the court to draw inferences as a jury.

In the following term, rules were obtained on these points by Sir W. W. Follett S. G., on behalf of the defendant J. L. Heathorn; and by Kelly, on behalf of the defendant Tait. Against these rules—

June 10.—Sir T. Wilde Serjt. shewed cause in Trinity term, 1842. J. L. Heathorn was properly made a co-defendant. He was present at the meeting of shareholders at which the liability of the shareholders to pay the bills in question was distinctly recognised. [Cresswell J. Was there any evidence that the statement—which appears on the minutes—that J. L. Heathorn was a shareholder, was read at the meeting?] There was not. But it must be understood that the minutes were taken down in the usual way. This was a meeting, not for the purpose of con-[106]sidering whether a company should be formed, but "a special meeting" of an existing company, held "in pursuance of a circular dated" &c. It has been suggested that the meeting was not regularly called, but whether that be so or not J. L. Heathorn attended. [Tindal C. J. Was the meeting held at the office of the company in Copthall Court or at the office of the solicitor?] It was at the office of the solicitor. [Tindal C. J. That makes it stronger.] The parties met only to discuss the existing state of affairs. No shares were afterwards issued. The question is, not whether it was not open to J. L. Heathorn to explain all this, but whether, unexplained, it was not sufficient *prima facie* evidence of his being an assenting party, and what inference a jury would be justified in drawing from the evidence. As Penman was the only party allowed to attend by a proxy, not being a member of the association, J. L. H. could only have attended as a member, a character which he could not afterwards repudiate; *Sheffield, &c. &c. Railway Company v. Woodcock* (7 M. & W. 574). Being present, the presumption is that every thing was done which would be necessary to render the proceedings of the meeting effectual. J. L. H. claims to be a partner, he is acknowledged to be a partner, and he acts as a partner. In taking the present objection, J. L. H., in effect, says, "I will not shew you what, but I ask you to assume that something has been omitted which ought to have been done to constitute me a partner."

The next question is, whether the association was illegal. This objection is not very creditable to the commerce of the country. This was a *bonâ fide* investment of actual capital, not a bubble scheme holding out that only small sums are to be advanced. There can be no objection to sending agents to look out for mines. There [107] has been no publication for the purpose of creating a delusion. The object of the association involved nothing injurious to the people of this country. No attempt was shewn to bring in unwary persons by false and delusive statements. If any delusion had been practised, the defendant had the full means of shewing it. None of the characteristics of a bubble concern are to be found. [Tindal C. J. As far as it appears the bills were drawn as a regular mercantile transaction. Maule J. referred to *Ex parte Bolitho* (Buck, 100). Cresswell J. Is there any allegation in the pleas that the holders of the bills had notice of any illegality in the transaction?] None. The illegality charged in the plea is, the presuming to act as a body corporate without legal authority, &c. [Tindal C. J. These are words introduced by the bubble act. I am not aware that presuming to act as a body corporate was an offence at common law.] The acting here is in a form which would not bind a corporation. The bills in question were drawn upon three individual directors by name. There is nothing illegal in dividing a partnership into shares, or in making the shares transferable. The provisions of the bubble act are out of the question. To shew illegality there must be a nuisance to the public. The mere power of transferring shares from A. to B. is not illegal. To make an association illegal it must be accompanied with delusion. This was a private partnership deed, not a prospectus held out to the public. It is not

something published to get deposits and lay hold of money. One of the objections is, that it is required that certain forms should be gone through. But any such impediments to the free transfer of shares would have excluded this association even [108] from the operation of the bubble act, supposing that statute not to have been repealed. The certificate is not to discharge from liability. It would only do so after payment of what was due from the party at the time he retired from the association, and could therefore occasion no injury to the public. The illegality of these transactions has always consisted in stating that the party transferring his interest was to be discharged. There is no stipulation that the transferee shall be in the same position as the transferor. It is not very material to consider whether if the agreement was illegal the defendant had notice of it. The last stipulation of the deed, the fifty-ninth article, deserves particular attention. It appears to have been misunderstood. There is no ground for saying that the effect of this clause is to discharge the partners, as against the public, though, in the case of *Blundell v. Winsor* (8 Sim. 601), in the Chancery Reports (ib. 610), this clause is printed in italics. Among other objections which were raised, an objection was taken as to the illegality of the company. In his judgment Shadwell V. C. says (ibid. 611), "I cannot but think that the deed of November 1833, by which the company was established, is, on the face of it, illegal. It proposes that certain persons should become partners for the fanciful purpose of working gold mines in North America; and it provides that the parties to the deed of the first, second, and third parts, and all persons who should become subscribers to or interested in the capital of the company, should, so long as they possessed any share of the capital, be and continue a company or partnership under the name of the Anglo-American Gold-Mining Association. It then provides that, in the first instance, the shares should not exceed sixty; but, in the subsequent part of the instrument, the shareholders are [109] empowered to increase the number of shares to an unlimited extent; and a great number of additional shares have been, in fact, created. The deed also provides that the shares, as well original as additional, may be assigned or disposed of by deed or will, to any person or persons, at the discretion of the holders. The fair inference to be drawn from the provisions of this deed is, that certain persons were to form a company, which might be increased to an unlimited extent, and that the shareholders were to have the power of transferring their shares to whomsoever they pleased, without any sort of control. The deed, therefore, necessarily represents that the persons who should assign their shares, would get rid of all the liabilities attached to them; and that the persons who should take their shares, would take them just as the assignors held them. It is clear, however, that this could not be done. In my opinion, therefore, the deed held out to the public, as an inducement to them to become partners in the working of these imaginary gold mines, a false and fraudulent representation that they might continue partners in the undertaking just as long as they pleased, and then get rid of all the liability that they had incurred, by transferring their share to some other person" (8 Sim. 610). Was it ever heard that a partnership deed is to be considered as a matter held out to the public? It was not, as alleged in the judgment, determined that they should sell single shares. It is difficult to see how the Vice-Chancellor could possibly have arrived at the conclusion to which he came. There was not a tittle of evidence to shew that the plaintiffs had notice of the supposed illegality. The judge misapprehended the contents of the deed, and the effect of the facts stated as to the proceedings of the association. He professes to found his decision [110] upon the judgment of this court in *Duerger v. Fellows* (2 Bingh. 248, 2 M. & P. 384); which, if properly considered, affords no ground for such decision. In that case a bond had been given to the plaintiff, conditioned for the payment to the plaintiff of 100,000*l.*, upon his forming a company for the carrying on of a distillery according to a process for which a patent had been taken out, and obtaining purchasers for 9000 shares. The plea was, that the patent contained a proviso for making it void in case the patentee should transfer the benefit thereof to more than five persons, and that, at the time of the making of the bond, it was intended that the company should consist of more than five persons, and that it should be formed for the purpose of using the privileges of the patent, and of acting as a corporate body, and dividing the benefit of the patent into 10,000 shares, to be transferable and assignable, without any charter from the King; and that it was illegally agreed between the plaintiff and the defendant that the plaintiff should form the company for such purposes. That plea was, on demurrer, held to be good, and an

answer to the action. Best C. J. in delivering the judgment of the court says (2 Bingh. 266, 2 M. & P. 412), "The seventh plea states, and the demurrer admits, that the plaintiff and defendant intended that the company which the plaintiff undertook to form, should act as a corporate body without any charter from the King; that the benefit of the letters patent was to be enjoyed by this pretended corporate body; and that the capital of their body was to be divided into ten thousand shares, which were to be transferable and assignable. It has been said at the bar, that the parties may have intended to obtain an act of parliament in order to give the body a legal existence; but nothing of this intention appears on the record. It has been further said, that the defendant should have shewn how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a corporation, the plaintiff should have traversed the plea;"—which here, the plaintiffs have done.—"By demurring generally he has confessed himself guilty of intending to form a company that was to act as a corporation. But the shares were to be transferable. There can be no transferable shares of any stock except the stock of corporations, or of joint-stock companies created by act of parliament. When it is said that the shares were to be transferable, that must mean that the assignee was to be placed in the precise situation that the assignor stood in before the assignment; that the assignee was to have all the rights of the assignor, and to take upon all his liability. Now the assignee can join in no action for a cause of action that accrued before the assignment; such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will yet remain liable for every debt contracted by the company before he ceased to be a member. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of parliament. Such authority is expressly given by the Bank acts, the South Sea acts, and the other statutes creating companies that possessed stock which it was deemed proper to render transferable. The pretending to be possessed of transferable stock, is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company that it should act as a corporation. It is not necessary on [112] these pleadings to decide whether the forming a company with such shares, is of itself, without other circumstances, pretending to act as a corporation; because it is, by the pleadings, distinctly admitted that the plaintiff and defendant intended that the company should act as a corporation."

In the King's Bench, and also in the House of Lords, the judgment of this court was affirmed solely on the ground that the plea shewed, and the demurrer admitted, that the company had been formed for the purpose of dividing the benefit of the patent amongst a greater number of persons than the patent authorised. That case was very different from the present. There, the decision proceeded upon an admission of those very facts which are here denied and disproved. The decision in *Duvergier v. Fellowes* has therefore really nothing to do with the present question. Whether the setting out of a fact, and alleging that fact to be illegal, is sufficient to stamp such fact with the character of illegality, where the truth of the plea, if sufficient, is admitted by the demurrer, is quite another question. *Josephs v. Pebrer* (3 B. & C. 639, 5 D. & R. 542) was decided upon the express provisions of the bubble act, a few months before that act was repealed; and the only question was, whether that case came within the act. The argument was very short. The counsel for the defendant were stopped. Abbott C. J. says (3 B. & C. 641), "If the projectors, before the association has been sanctioned either by an act of the legislature or by a royal charter, make shares in the concern transferable without any restriction, at the mere will of the holder, and provide that the purchasers shall render themselves liable to regulations to be framed by certain persons styling themselves a committee of management or directors, then the association [113] assume an unlawful shape. The words of the 6 G. 1, c. 18, are large and comprehensive, although not altogether free from obscurity." This judgment therefore proceeds solely on that act; and the circumstances which gave rise to the passing of the act, were particularly referred to. In *The King v. Dodd* (9 East, 516) Lord Ellenborough says, "Independently of the general tendency of schemes of the nature of the project now before us, to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief; for it therein

appears to be held out that no person is to be held accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed they may stipulate with each other for this contracted responsibility; but as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted by the partnership."

The King v. Webb (14 East, 406) decided that the mere power of creating transferable shares did not make the undertaking illegal. That was also a case under the bubble act; and it never occurred to the learned counsel who appeared for the prosecution, to contend that the defendant had been guilty of an offence at common law. In that case, where a large capital was to be raised by numerous small subscriptions in transferable shares, it was held that as the shares were transferable to a limited extent only, and not at the unrestricted option of the holders, there was not a raising or a pretending to raise a transferable stock within the meaning of the act. In *Walburn v. Ingally* (1 Mylne & K. 61) Lord Brougham C., speaking of companies having transferable shares, says, "To hold such a com-[114]-pany to be illegal would be—to say that every joint-stock company, not incorporated by charter or act of parliament, is unlawful, and, indeed, indictable as a nuisance,—and to decide this for the first time, no authority of a decided case being produced for such a doctrine." In *The London Grand Junction Railway Company v. Freeman* (ante, vol. ii. p. 606, 2 Scott, N. R. 705), the court of error appears to have wished to avoid being thought to adopt the decision in *Josephs v. Pebrer* (3 B. & C. 639, 5 D. & R. 542), *Duvernier v. Fellowes*, and *Blundell v. Winsor*. In *Nockels v. Crosby* (3 B. & C. 814, 5 D. & R. 751) it was held that a scheme for raising money by small subscriptions, to be laid out at interest for the benefit of the surviving subscribers, and where transferable shares were to be issued, was not illegal, even whilst the bubble act was in operation. Here, there is nothing which is hurtful to the public. There is no seeking to entrap the unwary by holding out delusive prospects of gain. The capital is to be increased by the creation of additional shares only in the event of such capital becoming bona fide required by the real money transactions of the association.

This association is in the nature of an ordinary trading partnership. The authority which partners possess to bind one another by their contract, is well expressed in *Sandilands v. Marsh* (2 B. & Ald. 673). It was there held that partners are bound by the contract of a co-partner, as to the terms on which any business shall be transacted, although such business be not in their usual course of dealing, provided the business be afterwards transacted with the knowledge of the other partners. The public are not bound to see that each partner is dealing within the terms of his authority: it is sufficient if they see that he is acting [115] in a partnership matter. Then, does the contract declared upon in this case, relate to a partnership matter? The arrangement for retiring these bills was strictly connected with the business of the partnership. The partners possessed the same authority for sanctioning this mode of meeting a partnership liability as they would possess and exercise in the ordinary case of overdrawing their banker to pay a partnership debt. The banker might recover from the partnership, the amount of the money so overdrawn by an individual partner. Here, however, the contract declared upon is one which the directors were specifically authorised by the shareholders to enter into. It was a contract to pay money to discharge a debt of the company in pursuance of a unanimous resolution of the shareholders. It is not material that, at the last meeting, J. L. Heathorn was not present. The public, in dealing with the partnership, are not bound to know, whether a meeting of the partners had been properly convened. Here, however, there is nothing to shew that the meeting was not regularly convened. In *Cannan v. Bryce* (3 B. & A. 179) it was held that money lent for the express purpose of paying differences on illegal stock-jobbing transactions, to which the lender was no party, could not be, after repayment, recovered back by the borrower, although the money was lent for the very purpose of enabling the latter to make a payment which he ought not to have made; which is not the character of the present case. If this company was illegal the plaintiff's right to recover would not be impeached. The object of the advance was to enable the association to pay an honest debt. *Dickinson v. Valpy* (10 B. & C. 128, 5 M. & R. 126) is inapplicable to the present case. There, the question was as to the power of one director to accept a bill for himself and his co-directors, so

as to make those co-directors liable upon the bill. Here, the contract is, for raising money to pay the amount of bills, upon which a joint liability is admitted to have existed. *Wintle v. Crouther* (1 Tyrwh. 210, 1 Cro. & Jerv. 316). *Hawtayne v. Bourne* (7 M. & W. 595) was the case of an agent, not of a partner. This is rather like the cases of *Loyd v. Freshfield* (2 C. & P. 325), and *Rothwell v. Humphreys* (1 Esp. N. P. C. 406).

W. H. Watson on the same side. The question whether the defendant Joseph Lidwill Heathorn is to be considered a partner, is one which the court will look at as judges and also as jurymen. In the former capacity they will say whether there was evidence of partnership to go to a jury. This was not a case of a partnership to be formed. J. L. Heathorn was the only one of the defendants who was not shewn to have done all the acts necessary for constituting the defendants partners inter se. With regard to J. L. Heathorn, he was shewn to have attended a meeting of the shareholders. Acting as a partner is, of itself strong evidence, to go to a jury, of his being a partner. The meeting at which he attended was not a general meeting, but one convened for a special purpose. The object for which the meeting was held would therefore be well known to him before he attended it. When there, he was treated as a shareholder. The resolutions were agreed to by every person present; and those resolutions formed the basis of the arrangement under which the plaintiffs advanced their money. It is submitted that these facts were clearly evidence for a jury. The solicitor-general in moving upon this rule said they were not, and cited *Fox v. Clifton (c)*. That was a case of a partnership [117] not then formed; and the meetings which the party attended, were held for the purpose of considering the propriety of forming the partnership. The case of the East India Shipping Company in the Exchequer (post, 122, 128) will probably be relied on by the defendants. But there, the only evidence to fix the defendant as a partner was, that he was seen going into the house in which a meeting of shareholders was held. Lord Abinger C. B. stated this to be the ground of the decision.

Looking upon the court as a jury, it is to be observed that if J. L. Heathorn was not a shareholder, he had the fullest means of shewing that fact.

The question of illegality is raised by the seventh plea, which states that the company was a new and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience of great numbers of the liege subjects of this realm, in their trade and commerce, and by the eighth, stating that the company was a company and partnership between the defendant and very many other persons presuming to act, and acting, as if they were a corporate body, and pretending to raise a transferable and assignable stock, without any act of parliament, &c. No evidence beyond the deed itself was offered to sustain the allegation that this company was a common nuisance. There was no going about to weak-minded persons to induce them to part with their money. There were mines; for it appeared that mines had been sold by the association to other persons. So far from there being any ground for the insinuation that these mines were merely imaginary, it appears from the proceedings, that one mine was actually sold by the company, and that the directors were authorised to sell another. The issuing of transferable shares by a company is not assuming to act as a corporate body. The [118] shares in the Russell Institution are transferable. Will it be said that that institution is a common nuisance, for which the shareholders may be indicted? The Vice-Chancellor, in his judgment, assumes the reverse of everything which the plaintiffs in this case assert and the defendants admit. The characteristics of a corporation are perpetual succession, a common seal, and the irresponsibility of individual members (vide Com. Dig. tit. Franchises (F 10)). How can it be said that this company have held themselves out as a corporation? Could the solicitor-general file a quo warranto information against them for acting as a corporation?

Penman had authority to draw on the treasurer of the Anglo-American Gold-Mining Association for as much money as he might require. The company were to become debtors to the persons who should be the holders of these bills. The bills in question having been drawn and negotiated by an authorised agent on behalf of the association, the amount of the responsibility of the company was not increased by the

(c) 6 Bingh. 776. 4 Moo. & P. 676, 9 Bingh. 115, 2 Moo. & Sc. 146. And see *Bourne v. Freeth*, 9 B. & C. 632, 4 Mann. & Ryl. 512.

bills being taken up by the plaintiffs. Great inconvenience would have arisen to the company from these bills being returned; whilst upon their being taken up the extent of their liability would remain the same as before. Although the plaintiffs have declared upon the agreement, the amount is recoverable as money paid for the defendants' use. The agreement with the plaintiffs was ratified at the meeting of the 9th of September 1836. A ratification by a majority of the shareholders present would have been sufficient to bind the association; but, in fact, the proceedings of that meeting were unanimous.

Montague Smith, on the same side. The plaintiffs have advanced nearly 6000l., which has gone in payment of bills drawn by Penman under an authority [119] given him by the shareholders in this association. The minutes of the meeting at which J. L. Heathorn attended were prepared before the meeting took place. When the parties had met, the names of those who attended were filled in, and the minutes, so completed, were read to the shareholders present. The words of the plea are those of the repealed statute. *Duvergier v. Fellowes* was upheld in the House of Lords upon a different point from that in which it had been decided in this court. The London and Westminster Bank and the London Joint Stock Bank, have transferable shares, the prices of which are quoted in every newspaper; yet they have experienced no attack from the Bank of England, their natural enemy, although they are not within the protection of the 7 G. 4, c. 46. The argument on the other side must go to this length—that all the defendants are guilty of an indictable offence. There is nothing in the objects of this association, or the manner in which those objects are carried out, which can subject those who are engaged in it to so serious a responsibility. Penman was authorised to draw on Muskett. It may be objected that the bills were drawn on H. Blundell alone, although Smith and Magnus were joint-treasurers with him, as joint-successors to Muskett. But the resolution of the 17th of December 1835 recognised the bills as properly drawn on H. Blundell alone; and this was alluded to in the report at the time when this resolution was adopted. If J. L. Heathorn was a partner, which it is submitted he was shewn to be, he was bound by the proceedings at the last meeting. In *Alderson v. Clay* (1 Stark. N. P. C. 405) it was held that in an action against a member of a society established under a deed, for goods supplied to the society, the defendant might be shewn to be a partner by evidence of his [120] having acted as such, without producing the partnership deed.

Sir W. W. Follett S. G. (with whom were Richards and J. L. Adolphus), in support of the rule obtained on behalf of J. L. Heathorn. J. L. Heathorn, who was not a party to the agreement, is sought to be made liable as a partner. This action is, in fact, brought by the other defendants for the purpose of relieving themselves at the expense of J. L. Heathorn. (This was denied by Sir Thomas Wilde Serjt.) The illegality of this association has been established by the decision of the Vice-Chancellor of England, upon a bill filed by one of the present defendants. This is an association for working mines in America, a foreign country; a circumstance which may be material to be considered with reference to the cases that have been decided. There are certain modes by which parties may become partners; one is, by executing a partnership deed. Here, though a partnership deed is shewn to have existed, it was not executed by J. L. Heathorn. The question here is, whether J. L. Heathorn was an actual partner; there being no pretence for saying that he held himself out to the public or to the plaintiffs, as a partner. [Tindal C. J. There was no holding out except the appearing at the meeting and being registered as a person attending there as a partner.] It is not shewn that he knew that he was so registered. The contract with the plaintiffs was entered into on the credit of those who were parties to the deed. (This statement was denied by Sir T. Wilde Serjt.) This is not an ordinary partnership, but a joint-stock company, with transferable shares for the introduction of new partners. By the fifth clause of the deed (supra, 94) the shareholders may in [121]crease the capital of the company to any amount, by creating an additional number of 100l. shares. The power of doing this is not even restricted to the directors, but is left to the decision of a special meeting of the shareholders. [He then called the attention of the court to the sixth, seventh, eighth, ninth and tenth clauses.] By the eleventh clause those persons only can take an interest in the association whose names are entered in the share register-book; and the thirteenth provides that shares shall not be divided into fractional parts. It appeared that the shareholders had ordered additional shares to be issued. To make J. L. Heathorn a partner he must

be either an original subscriber or the holder of an additional share, or an assignee of shares. The court will remember that the solicitor of the company was the principal witness for the plaintiffs. The sixteenth clause requires that every proposal for a transfer shall be laid before the solicitor of the company. And by the nineteenth section the entries made by the solicitor are to be conclusive. By the twentieth clause no person is to be entitled to the right and privilege of a shareholder of the company or be in any way interested or concerned in the management of the affairs thereof in respect of any share or shares, his title to which shall not have been entered in the share register-book. There was no proof that the name of J. L. Heathorn was entered in the share register-book. He was bound to produce his title to the solicitor. There could be no dispensation with the terms of the deed except with the consent of every individual member of the association. It must be taken that the names of the parties present at the meeting of the 17th of December were not read over; as if they had, it cannot be doubted that the question would have been put to the witness by the plaintiff's counsel upon his examination in chief. Nor was any question put upon re-examin-[122]-ation as to the names of the persons who were there. We should have objected to the reading of the names and the number of shares set opposite to those names, if it had appeared that the list was meant to be read as evidence to shew that J. L. Heathorn attended the meeting as a shareholder. [Tindal C. J. In what way would you have objected? Do you say that he was there by accident?] There are cases to shew that mere presence at such a meeting will not bind the person attending it as a partner. The witness, who had previously been examined on behalf of the plaintiffs, was hostile to the defendants. It would have been madness on their part to cross-examine such a witness with a view to negative that which had not been proved. The witness was the brother of a party deeply interested. No circular was shewn to have been sent giving notice of the intended meeting. Numerous meetings of the shareholders appear to have been held, at only one of which J. L. Heathorn was shewn to be present. This very question has been decided by the court of Exchequer in the case of *The East India Shipping Company v. Lord Charleville* (ante, 117), in perfect conformity with prior decisions. It has been said that some of the cases in which it has been held that presence of a party at a meeting does not shew him to be a partner, were cases in which the company had not been yet formed. That undoubtedly must be admitted. Thus, *Dickinson v. Valpy* is not an authority for the defendants, that presence at a meeting of an existing company would not be sufficient to charge the party. But both that case and *Fox v. Clifton* (ante, 116) shew that the liability of a member of a joint-stock company cannot be established by evidence which would be sufficient to create a liability as a member of an ordinary trading [123] partnership. In *Fox v. Clifton* the evidence against the defendants was materially strengthened by a variety of acts done by them. It was held, however, that the question whether the defendants were or were not partners in the particular concern, was not a mere question of fact for the discretion of the jury, but one depending upon the legal result of the facts found by them; and it not being shewn that the defendants had held themselves out as partners, the court decided that the defendants were not liable.

Supposing it to be made out that J. L. Heathorn was a shareholder, he was not bound by this special contract. No authority was given to pledge the liability of the individual shareholders. The bills were drawn by Penman upon H. Blundell. [Cresswell J. Then the question would be whether abroad, Penman was not the company.] The effect of the resolution is this—Penman has deceived the company and has drawn bills which he was not authorised to draw, and the company authorise the creation of new shares for the purpose of taking up those bills. But looking at the deed the directors had no power to bind the shareholders by thus increasing the amount of shares. If the directors had any authority to enter into this contract on the part of the shareholders, it must have been from some power previously conferred upon them, or by the recognition supposed to have taken place at the meeting of September 1836, at which J. L. Heathorn was not present. [Coltman J. Would not the directors have had power, under their general authority, to pay these bills if they had had funds of the company in hand?] It is submitted that they would clearly have had no such power. Their authority is by deed, and is this,—to apply the moneys from time to time in their hands belonging to the company, in payment of such bills as Penman, in pursuance of the powers and provisions therein in that behalf con-

tained, should draw [124] upon them. The moneys which they are so to apply are to be moneys previously received from the shareholders. Penman was not to purchase without the assent, not of the directors but of the shareholders. The duties of the different officers are defined by the deed—those of the trustee and treasurer by the 8th clause (a)¹. The company would not be bound by a borrowing of money by the directors. No power of any kind is given to the directors. These bills were drawn by Penman upon H. Blundell in his private capacity. [Maule J. The bills would be more negotiable in America by reason of their being so drawn.] In an ordinary partnership there is an implied authority to draw bills. In *Dickenson v. Valpy* the judgment of Bayley J. does not, as has been supposed, proceed upon the nature of the undertaking. His words are, "The only question which could be submitted to the jury was, whether companies instituted for similar purposes, had constantly been in the habit of drawing and accepting bills, or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power" (b). The directors of such a company ought to take care to have ready money to answer all demands upon them. In *Bramah v. Roberts* (3 New Ca. 963, 5 Scott, 192) it was held that one director of a joint-stock company has no implied authority to bind his co-directors or the shareholders, by accepting bills of exchange. If that case be law, how can these gentlemen, having no power to contract on the face of the deed, bind the shareholders by entering into the special contract declared on? That contract is indeed directly in the teeth of the directions given at the meeting of the 17th December 1835.

[125] The directors ought to have issued new shares and have raised money in the mode authorised by the shareholders. [Maule J. I rather think that my impression at the trial was that it was a question of fact; but the court of Exchequer appear to have considered that such a question would be a question of law. Coltman J. The resolution of the 17th December 1835 may be an adoption of Penman's act. It points out special modes of raising money to meet the bills, but does not exclude every other mode of providing for the bills.] In *Ducarrey v. Gill* (a)² it was held that an agent, authorised to draw bills on behalf of a joint-stock company, cannot bind the shareholders by bills drawn in his own name, though drawn and negotiated for the purposes of the association. It has been contended that the recognition of the contract at the meeting of the 9th September 1836 is binding. But J. L. Heathorn was not present at that meeting. It was objected at the trial, that no circular for convening the meeting of the 9th September, 1836, had ever been sent to J. L. Heathorn, and that therefore he was not bound by any proceeding which took place thereat. The deed contained no power to enter into any contract except by the act of the shareholders themselves.

J. L. Heathorn was not a shareholder. If a shareholder, he was not bound by this contract. The question of illegality turns upon this particular, whether before the passing of the bubble act this association would have been illegal. That it would have been illegal under the statute, there can be no doubt.

J. L. Adolphus on the same side. It must not be assumed that the names of the parties present at the meet-[126]-ing of the 17th of December 1835 were read over at the same meeting. That is not the usual course pursued at public meetings. [Wilde Serjt. I will put the whole case upon the fact of J. L. Heathorn being a registered partner. This was declined by Kelly.] In *Fleming v. Hector* (2 M. & W. 172, 2 Gale, Exch. 180) it was held that the members of a club were not, as such, liable for work done or goods supplied by order of the committee for the use of the club, in the absence of any express authority conferred upon the committee. The creditor is bound to inquire whether those with whom he contracts have power to bind any others than themselves. *Attwood v. Munnings* (7 B. & C. 278, 1 Mann. & Ryl. 66) shews that it lies upon the party contracting with those who assume to possess a power to bind others, to inquire whether the power exists, and whether it has been properly pursued. In *Hawtayne v. Bourne* (7 M. & W. 595) it was held that the resident agent

(a)¹ Not set out.

(b) Quære, whether such a power, if not absolutely necessary, would not be implied in a case where the funds were to be raised in one country and expended in another distant country.

(a)² Mood. & Malk, 450. In that case it was, however, ruled by Lord Tenterden C. J. that the defendant was liable as a partner, as for money lent to the association.

of a mining company has no implied authority to bind the shareholders by borrowing money on their credit, for the purpose of meeting any emergency, however pressing—as the payment of wages due to labourers who had obtained warrants to distrain upon the materials of the mine.

Kelly, in support of the rule obtained by the defendant Tait. The question now for the decision of the court upon the defence of illegality, which is not pleaded by the other defendants, is, not whether the eighth plea of the defendant Tait (*supra*, 89) is good or bad, but whether the verdict ought to be entered for the defendants upon the issue taken upon the replication to that plea. [Tindal C. J. To make out the truth of this plea there should be some such state of facts as would support an [127] indictment for a misdemeanor at common law.] (He then adverted to the sixteenth, seventeenth, and eighteenth clauses of the deed (*supra*, 96).) The judgment of the court in *Duvergier v. Fellowes* is strictly applicable to this case. There, one of the objections taken was, the power of creating new shares. [Maule J. Is not the creation of new shares by subdividing the part-ownership of a ship legal?] That is by act of parliament (*b*). [Maule J. No, it is at common law.] An interest in a mining speculation is, however, very different from a share in a chattel. The contract in question was entered into without any assent on the part of the shareholders, either expressed or implied. [Maule J. What difference does it make whether the assent was before or after the arrangement with the plaintiffs for taking up Penman's bills?] If an unchartered unincorporated company possesses these powers, where is the necessity for the constant interference of the legislature on their behalf? [Cresswell J. To enable them, where the members are numerous, to sue and be sued, without making all the members parties. Coltman J. Does not the plea import that the company assumed to create transferable shares by which the parties transferring their interest to others would be discharged from liability?] It imports that it was meant to give rights to the assignees which the law would not give them. (He then referred to the fifteenth clause of the deed (*supra*, 96).) There was a clear misrepresentation as to the means of obtaining a discharge from future liability.

J. L. Heathorn was not liable upon this contract; and if he was not, Tait is entitled to a verdict upon the plea of non assumpsit, which can be found for the plaintiffs [128] only in the event of all the defendants being liable as joint-contractors (*vide Porter v. Harris*, 1 Lev. 63). Four different acts are required by the deed of settlement to be done in order to constitute a party a shareholder. Each of these acts might have been proved on the part of the plaintiffs, if J. L. Heathorn was a regularly admitted shareholder. *The East India Shipping Company v. Lord Charleville* shews that attendance at a meeting even of an existing company is not sufficient to fix a person as a shareholder. [Tindal C. J. The present case is very different from one where there is a large public body. Coltman J. No objection was taken at the trial to the admissibility in evidence of the fact that J. L. Heathorn was present at the meeting of the 9th of December 1835.] That objection could not have been taken, as the proceedings at the meeting were evidently against the other defendants. [Cresswell J. Not more so than as against J. L. Heathorn, unless we are to presume that the other defendants had due notice of the holding of the meeting.]

Tindal C. J. We wish to be furnished with copies of the pleadings—of the deed of settlement—of the resolutions of the 9th of December 1835—of the agreement of the 24th of December 1835—of the proceedings at the members of the 17th of September 1836—and of the short-hand writer's notes.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

This was an action of assumpsit against Henry Heathorn and twelve other defendants; and the declaration, in the first count, stated that the defendants were partners in a company called the Anglo-American [129] Gold-Mining Association, and that by an agreement in writing, of the 24th of December 1835, purporting to be made between Henry Blundell, one of the defendants, and certain other persons, being the agents of the other defendants, for and on behalf of themselves and the said company of the one part, and the plaintiffs of the other part, after reciting that the members of the company proposed to the plaintiffs to become shareholders and directors in the said

(b) The effect of the navigation laws seems to be to limit to sixty-four shares, that which at common law was divisible ad infinitum.

company, and that the plaintiffs, having found that disputes were pending between the said company and one John Penman, its late superintendent or agent in North Carolina, who had drawn bills of exchange to a large amount on the defendant Henry Blundell, on account of the company, declined to become shareholders until they had had an opportunity of ascertaining the state of the company in reference to the disputes so referred to; but that the directors and members of the said company, being desirous that the bills so drawn by J. Penman on H. Blundell should be taken up, for the honour of the drawer, under the guarantee and indemnity of the directors and of the company, the plaintiffs consented to take up the said bills, to an amount not exceeding 6000l., upon the footing so proposed; and that the sum to be so advanced by them, together with such further sum, if any, as should be required to make up the said sum of 6000l. should, in the event of their determining to join the company, go in payment of shares to that amount to be taken by them accordingly; and after reciting that at a meeting of shareholders, duly held on the 17th of December 1835, it was resolved that one hundred additional shares of 100l. each, should be created and disposed of by the directors for the benefit of the company, and that sixty of such shares had been set apart with a view to, and in compliance with, the proposal before mentioned,—it was witnessed that it was agreed as follows, that is to say, [130] that bills not exceeding 6000l. drawn by J. Penman on H. Blundell on account of the company, should be taken up by the plaintiffs for the honour of the drawer, and that the plaintiffs should follow the instructions of the company, or of its agent or agents duly authorized, as to proceeding against J. Penman or against the property of the company, or otherwise, in respect of the bills; and that in the event of the bills not being paid, and of the plaintiffs not making their election to take the sixty shares, so reserved and set apart for them, the defendants engaged and agreed for the payment of such bills or bill, with interest at five per cent. on the amount advanced, and all costs and expenses attending such bills, at any time after the 1st day of October then next, on the company, and the directors having three calendar months previous notice requiring the same; and that in case the plaintiffs, or any of them, should, within two months after receiving from the directors a communication of the result of the said operations or differences between the company and J. Penman, and of the state of the said company's affairs (and which communication the said directors were to make in as full and explicit a form, and at as early a period, as should be in their power), or at any earlier period, determine to take the sixty shares so reserved and set apart, they or he should be at liberty so to do; and that in that case the money so advanced in taking up the bills, with such further sum, if any, as should be necessary to make up the sum of 6000l., should go in payment of such sixty shares; but that the plaintiffs should in that case be entitled only to the costs and expenses of the bills, and not to any interest; and it was further agreed that, in the event of the plaintiffs, or any of them, taking the said sixty shares, they or he should, if they or he, at the time of taking such shares, should declare such to be their or his wish, be elected directors or a director of the company jointly with the [131] then directors. The declaration then proceeded to allege mutual promises; and that the plaintiffs paid a large sum, to wit, 5500l. in taking up, for the honour of the drawer, bills drawn by J. Penman on H. Blundell for and on account of the company; which bills had been dishonoured and not taken up by any of the parties thereto; that the plaintiffs had always been ready to follow the instructions of the company and their agents; and that afterwards, and more than three calendar months before the commencement of this suit, they gave notice to the company and the directors, that they declined to take the said sixty shares, or to become members of the company, and gave notice to the company and the directors to pay the advances, interest, and expenses; and they assign, as a breach, the nonpayment thereof. Counts for money lent, money paid, and money had and received, and upon an account stated, were added to the special count.

Three only of the thirteen defendants, viz. Joseph L. Heathorn, J. Tait, and G. A. Muskett, appear before the court upon the present rules; which were granted upon the ground that Joseph L. Heathorn was not a shareholder, and was therefore not a party to the promise stated in the declaration; and also that the company was an illegal association; and it will therefore be unnecessary to advert to the pleadings of the other defendants. The only plea pleaded by the defendant Muskett, is non assumption.

Joseph L. Heathorn pleaded ten pleas, of which the first, second, eighth and ninth only are material to the present inquiry. The first is non assumpsit. The second traverses that the defendants, at the time of making the agreement in the first count mentioned, were partners or shareholders in the supposed company or association, *modo et formâ*. The eighth plea, which is pleaded to the first, second, third, and last counts of [132] the declaration, alleges that the company or association in the first count mentioned, was an illegal company, presuming to act as a corporate body without any authority, and also presuming to raise, and constituted to raise, transferable and assignable stock and capital to any amount, transferable at the discretion of the holders, to the common nuisance of the subjects of the Queen: and the eighth plea then proceeds, by proper allegations, to apply itself to the second, third, and last counts of the declaration. The ninth plea is pleaded to the same counts, and is similar in substance to the eighth, except that it adds that, at the time of the formation of the company no gold mines had been discovered, and alleges that the objects of the company were fanciful, visionary, and fraudulent, tending to the common nuisance, &c. of the Queen's subjects. To each of these last two pleas the plaintiffs replied *de injuriâ*, &c.

The defendant Tait pleaded nine pleas. Those which are material to the present purpose are, the plea of non assumpsit, the traverse of the partnership, the sixth plea, which alleges in substance that the company was an illegal company, presuming to act as a corporation, and pretending to raise transferable stock (which is denied in the replication thereto), and in the seventh plea charging the company to be a common nuisance to the liege subjects of the realm; which is also denied in the replication.

Five of the defendants suffered judgment by default.

Upon this state of the pleadings, and on the evidence given at the trial, three questions arose, according to the determination of which by the court, it was agreed that they should direct in what manner the verdict should be entered on the several issues; the court being at liberty to draw such inferences from the facts proved as a jury might do, viz. first, whether the defendant Joseph L. Heathorn was a partner or shareholder in [133] the company; secondly, whether admitting him to be such, the defendant H. Blundell and the other persons parties to the agreement set out in the declaration of the first part, had any authority, express or implied, to enter into the agreement stated in the declaration as agents on behalf of the company; and, thirdly, whether the company in question was an illegal company.

Upon the first question we think the evidence given at the trial was sufficient for the jury to find the issues which rest upon that question, in favour of the plaintiffs.

The objection taken was, that there was no proof that the defendant Joseph L. Heathorn ever signed the deed, or applied to have his name inserted in the share register book, nor was any transfer, or will, or any register of shares, produced. And undoubtedly there was no such evidence. But upon the evidence the question before us is, whether the defendant Joseph L. Heathorn did not, by his conduct, distinctly admit himself to be a partner and shareholder; for if such admission was proved before the jury, no proof of a formal title to the shares was necessary for the purpose of making him liable. Now the evidence as to that point was, that on the 17th of December 1835, he attended a special meeting of the Anglo-American Gold-Mining Association,—which had been called by a circular,—at the office of their solicitors. In the minute of that meeting the names of the several shareholders are inserted, with the number of shares each person held placed opposite to his name; and amongst such names is that of the defendant Joseph L. Heathorn, with one share opposite thereto. It can scarcely be reconciled with any other supposition than that of his being a shareholder, that he should have been present at all upon such an occasion, or that he should have been permitted to remain there by the other shareholders, the number of shareholders actually present being ten only including himself; so [134] that he could not have been overlooked; and his right to be present, unless he was a shareholder, must have been questioned. It is further to be observed that the business transacted at that meeting was of an important and confidential character: amongst other things, that of confirming the sale of one mine, and that of empowering the directors to sell another; the sending out of a new agent for the company, on a very weighty mission; and the providing for the payment of the very bills which form the subject of the agreement. And, lastly, it was proved that the minute was read to the assembled shareholders. We think these circumstances might fairly be

held, and ought to have been held, by the jury, to amount to an admission by the defendant J. L. Heathorn, that he was a holder of one of the shares in the concern; and we think that such admission dispensed with the necessity of any more formal or additional proof of that fact, by shewing that he had conformed to the requisites of the deed or otherwise; and the case of *The Sheffield and Manchester Railway Company v. Woodcock* (7 M. & W. 574), appears a sufficient authority in support of this conclusion.

The second question which has been argued before us is, whether, admitting the defendant J. L. Heathorn to be a shareholder, the defendant H. Blundell and the other persons parties of the first part to the agreement set out in the declaration, had any authority, expressed or implied, to enter into the agreement as agents on behalf of the company.

Upon this point the objection taken on behalf of J. L. Heathorn is, that although he attended the meeting of the 17th of December 1835, yet no authority was given at the meeting by the shareholders to H. Blundell, or to any others, to enter into the agreement upon which this [135] action is brought; that although on the 9th of September 1836 there was another general meeting of the shareholders, at which the contract or agreement entered into between the directors and the plaintiffs was sanctioned, yet that the defendant J. L. Heathorn was not present at that meeting, and was therefore not bound by its proceedings; and that there can be no implied authority for the shareholders present at that meeting to bind the other shareholders, the powers of part of the shareholders of joint-stock companies to bind the rest not being analogous to those of partners in ordinary trading concerns.

It appeared that, at the time of the agreement entered into between H. Blundell and the other two directors on behalf of themselves and the company on the one part, and the plaintiffs of the other part, J. Penman, the agent of the company in North America, had drawn bills on H. Blundell on account of the company, exceeding the amount of 6000*l.* which were then in the hands of bona fide holders for value, and which had been sent to this country for acceptance and payment; and it further appeared that the directors, at the time of the arrival of the bills, had no funds of the company wherewith to meet them. It is obvious, that the return of those bills protested to America would have been destructive of the prospects of the company; and the plaintiffs having offered to retire them to the extent of 6000*l.* for the honour of the drawer, upon the directors and shareholders being made jointly and individually responsible for the reimbursement of the plaintiffs, the agreement was signed by H. Blundell and two other directors, in order to carry such plan into effect.

Now we hold it to be unnecessary, upon this occasion, to enter into the question, how far shareholders in a joint-stock company may, without any express regulation in the deed of settlement, or without an express [136] assent to that purpose, bind the others by a contract to reimburse third parties for advancing money to take up bills which have been drawn on account of the partnership concern; because we think, that on the present occasion, there was sufficient evidence for the jury to find that this defendant J. L. Heathorn did, in fact, give his consent that the bills drawn by J. Penman on account of the company should be paid in the manner in which such payment took place; for he was actually present, as a shareholder, at the meeting held on the 17th of December 1835; and we cannot suppose, upon any reasonable construction of the evidence given, that he was an idle or indifferent observer of that which took place on that occasion, but that he was, like any other shareholder, alive to his own interests and those of the concern; and at that meeting, after reading the circular convening the meeting, and the correspondence of J. Penman and other letters, it was unanimously resolved, amongst other things, "that in case the directors should not be able to effect the sale of the Alexander Mine in the course of that week, they should be authorised to sell any number of new or additional shares, not exceeding 100, as might be necessary for enabling them to repay their respective advances, and to pay the bills drawn by J. Penman upon Blundell." And we think a jury might, from this resolution, infer a direct admission on the part of the shareholders present, that the bills in question had been drawn for and on behalf of the company, and that they were bills for which the company was bound to provide payment,—in fact, that they adopted the bills; and although a specific mode of payment is pointed out in that resolution, namely, first by the produce of the sale of the Alexander mine, and next by the sale of the new shares, yet that such resolution amounts to a direct

admission by all the shareholders who were actually present at the meeting, of their [137] liability upon these bills. And we think that a jury might, further, well infer, after such an admission, that it must necessarily have occurred to, and been present to the minds of, all the shareholders who constituted that meeting, that the mine might not be sold, and the new shares might not find purchasers, and that the shareholders in such event assented to the payment of the bills by the usual and ordinary means, and the only way of relieving themselves from their own admitted liability, that is, by borrowing the money from others, which was, in substance, the transaction with the plaintiffs. And upon this ground, viz. the assent on the part of the defendant J. L. Heathorn, we think the jury would be warranted in finding those issues which depend on the second question, in favour of the plaintiffs.

Upon the third question we are called upon to decide in which way the jury should have disposed of the issues upon those pleas that state the company to have been an illegal company and a common nuisance.

It is to be observed that, at the trial of the cause, no evidence whatever was produced on the part of the defendants; and as the affirmative of those pleas is to be made out by them, the question will depend entirely on the evidence called by the plaintiffs, and the inferences which the jury ought to have drawn, from such evidence of the plaintiffs, in support of the pleas; and as the illegality of the company is set up by the very persons who constitute that company, in order to avoid the payment of a demand just in itself, it may be fairly required that the affirmative of the pleas should be established by satisfactory evidence.

In the case of *Duvergier v. Fellowes* (5 Bingham 248, 2 M. & P. 384), upon which great reliance is placed on the part of the defendants, the question arose upon a demurrer, which admits all [138] the facts that are well pleaded. Accordingly, it was observed by the Chief Justice in giving the judgment of the court, "that by demurring, the plaintiff has confessed himself guilty of intending to form a company that was to act as a corporation." And again, "It is not necessary on these pleadings to decide whether the forming a company with such shares (i.e. transferable without limitation or restriction) is, of itself, without other circumstances, pretending to act as a corporation; because it is by the pleadings distinctly admitted that the plaintiff and defendant intended that the company should act as a corporation;" whereas, on the contrary, in the present case, the replication expressly denies this allegation contained in the plea. Indeed the case of *Duvergier v. Fellowes* cannot be considered as a decisive authority upon the point of the illegality of the present company, because, in that case, the plea disclosed the invalidity of the assignment of the patent granted to the plaintiff, which formed the consideration for the contract, and such invalidity was, of itself, a sufficient ground for the judgment of the court. And when that case was removed by writ of error, first to the court of King's Bench and afterwards to the House of Lords, the judgment of the court below was affirmed expressly on the latter ground, without any opinion being pronounced upon that of the illegality of the company.

The sixth plea of the defendant J. L. Heathorn,—which does not substantially differ from the other pleas on the record that set up the illegality of the company,—states that it is an illegal company, formed for the alleged purpose of working gold-mines, "and presuming to act as if they were and are a corporate body, without any act of parliament," &c. The plaintiffs deny this allegation; and the question is, what is the proof of the allegation? Proof that a certain number of persons in partnership, called themselves by the name of the Anglo-American [139] Gold-Mining Association, would surely not, by itself, be sufficient to warrant the jury in finding that those persons "presumed to act as a corporation." Partners in trade who carry on business under the name of an expired firm might, upon that ground, be subjected to the same charge. The having a common seal has always been held one incident to a corporation; Co. Litt. 30 b.; and the power of doing no act except under such common seal, another. But in this case there has been no assumption of any seal, nor was any act whatever done except in the individual names of agents or directors. The plea then goes on to allege another character of the illegality of the association, viz. "and also by presuming and pretending, without any act of parliament, &c., to raise, and being constituted and formed with a view of raising, a transferable and assignable stock and capital to be considered as divided into sixty shares of 100l. each, with power for the shareholders of the company at a special meeting of shareholders to be called for that

purpose, at any time, and from time to time, to increase the capital to any amount that might be agreed on by creating an additional number of 100l. shares, and all which several shares, as well original as additional, were to be and are transferable and assignable from the holders thereof, by deed or will, or otherwise, to any other person or persons, at the discretion of the holders thereof, to the common grievance," &c.

The deed by which this company was established does certainly appear to make out the allegation above set forth; the only restriction being, that the transferee shall have no right to act or receive any benefit until his title shall be approved of by the solicitor of the company,—a matter of regulation more properly than of restraint. The plea is framed upon the very words of the 6 Geo. 1, c. 18, s. 18, by the nineteenth section of which act the several illegal companies described in the [140] eighteenth section are declared to be all common nuisances, and are made punishable by indictment. Even if those clauses had not been repealed,—as they have been in terms by the 6 G. 4, c. 91,—a question would have arisen whether the facts given in evidence at the trial were sufficient to shew that the defendants had committed an indictable offence within the statute. And, looking at the doctrine laid down in the case of *The King v. Webb* (14 East, 406) as to the objects and purposes of companies falling within the meaning of the statute, it would have been a question, whether the facts warranted a finding that the defendants had been guilty of an offence within that statute. But that statute having been repealed, the question is now altered; and we have to determine whether such a company as the present has been shewn to be a nuisance and public grievance at common law. The raising of transferable shares of the stock of a company can hardly be said to be of itself an offence at common law; no instance of an indictment at common law for such an offence can be shewn, the raising of stocks with transferable shares being indeed a modern proceeding; and the very great particularity with which it is described in the statute seems to shew that it was an offence created by the statute only. If there had been any evidence in this case that the creation of these assignable shares had been productive of injury or inconvenience to numbers of the Queen's subjects, so as to make or occasion a common nuisance or grievance in fact, the jury ought to have found the issues for the defendants. But there was no evidence of the sort; and in truth the whole number of owners of the shares of this company of whom any evidence was given, was very limited indeed, and those composed not of low and ignorant persons, likely to be imposed upon, but, as far as [141] appeared, of men acquainted with the business of the city. Unless, therefore, the nature of the undertaking was such as imposed upon the judge the necessity of telling the jury that the defendants had set up and established an undertaking which was a public and common grievance and nuisance at the common law, there was no evidence to shew that it was one in fact; and as we consider the former proposition is not maintainable, we think the verdict on those issues which raise the question of illegality, must be entered for the plaintiff.

Rule discharged.

The defendant Muskett having died on the 31st of January 1843, after judgment had been given for the plaintiff on the demurrers, and after the argument, but before the decision of the court, upon the rules for setting aside the verdict, Sir T. Wilde Serjt. on a subsequent day in this term, obtained a rule nisi to enter up judgment for the plaintiffs as of Hilary term 1843.

Channell Serjt., for the executors of Muskett, now shewed cause, upon an affidavit stating—that a creditor's bill was filed in February last against the executors and devisee of Muskett, on which a decree was pronounced by Shadwell V. C. directing advertisements to be published calling upon the creditors to come in and prove their debts; which decree had been duly registered under the 1 & 2 Vict. c. 110, s. 18—that the personal estate was insufficient to pay the creditors who had come in and proved—that a London bank with whom Muskett had deposited the title-deeds of his real estate had obtained an order for the sale of such real estate, to reimburse themselves,—and that the deponent was advised that the effect of entering up judgment previously to the decree, might be, to embarrass the proceedings under it.

[142] The plaintiffs are not entitled to the benefit of the rule of practice as to entering up judgment where it has been delayed by the act of the court. The plaintiffs could have had no judgment before the demurrers were disposed of; they could not have had judgment until after Hilary term 1843.

This, it will be remembered, is not the case of a sole defendant. Where one of

several defendants dies after verdict, the proper course is to enter a suggestion: at law, the remedy is gone against the deceased party.

Another ground for resisting the application altogether is this; a bill has been filed against the executors, and the usual decree has been pronounced, directing a sale of the real estate if the personalty shall prove insufficient. It does not appear whether the whole estate is insufficient. The decree has been registered under the 1 & 2 Vict. c. 110, s. 18.

Sir T. Wilde Serjt. The judgment will be not generally of Hilary term, but of a day after the demurrers were disposed of. [Tindal C. J. Is it not a general rule that no party shall suffer from the delay of the court (a)? Coltman J. Why should parties be put into a worse situation in this case by the delay of the court than when a sole defendant dies? Maule J. If the party is to be set right, where by the delay of the court he would lose the whole, why not where he would lose a part only? The rights of the parties in equity will not be affected by making this rule absolute. And as the decree of the Vice-Chancellor is not a decree or order [143] for the payment of money, it does not appear to be within the 1 & 2 Vict. c. 110, s. 18.]

Per curiam. Rule absolute.

BIRD AND OTHERS, Assignees of Robertson, a Bankrupt, v. BASS AND OTHERS.
May 30, 1843.

[S. C. 6 Scott, N. R. 928.]

Notice of an act of bankruptcy, within the 2 & 3 Vict. c. 29, means knowledge thereof, or wilfully abstaining from acquiring such knowledge.—Where, therefore, notice of an act of bankruptcy was sent by letter to the attorney of the execution creditors: it was held, that they were not affected with such notice by the mere delivery of the letter at their attorney's office, nor until the same had been read, there being nothing to shew a wilful abstaining from reading the letter.—A sheriff's officer having a *fi. fa.* against A., called at his house when he was from home, waited till he returned, and then informed him of his business. Held, sufficient evidence to warrant the jury in finding that the writ was executed at the time of the officer's entry (*vide post*, 192).

Trover, to recover the value of certain furniture.

Pleas, first, not guilty; secondly, not possessed; upon both of which issue was joined; thirdly, a justification under a *testatum fieri facias*, really and *bonâ fide* executed and levied before the fiat,—with this, that at the time of the executing and levying of the execution, the defendants had not notice of any act of bankruptcy committed by Robertson prior to the executing and levying thereof; and that the judgment was not founded on a warrant of attorney given by way of fraudulent preference, but was a judgment in a suit commenced adversely (*see* 2 & 3 Vict. c. 29).

Replication to the third plea, that the defendant, at the time of the executing and levying of the execution, had notice of a prior act of bankruptcy committed by Robertson. Upon which issue was joined (*vide ante*, 37, n.).

[144] At the trial before Coltman J. at the last spring assizes at Liverpool, the only question was, whether the defendants' attorney had received notice of the bankruptcy before the levy was actually made.

The evidence was as follows:—On the 20th of January 1843, Robertson signed a declaration of insolvency. On the 23d (Monday) a clerk of Mr. Watson, the attorney of Robertson, called upon Messrs. Stockly and Thompson, the defendants' attorneys at Liverpool, and inquired whether they had received a letter from London, saying that a fiat against Robertson would be down on Tuesday, the 24th. (The fiat did not, in fact, issue till the 26th.)

(a) In error from the Exchequer in a revenue case, where the Treasurer and Chancellor were absent, it was said by the judges that "in no case shall the not coming of the justices be ascribed as a default of the parties; whether it be in day of assise or otherwise, the tenants shall have no damage by their not coming." *Cam. Scacc. H. 6 H. 7, fo. 16, pl. 9.*

On the same 23d of January Mr. Watson posted in London a letter to S. and T. informing them that an act of bankruptcy had been committed by Robertson, and that a fiat had been sent for against him. This letter, in the course of post, arrived at Liverpool on the morning of the 24th. S. and T. had a box at the post-office there, wherein letters for them, coming by post, were deposited; which box was fetched from the post-office by a clerk every morning about nine o'clock. Mr. S. resided on the Cheshire side of the Mersey, and usually crossed over by the ferry-boat at nine or half-past nine every morning, the passage averaging a quarter of an hour. The office of S. and T. was distant about five minutes walk from the landing-place on the Liverpool side. It did not distinctly appear at what time Mr. S. crossed on the morning of the 24th, or at what time he arrived at the office; but his partner, Mr. T., who was called as a witness by the plaintiffs, stated, on cross-examination, that he arrived at the office on the morning of the 24th about half-past ten, that he found Mr. S. there, and that Mr. S. had then opened the letters received by that morning's post.

With regard to the time of the levy, a female servant of Robertson's stated that she opened the door to the [145] sheriff's officer and his follower, at twenty minutes past ten, by the kitchen clock, on the morning of the 24th; that the officer asked for Robertson, who was not then at home, and that he waited for him till he came, which was a little before eleven, when the officer, for the first time, informed him of his business.

The learned judge told the jury that the question for them would be, whether the notice or the seizure was first in point of time; that it lay upon the plaintiffs to establish the priority of the notice; that to determine the question of priority, it would be necessary to ascertain, first, at what time the contents of the letter came to the knowledge of Stockly; and, secondly, at what time the sheriff's officers entered into Robertson's house, and whether the entry was made for the purpose of executing the writ, and to prevent the removal of the goods, or was made merely with the intention of waiting till Robertson should return home before they executed the writ; and that if they thought that the entry was prior, in point of time, to the reading of the letter, and that it was made for the purpose of executing the writ, they should find a verdict for the defendants; and that otherwise they should find for the plaintiffs. The jury returned a verdict for the defendants.

April 21.—Sir T. Wilde Serjt., in last Easter term, moved for a rule nisi for a new trial, upon the ground that the verdict was against evidence.

A rule nisi having been granted,

Channell and Murphy Serjts. (with whom was Crompton) now shewed cause, and Sir T. Wilde Serjt. (with whom was S. Martin) was heard in support of the rule.

TINDAL C. J. The time runs so very near in this case, that, unless we can see our way very clearly, I think [146] there will be no ground for sending the cause down again; for, if it went down, and there was a new trial upon the same evidence as before, I do not see that another jury could come to a different conclusion.

Two points have been made on behalf of the plaintiffs; first, that the giving of a notice does not depend upon the time at which such notice or letter is read by the party, but upon the time at which it reaches his office, or his usual place of business. That may or may not be the case. I can imagine many cases in which a notice might be considered sufficient if left at the place where the party for whom it is intended, usually receives his letters. That would be a question for the jury. A man might not open the letter containing the notice until he had read all his other letters; or he might not see it from its being in a very obscure corner of the office. These and similar circumstances would be matter of comment to a jury upon the question whether the party had wilfully refused a notice which, if he had read it in time, would have been good.

The second point is, that the entry by the sheriff's officer without a seizure, did not amount to a levy; that it was not an execution executed. But I think this also was a question for the jury. If the officer entered under the writ, he entered, not as a trespasser, but for the purpose of doing the duty required of him by the exigency of the writ. Therefore, although he should not, at first entering, have taken any active measures under the writ, yet unless it appeared, clearly and distinctly, that he did not seize any thing or make any attempt to execute the writ, I should say the entry is *prima facie* evidence of the execution of the writ itself. That also was left

to the jury; and I am not disposed to say that if sent to another jury they could draw a different conclusion.

[147] COLTMAN J. Supposing the points taken on the part of the plaintiffs, or either of them, to be right, I certainly left the case improperly to the jury. But I think the notice meant by the act of parliament is knowledge. If, indeed, there was an abstinence from making use of the means of knowledge, it might be something; but nothing of that sort appeared in this case. And, with regard to the other point, namely, as to the time from which the sheriff's officer is to be considered in possession, I told the jury that if they were of opinion, on the evidence, that the man was left in possession in order to prevent any of the goods being removed, and they thought that the date of the seizure was to be considered as running from that time, they were then to determine which of those two facts occurred first,—the entry of the sheriff's officer, or the reading of the letter by the defendant's attorney. I am not aware that there is any reasonable objection against that mode of summing up. My own opinion was, that, at least, there was very good ground for the jury to infer the entry to have been before the reading of the letter. And if the cause went down again and a contrary verdict was found, I do not know that it would be more satisfactory than the present one.

MAULE J. I also think that the rule should be discharged. The question turns on the sense of the words in the act of parliament (2 & 3 Vict. c. 29), and the allegation in the third plea,—that the defendants, being the persons at whose suit the execution issued, had not, at the time of such execution, "notice of any prior act of bankruptcy by him committed." I think notice in the act of parliament means knowledge. If a person were to see another commit an act of bankruptcy, though no one told him of it either by notice in writing or by verbal communication, yet still he would have notice within the meaning of the act. A difficulty might indeed arise, if [148] a person wilfully abstained from opening a letter in order to prevent his having the notice of the act of bankruptcy. In such a case I think it might reasonably be inferred that he knew that if he did open it he should receive the intelligence it contained; and therefore that he had, from his own observation or some other circumstance, notice of the act of bankruptcy. But there is no evidence of that sort here. And, abstractedly from a case of that kind, I think a person cannot be said to have notice of what he knows nothing about; and, therefore, that, in the present case, the arrival of the letter at the post-office,—its being put into the box, to be ready when called for by the defendant, or the delivery to the clerk, or indeed any thing short of the actual reading, or being informed of its contents,—would not amount to proof of notice. If a person had called to communicate verbally to the defendant's attorney the fact of an act of bankruptcy having been committed, and he was then engaged in business in another room, and was detained for an hour before he could see the party and receive his communication, I think the question would be, when the notice was actually given, not when the person was ready to give it.

As to the period of the execution, I think there was evidence of a levying at the time of the entry by the sheriff's officer. I do not mean to say that if it was sought to charge the sheriff as a wrong-doer, the mere entry that was proved in this case, would have been sufficient to raise the inference that the sheriff was a trespasser. But it was the duty and business of the officer to take possession under the writ. The term of a "man being in possession" is a common phrase, well understood. Now, in this case the officer did nothing new after he entered, except speaking to Robertson; and I think the jury might fairly infer that the man took possession in pursuance of the duty he was to perform, from the time he came into the house.

[149] That being so, the question reduces itself to this,—whether the reading of the letter by the attorney of the execution-creditor or the coming of the officer into possession had priority in point of time. And upon this point I think the jury had evidence on which they might fairly come to the conclusion they drew; and consequently that this rule ought to be discharged.

CRESSWELL J. concurred.

Rule discharged.

WILSON v. FOSTER. June 2, 1843.

Where a defendant who was abroad, was directed by an award to pay a sum of money, and it did not appear that he had been served with the award, though a letter from him shewed he was aware of its effect, the court refused to grant a rule, calling upon him to pay the money, and ordering and directing that service thereof, by sticking it up in the master's office, should be sufficient.

Manning Serjt., on a previous day in this term (29th May), moved for a rule calling upon the defendant to shew cause why he should not pay to the plaintiff the sum of 140l. due under an award, with costs; and ordering that service of the rule by leaving a copy thereof at the defendant's last known place of abode, and sticking up a copy in the master's office, should be deemed good service. It appeared from the affidavits that the defendant was abroad; but it was stated that a letter had been received from him by which it appeared that he was aware of the effect of the award. The object of the application was to put the plaintiff in the situation of a judgment-creditor (see 1 & 2 Vict. c. 110, s. 18). The learned serjeant cited *Jones v. Williams* (11 A. & E. 175, 4 P. & D. 217), *Burton v. Mendizabel* (1 Dowl. N. S. 336), and *Doe d. Moody v. Squire* (2 Dowl. N. S. 327). [Cresswell J. [150] referred to *Neale v. Postlethwaite* (1 Q. B. 243, 4 P. & D. 643). Tindal C. J. You do not shew any service of the award upon the defendant. At any rate, it would be more satisfactory that the letter stated to have been written by him should be produced. At present you are trying to fix a man with an attachment, without personal service of the award. In *Doe d. Moody v. Squire* the defendant appeared and shewed cause against the rule; and that may have been considered the same as if he had been served with the award. Here, the defendant has left the country, and cannot appear to shew cause. It would be very unjust to proceed in this manner *contra absentem*.]

The learned serjeant now renewed the application, and produced the defendant's letter. He contended that as the submission to an arbitration had already been made a rule of court, the plaintiff was entitled to have that rule perfected by the insertion of the amount awarded to him (b). [Maule J. The plaintiff is seeking to obtain the effect of a judgment by the service of a rule in such a manner that the defendant can have no knowledge of it. This is, in fact, an attempt to introduce into the English law, certain proceedings against absent parties which are familiar to the Scotch law. The plaintiff's object can only be attained by proceeding to outlawry (c).]

Per curiam. Rule refused (d).

[151] PRITCHARD v. GEORGE HITCHCOCK. June 6, 1843.

[S. C. 6 Scott, N. R. 851; 12 L. J. C. P. 322. See *Aiken v. Short*, 1856, 1 H. & N. 215; *Newington v. Levy*, 1870, L. R. 5 C. P. 612; L. R. 6 C. P. 180. Applied, *Petty v. Cooke*, 1871, L. R. 6 Q. B. 795.]

A. had guaranteed the payment to B. of two bills of exchange accepted by C. C. afterwards handed over the amount of the bills to B. A fiat having issued against C., his assignee, in an action for money had and received, recovered the money back from B., as having been paid by way of fraudulent preference. In an action by B. against A. upon the guarantee, A. pleaded that C. had paid, and B. had received, the money in satisfaction of the bills, which allegation was traversed by the replication.—Held, that the payment did not amount to a payment in satisfaction (vide infra, 162 (a)).—Held also, that B. might prove the facts under the above replication (vide infra, 167, n.).—But, held also, that the verdict and judgment in the action by the assignees against B., although evidence to explain the transaction, was not conclusive against A., that the money had been received by B. to the use of the assignees.

Assumpsit. The declaration stated that before the making of the promise, &c.

(b) See *Hodson v. Patterson*, ante, vol. iv. p. 333.

(c) Vide *Cassidy v. Stewart*, ante, vol. ii. p. 437, ib. 474; *Taylor v. Lord Stuart de Rothesay*, ante, vol. iv. p. 388.

(d) See *Doe v. Amey*, 8 M. & W. 565.

the plaintiff had lent to William Hitchcock a large sum of money, to wit, 1000l., and for the purpose of securing to the plaintiff the repayment of the said sum by W. H., the plaintiff had drawn his bill of exchange in writing, bearing date, &c., and directed the same to W. H., and thereby required W. H. to pay to the plaintiff, or his order three months after date thereof, the sum of 1000l.; that W. H. had accepted the said bill; of all which, &c., the defendant before the making, &c. had notice; that before the making, &c. the plaintiff had lent to W. H. a certain other sum of money, to wit, 1000l., and for the purpose of securing to the plaintiff the repayment of the last mentioned sum of 1000l. by W. H. to the plaintiff, the plaintiff had made his certain other bill, &c. dated, &c., and had directed the same to W. H., and thereby required W. H. to pay to the plaintiff, or his order, three months after the date thereof, the sum of 1000l.; that W. H. had accepted the last-mentioned bill; of all which, &c. the defendant before the making, &c. had notice; that before the making, &c. the said bills were in the hands of the plaintiff, unnegotiated, and undue and unpaid; that W. H. was minded and desirous of ob-[152]-taining further time for the payment of the first-mentioned bill than the time at which the same would become payable according to the tenor and effect thereof; whereof the defendant before the making, &c. had notice; and thereupon afterwards, and whilst the several bills so remained due and unpaid, and in the hands of the plaintiff, to wit, on, &c. in consideration that the plaintiff would consent and agree not to press W. H. for payment of the amount of the first-mentioned bill when the same should become due, and not to negotiate such bill, and to abstain from pressing for payment of the amount thereof, or any part thereof until the 13th day of August then next; the defendant promised the plaintiff to guarantee the payment unto the plaintiff, on the 13th day of August then next, as well the amount of the first-mentioned bill, or so much of the said amount as should not have been previously paid, as also the payment of the amount of the secondly-mentioned bill. Averment: that the plaintiff, confiding, &c., did, at the time of the making of the said promise, consent and agree not to press W. H. for payment of the amount of the first-mentioned bill, when the same should become due and payable, and did, from the time of the making of the said promise, abstain from pressing W. H. for the payment of the amount thereof, until the 13th of August next after making of the said promise, and never did negotiate the said bills or either of them; that W. H. did not pay to the plaintiff the amount of the first-mentioned bill on or before the day when the first-mentioned bill became due and payable, according to the tenor, &c., or on or before the said 13th of August, nor did nor would W. H. pay to the plaintiff the amount of the secondly-mentioned bill, on or before the day when the same became due and payable, &c., or on or before the said 13th of August, but therein failed and made default; whereof the defendant then had notice, and was [153] then called upon and requested by the plaintiff to pay him as well the amount of the first-mentioned bill, as also the amount of the secondly-mentioned bill; that the defendant nevertheless did not, nor would when he was so called upon, &c., pay to the plaintiff the amount of the said two several bills, or any part thereof, but then, and at all times before the commencement of this suit, wholly neglected, and the amount of the said several bills still remains wholly unpaid to the plaintiff; that after the said 13th of August in the year aforesaid, and before the commencement, &c., to wit, on the 10th of September in the year aforesaid, a certain fiat in bankruptcy was duly issued, and sued forth according to the statute, &c., against W. H., under which W. H. was afterwards, to wit, on, &c., duly declared and adjudged to be a bankrupt within the true intent, &c., and that afterwards, to wit, on the 4th of October in the year aforesaid, W. C. the elder, C. B., R. L., and J. F. G. were duly appointed assignees, &c. of the said W. H., according to the form of the statute, &c., and then accepted, and took upon themselves, the office of such assignees; that afterwards, and after W. C., &c. were appointed such assignees as aforesaid, and after the said 13th of August in the year aforesaid, and whilst the amount of the said several bills remained due and unpaid to the plaintiff as aforesaid, and after the defendant had been called upon and requested by the plaintiff to pay him the amount of the said several bills as aforesaid, and before the commencement, &c., to wit, on, &c., W. C., &c., as such assignees as aforesaid, required the plaintiff to repay to them the said W. C., &c. as such assignees as aforesaid, divers sums of money, amounting in the whole to 2000l., which after the said bills became due and were payable according to the tenor, &c., and between the 8th August and the 1st September in the year aforesaid, and before the

date and [154] issuing of the said fiat, had been paid by W. H. to the plaintiff, as payments made in discharge of the bills in fraud of his other creditors, and by way of fraudulently preferring the plaintiff to his other creditors; which the plaintiff, in ignorance of any such fraud or fraudulent preference, then refused to repay; of all which the defendant then had notice; and thereupon afterwards and whilst the amount of the said two bills remained wholly unpaid by the defendant to the plaintiff as aforesaid, and after the defendant had been so called upon, and requested, by the plaintiff to pay him the same, and before the commencement, &c., to wit, on, &c., W. C., &c., as assignees as aforesaid, commenced an action in the court of Queen's Bench (a) at Westminster against the plaintiff for the recovery of the sums so paid by W. H. to the plaintiff as aforesaid; and the plaintiff then and until the recovery of the judgment thereafter mentioned, being ignorant that such payments had been made by W. H. in fraud or by way of such fraudulent preference as aforesaid, and believing that he had a good defence to the action, appeared and pleaded to the action, and endeavoured, as much as in him lay, to defend himself against the said action; that he defended the said action at the instance and request and for the benefit of the defendant; that such proceedings were thereupon had in the said action, that it was afterwards, to wit, on, &c. considered and adjudged, &c., that W. C., &c., as such assignees as aforesaid, should recover from the now plaintiff as well the said sum of 2000l. as also the sum of 406l. 13s. 6d. for their costs and charges by the said court adjudged; which damages, costs, and charges in the whole amounted to 2406l. 13s. 6d., and that the now plaintiff should be in mercy, &c.; as by the record, &c.; [155] that the sum so recovered by W. C., &c., against the now plaintiff as aforesaid, was recovered for and in respect of the same identical sums of money; that, by reason of the said judgment, and of the defendant not having paid to the plaintiff the amount of the two several bills, or either, &c., according to his said promise, the plaintiff was afterwards, and after the recovery of the said judgment, and before the commencement, &c., to wit, on, &c. called upon, and forced and obliged, to pay, and actually did pay, to W. C., &c., as such assignees, as aforesaid, the several sums of, &c., so recovered as aforesaid; and the plaintiff was also forced and obliged to incur, and actually did incur, a great expense, amounting to a large sum of money, to wit, 300l., in and about defending and endeavouring to defend himself against the said action; which the plaintiff is still liable to pay.

Pleas: first, non assumpsit; secondly, that the plaintiff did not consent or agree not to press W. H. for payment of the last-mentioned bill, modo et formâ; concluding to the country; thirdly, that the plaintiffs did, before the 13th of August next after the making of the said promise, to wit, on, &c., and on divers other days, &c. press W. H. for payment of the amount of the first-mentioned bill; concluding to the country. Upon all of which three pleas issue was joined.

Fourthly, that after the making of the said promise, and before the commencement, &c., to wit, on, &c., and on divers other days between that day and the 1st of September 1841, W. H. paid to the plaintiff, and the plaintiff then accepted and received from W. H. divers moneys amounting to a large sum, &c., to wit, 2002l. 6s. 6d., in full satisfaction and discharge of the said bills, and of all damages sustained by the plaintiff by reason of the nonpayment thereof, and further that the defendant never had notice that the said bills had not been paid [156] by W. H. on the said 13th day of August 1841, nor was the defendant ever requested to pay the amount thereof between the said 13th day of August aforesaid, on which day the defendant had such notice, and was so required to pay the amount of the said bills as in the declaration mentioned, and the commencement of this suit, &c. Verification.

Fifthly, that the promise by defendant was in writing, and signed by him, and that the plaintiff, before the commencement of the writ, and before the issuing of the fiat, to wit, on, &c., did knowingly and intentionally cancel the said promise, and did then deliver up the same so cancelled to the defendant as satisfied, cancelled, and annulled. Verification.

Sixthly. As to the nonpayment of the 2000l. and the damages alleged to have been maintained by the plaintiff by reason of the nonpayment of the bills, and also as to the damages sustained by the plaintiff by reason of his being obliged to pay the

(a) The action was not in the Queen's Bench, but in the Common Pleas. See *Cook v. Pritchard*, ante, vol. v. p. 329.

moneys recovered, as in the declaration stated, &c. ; that the next payment in the declaration alleged to have been made by W. H. were not made by him in fraud of his other creditors, and by way of fraudulently preferring the plaintiffs to other creditors of W. H., *modo et formâ* ; concluding to the country. Upon which issue was joined.

Seventhly. As to the causes of action in the introductory part of the sixth plea mentioned, that at the time of the said several payments by W. H. to the plaintiff, and also at the time of the commencement of the said action against the plaintiff, the plaintiff well knew that such payments were made in fraud of the other creditors of W. H., &c. Verification.

Eighthly, to the causes of action in the introductory part of the sixth plea mentioned, that the defendant had not, at the time of making these several payments by [157] W. H. in discharging these bills, any notice that such payments, or any of them, &c., were made in fraud of the other creditors, &c. Verification.

Replication to the fourth plea, that W. H. did not pay to the plaintiff, nor did the plaintiff accept and receive from W. H. the said several sums of money in the fourth plea mentioned, in full satisfaction and discharge of the said bills and all damages sustained by the plaintiff by reason of the nonpayment thereof, and that the defendant had notice of the nonpayment thereof, *modo et formâ* ; concluding to the country.

To the fifth plea that the plaintiff did not cancel the said promise, &c. ; concluding to the country.

To the seventh plea that the plaintiff did not know that the payments were made in fraud of the other creditors, &c. ; concluding to the country.

To the eighth plea, that the defendant had, at the time of the making of the payments by W. H., &c., notice that such payments, &c. were made in fraud of the creditors of W. H., &c. : concluding to the country. Upon all of which replications issue was joined.

On the trial before Lord Denman C. J. at the last spring assizes for the county of Surrey, the following facts appeared.

In the month of July 1841, William Hitchcock, a brother of the defendant, owed the plaintiff 2000*l.* for money lent ; and, as securities for the sum, had accepted two bills of exchange drawn by the plaintiff, each for the sum of 1000*l.* The first of these bills being on the eve of becoming due, William Hitchcock applied to the plaintiff to renew it ; which the latter did, upon receiving from the defendant the following guarantee :—

“In consideration of your consenting and agreeing not to press for immediate payment of the amount of a certain bill of exchange for the sum of 1000*l.*, dated the 19th day of April now last, and drawn by you upon, [158] and accepted by, my brother, William Hitchcock, and now in your hands, when the same shall become due, and not to negotiate such bill, and to abstain from pressing for payment of such amount, or any part thereof, until the 13th day of August next (being the day on which a certain other bill of exchange for the sum of 1000*l.* dated the 10th day of May now last, and likewise drawn by my said brother upon and accepted by you (sic), and now in your hands), I do hereby guarantee the payment unto you on the said 13th day of August next, as well of the amount of the said first-mentioned bill of exchange, or so much of such amount as shall not have then been previously paid, as also of the amount of the said secondly-mentioned bill of exchange. Dated, the 17th of July 1841.—I am, &c., (Signed) GEORGE HITCHCOCK.”

Between the 9th and 31st of August following, W. H. being at that time in a state of complete insolvency, paid to the plaintiff's attorneys, after some application on their part, several sums, amounting to 2002*l.* 2*s.* 6*d.*, being the amount of the two bills and interest. On the 16th of September a fiat in bankruptcy issued against W. H. ; the assignees under which brought an action against the plaintiff to recover back the money so paid by the bankrupt, upon the ground that the payments were a fraudulent preference ; in which action they succeeded. The costs of the assignees amounted to 406*l.* 13*s.* 6*d.*, which sum, together with the amount of the verdict, was paid by the plaintiff.

At the present trial evidence was tendered on the part of the plaintiff to prove the trading of W. H., the petitioning creditor's debt, and the act of bankruptcy ; but

this evidence was objected to on behalf of the [159] defendant, and rejected by his lordship, who was of opinion that the question as to the bankruptcy of W. H. was not raised by the pleadings.

It was then contended on the part of the defendant, that the affirmative of the issue raised by the fourth plea was supported by the fact of the payments stated in the declaration, and admitted to have been made by W. H. to the plaintiff. On the part of the plaintiff it was argued, that as the money in question had been, in point of law, received by the plaintiff to the use of the assignees, it could not operate as a payment to him. His lordship said he thought that the proof of the fact of money having passed from W. H. to the plaintiff by way of payment, even although it was a fraudulent preference, was, as between the present parties, sufficient to support the issue.

It is not material to consider the questions as to the other issues.

A verdict was returned for the plaintiff on the first, second, third, fifth, and seventh issues, and for the defendant on the fourth, sixth, and eighth; leave being reserved to the plaintiff to move to enter a verdict upon the issue taken on the replication to the fourth plea.

Sir T. Wilde Serjt. in last Easter term obtained a rule nisi accordingly, and also for judgment non obstante veredicto on the issue raised upon the fifth plea; or for a new trial on the ground of misdirection, of the improper rejection of evidence, and that the verdict was against evidence.

Bompas Serjt. (with whom was Peacock) now shewed cause. The real question in the case is as to the meaning of the fourth plea, alleging a payment and acceptance in satisfaction of the money due from W. H. to the plaintiff; which allegation is traversed by the replication. There was a payment of money in point of fact. [160] Then the question is, whether events occurring subsequently to the fact of payment, will change the nature of that fact—whether the circumstance of the assignees recovering the money back from the plaintiff, will prove that it had not been paid to him. [Maule J. The plaintiff will say that the fact of the assignees having recovered the money back from him, made it no payment, ab initio; and, if so, he has a right to say that the money was not received by him in satisfaction of his debt.] He might have replied that it was not a valid satisfaction, in the same way as a party who seeks to avoid a contract obtained by duress or fraud, must shew that it was so obtained. [Maule J. Suppose this had been the case of a plea of the delivery of a chattel in satisfaction, which had been traversed by the plaintiff; might not the plaintiff have shewn that the owner of the chattel had recovered the value of it from him in trover (a)? Cresswell J. The real question is, what was given and what was taken in satisfaction? Was it the property, or the mere possession, of the money?] It was a payment at the time, and so received, though it was avoided by subsequent events. There are cases undoubtedly where subsequent events have been held to change the nature of a previous transaction; as in the case of *Marston v. Allen* (8 M. & W. 494), which will probably be relied upon by the plaintiff, where it was held that the delivery of a bill (which had been indorsed by the holder to another party for safe custody) was not an indorsement to such party. [Tindal C. J. So here, the [161] plaintiff says the handing over the money was not a payment.] In *Marston v. Allen* the holder of the bill did not intend to confer any rights upon the party into whose custody he gave the bill; but here W. H. intended to pay, and the plaintiff to receive, the money, in satisfaction. [Maule J. But in point of fact it was a payment to the plaintiff, not for his own use, but for the use of other persons. Your argument is, that the plaintiff should have shewn this by his replication. Now suppose the replication had stated that the money alleged in the plea to have been paid to the plaintiff, was not paid to him by the defendant, or accepted by him in satisfaction; but was paid to him by the defendant for the use of the assignees,—that would have

(a) A fortiori upon a recovery of the chattel itself in detinue, or in replevin, the judgment in which actions does not vest the property in the defendant, as is the effect of a judgment in trover, or in trespass de bonis asportatis et conversis, P. 19 H. 6, fo. 65, pl. 5; M. 6 H. 7, fol. 8, 9, pl. 4. If, however, after a judgment for the plaintiff in detinue, which is to recover the goods or their value, the plaintiff, by issuing process for the value, renounces his right to the chattel in specie, the property would, it is conceived, vest in the defendant.

been bad,—as amounting to a statement in a round about way that the plaintiff had not accepted the money in discharge of the debt. That would be the effect of the replication you propose.] The replication suggested would undoubtedly be bad, as neither denying nor confessing and avoiding, the allegation in the plea. [Maule J. It would amount to a denial that the money was accepted by the plaintiff in discharge of the debt.] In the case of a plea of no award, the meaning of the plea is, that no legal award was made at the time; but if something has occurred afterwards to render the award invalid, the defendant must set out the facts in his pleading. In the present case the plaintiff took the money, and for a time, at least, held it as a satisfaction of his debt. During that time he could not have sued the surety, nor could the surety, by paying the plaintiff, have maintained any action against the principal debtor. The surety was then discharged absolutely, and the plaintiff cannot revive the debt against him by matter ex post facto. The whole question will perhaps turn substantially upon the point, whether or not the facts upon which the plaintiff relies, ought to have been [162] specially replied, with a special traverse of the payment, or an inducement giving colour (a).

At all events the plaintiff is not entitled to a verdict upon the issue on the fourth plea, as the jury have found a verdict for the defendant upon the sixth, thereby negating the fact of fraudulent preference. [Maule J. The bankruptcy was not proved.] And, therefore, it was not shewn that the money the plaintiff received was not properly his own. The verdict and judgment in the former action were not evidence against the present defendant, being *res inter alios actæ*. [Maule J. They would clearly not be conclusive against him.]

Sir T. Wilde and Channell Serjts. (with whom was Deedes), in support of the rule. As the bankruptcy was not proved, it is manifest that the jury could not find the fact of a fraudulent preference (b). The fourth plea is pleaded as a bar to the action, and must be received in that sense. It purports that the plaintiff has no cause of action against the defendant, a surety, because the [163] principal debtor paid the debt, and the claim of the plaintiff was thereby satisfied. The question then is, was the debt paid? Was not the effect of the recovery of the money by the assignees to rescind the payment ab initio? Whose money was it that was paid? Was it ever paid in discharge of W. H.'s debt? It was paid to the use of the assignees from the first moment that the plaintiff received it. Clearly, then, it never was a payment to the plaintiff in satisfaction of his claim. The language of the plea must receive a legal construction. The term "payment" cannot mean the handing over from one party to another of money which does not belong to the one, and which cannot be retained (*vide supra*, 162 (a)) by the other. It is said that at any rate the facts ought to have been specially replied; but it is admitted that if they had been set out upon the record, the replication would have been bad (*vide infra*, 167, n.). It is, however, contended that the facts might have been specially stated, with a special traverse of the payment. But the argument on the other side shews that this is not the case for a special traverse. For, in the first place, the facts alleged in the inducement would amount either to a direct denial of the allegation of payment, or they would be in confession and avoidance; and in either case a special traverse would be improper.

(a) *Quære*, whether a special replication might not have been supported on the ground that the subject of the fraudulent preference was not a specific chattel, but a successful assertion of title to which, the assignees would shew that the creditor never had acquired any thing in the chattel beyond a mere naked possession without property, but was, as far as appears, a payment in moneys numbered, in coin or notes unarmarked. The right of the assignees arising out of the circumstances which gave to the payment the character of a fraudulent preference, would therefore appear to be, not a right to avoid and annul the payment, but a new right accruing to them from the very fact that the property in the coin or notes had vested, and had irrevocably vested, in the defendant. *Vide post*, 167, n. (a).

(b) The bankruptcy was distinctly alleged in the declaration, and was not denied by any plea. There seems to be no difference, as to the question of fraudulent preference, between a bankruptcy admitted on the record and a bankruptcy denied and proved. The plaintiff produces his *seeta*, ready to establish the truth of the allegations of his declaration; the defendant cannot weaken the effect of those allegations by declining to hear the evidence brought to support them.

[Maule J. It may be doubted whether the defendant, after taking issue, or upon a general demurrer, has strictly a right to contend that the traverse ought to have been special.] Under a plea of no award, it is competent to the defendant to shew that although an award has been made in point of fact, the instrument is defective, and consequently is invalid. In *Hill v. The Manchester Water-Works Company* (5 B. & Ad. 866, 2 N. & M. 573)—in an action against a corporation on a bond, the condition of which recited, that the company were by an act [164] of parliament authorised to raise money by bond, and that at a general assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose,—the defendants pleaded non est factum; and it was held, that although the company could not, under that plea, shew that the bond executed by them was invalidated by collateral matter, they might shew that it was void, because executed contrary to the provisions of the act of parliament. [Maule J. The issue is, whether the money was received by the plaintiff in satisfaction of his claim. You say it was received by him for the use of the assignees of the debtor. His bankruptcy must therefore be proved. You will then contend that it was proved by shewing the record in the action by the assignees against the present plaintiff, in which they recovered the money from him.] That is not exactly the argument submitted. The question is, whether the principal debtor discharged his debt to the plaintiff. A jury have found, and this court has upheld, the finding (see *Cook v. Pritchard*, ante, vol. v. p. 329), that the assignees had a right to the money which passed from the debtor to the plaintiff on that occasion. If another jury were to find that there had been no fraudulent preference, that would not make the former transaction amount to a payment. The verdict and judgment in that case are conclusive against the present defendant: for that was not, as far as he is concerned, *res inter alios*. As a surety he cannot be treated as a stranger to transactions between the principal debtor and creditor, relating to the debt itself. If the creditor had recovered against the surety, and the latter were to sue the principal debtor, the judgment in the former action could not be said to be *res inter alios*. [Coltman J. Your argument would seem to go the length of shewing, that if the former verdict had been [165] obtained by reason of gross negligence on the part of the then defendant, it would still be binding on the surety.] Negligence, or collusion, or fraud, might have been set up by the present defendant. But he has no right to try again a question that has already been fairly contested and disposed of. It was not necessary in the present action to prove the bankruptcy of the principal debtor. The action is brought upon a guarantee for the payment of two bills; the surety says they have already been paid: surely the judgment in the former action is conclusive to shew, they have not been paid. Whether or not the surety was discharged is another question. [Cresswell J. Can you use the record in the former action to shew a fact upon which the verdict and judgment were obtained, namely, that the money was received by the plaintiff, not as a payment, but for the use of the assignees? In the ordinary case of an action for negligence against a master, in which a verdict is obtained by the plaintiff, where the master brings an action against his servant in whose negligence the cause of action originated, the verdict and judgment in the former action are evidence of the amount of damages, but not of the circumstances under which they were recovered (a).] It is submitted that the cases are distinguishable. It was certainly competent to the plaintiff in this action to shew that the money which was alleged in the former action to have been received by him to the use of other parties, and as such was recovered from him, had been paid to him by the principal debtor in respect of these particular bills.

TINDAL C. J. The principal question in this case arises on the issue taken on the fourth plea, which states that W. H. had paid to the plaintiff, and that the plaintiff [166] had received and accepted from him, a sum of money in full satisfaction and discharge of the bills of exchange mentioned in the declaration. The replication traverses this allegation of payment and acceptance. And the question is, whether, under this general traverse, the plaintiff was at liberty to give in evidence circumstances subsequent to the fact of the money being handed over to him from W. Hitchcock for the purpose of shewing that the transaction was not, in fact, a payment in satisfaction of the bills in question. And upon the best consideration which I can bring to the case, I am of opinion that the plaintiff was at liberty to do so. Of the fact of money

(a) Vide dict. per cur. in *Green v. The New River Company*, 4 T. R. 590.

being passed as a payment there can be no doubt; but I think that the plaintiff was at liberty to shew that what appeared at the time to be a good and satisfactory payment, was perfectly illusory; that the money which he had received from W. Hitchcock could not be appropriated by him to his own use, but that it belonged to the assignees. Suppose the particular facts had been replied, the replication must have been by way of confusion and avoidance; and it is a rule in pleading that where a replication is in confession and avoidance, and the subject matter of the avoidance is inconsistent with the facts stated in the plea, the plaintiff must specially traverse them (a)¹. If, therefore, the plaintiff had replied the facts specially he must have concluded "without this," that the money was paid by W. Hitchcock and accepted by him in satisfaction. In *Cumber v. Wane* (1 Stra. 426), where, to an action in assumpsit for 15l., the defendant pleaded that he gave, and the plaintiff received, a note for 5l. in satisfaction, the plea was held bad; and Pratt C. J., in giving judgment, said, "As the plaintiff had a cause of action, it can only be [167] extinguished by satisfaction he agrees to accept; and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction; or, at least, the contrary must not appear, as it does in this case." So here, the real facts of the case shew that the plaintiff had not received any satisfaction for his claim; and I think that was evidence to support, in point of law, the denial of the payment.

Upon the other point I am of opinion that the judgment in the action by the assignees against the present plaintiff was not conclusive against the present defendant. He was no party to that action, and could not interfere in it. But I think it was admissible as evidence for the purpose of shewing the nature of the whole transaction. Upon the whole, I am of opinion that the case should go down to a new trial to ascertain whether or not there had been a real and genuine payment of the bills by the bankrupt to the plaintiff.

COLTMAN J. The plea imports that W. H. paid 2092l. 2s. 6d. of his own money; if the money was not his, it was not paid in satisfaction of his debt (a)². *Cumber v. Wane* is very much in point. What there appeared upon the record, in this case appeared by the [168] evidence; namely, that the plaintiff had not received satisfaction for his debt. Upon the other point also I quite agree. The judgment in the former action, though receivable as a medium of proof that the money did not belong to the party paying it, was not conclusive evidence to satisfy the allegation—that the money had not been paid in satisfaction.

MAULE J. I also think the rule must be made absolute for a new trial. As to the fourth plea the most material point is, the allegation that the plaintiff received the money from W. Hitchcock in satisfaction of his claim. But the evidence shews that the money received by him was received inconsistently with its being in satisfaction, for that it was received to the use of the assignees of the bankrupt. This was affirmative matter negating the allegation in the defendant's plea. There is no rule of pleading to prevent the plaintiff from denying that which the defendant has alleged; and here it was quite unnecessary for the plaintiff to give colour or to have a special traverse. I do not think, however, that the plaintiff is entitled to have a verdict entered for him upon the fourth plea, as I am of opinion that the judgment in the action between the assignees and him was not conclusive evidence against the present defendant. It is said that it is hard, after the plaintiff has done his best to defend himself in the action brought by the assignees, and has been compelled to pay them back the money, that he should suffer the loss. But the question between the present

(a)¹ See 1 Wms. Saund. 21 (2), 209 (8); *Kenchin v. Knight*, 1 Wils. 253.

(a)² In this view of the case a special replication would be clearly inadmissible; but, quære, whether at the time of the fraudulent preference, which must be taken to have occurred before any act of bankruptcy, it being so alleged in the declaration and not denied, the money was not, for all purposes, the money of W. Hitchcock, though it may have been so applied by him as to give the assignees a right of action to recover it, as if it had been their own money. If the assignees had declared specially, would they not have stated that W. H., with intent to defraud his creditors, voluntarily paid the money to the defendant, without saying that the money so handed over belonged to them? It would rather seem that the assignees are allowed to recover, *brevi manu*, as for money received for their use a sum of which, though paid otherwise than for their use, they are entitled to take the benefit.

plaintiff and defendant is, whether the assignees were entitled to recover that money. And that is a fact which the plaintiff cannot prove conclusively by the production of the record in the former action—he must bring forward other evidence. If the next jury should find against the plaintiff upon that point, and that the assignees had no right to the money, [169] it would be the same between the present parties as if the plaintiff had been robbed of it; and he must put up with the loss. Juries do sometimes find different verdicts upon the same facts. In an action on a policy of insurance against the insurer, where the defence set up is that certain matters ought to have been communicated to the insurer, the jury may find that the matters were material and give a verdict for the defendant. The assured may then sue his broker for negligence in not making the communication; and in that action the jury may think the matters not material; and the assured consequently has to put up with the loss. It is a hardship upon him; but there is no remedy for it in the present state of the law.

CRESSWELL J. concurred.

Rule absolute for a new trial.

BROWN v. LUDHAM AND ANOTHER. June 6, 1843.

[S. C. 6 Scott, N. R. 934.]

A horse, pointed out by A., an execution creditor, as the property of B., the execution debtor, having been seized under a *fi. fa.* C. claiming property, brought trespass against the sheriff, who applied for relief under the interpleader act. The court, instead of directing an issue, ordered that the action of trespass should proceed, and that A.'s name should be substituted for that of the sheriff, subject to the terms usually imposed where an issue is directed.

Channell Serjt. on the first day of the term, on behalf of the sheriff of Herts., obtained a rule nisi under the interpleader act. It was stated in the affidavits upon which the rule was moved for, that on the 4th of May last a writ of *fi. fa.* issued at the suit of the plaintiff in this cause, under which an entire horse called "The young Yorkshire Hero" was seized at Tring on the 5th. On the 15th the sheriff received notice from one Throup and another, that the horse was their property; and on [170] the 23d they commenced an action of trespass against the sheriff and his officer.

Bompas Serjt. now appeared for the claimants, who, it was stated, had purchased the horse on the 4th of March, and had been prevented from obtaining considerable profits, as the animal was just going on circuit. The learned serjeant suggested that the execution creditor might be substituted for the sheriff as the defendant in the action of trespass brought by the claimants; and offered to give security, to the satisfaction of the master, upon the horse being given up to them. [Tindal C. J. Would not trover be the more proper form of action?] In that action the claimants would not recover damages for the loss of the profits (*a*).

Storks Serjt. for the execution creditor objected to the course proposed. The books of practice lay it down that there should be an issue, in which the claimant is to be the plaintiff (*b*). [Tindal C. J. The statute (*c*) [171] does not say so. Maule J.

(*a*) Unless specially laid.

(*b*) See 2 Archb. Prac. 4th edit. p. 860. But see also 7th edit. p. 1008.

(*c*) The 1 & 2 W. 4, c. 58, s. 6, authorises the court, from which the process issued, to call before them the execution creditor and the claimant, "and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff, &c., all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case." The powers and authorities here referred to are those given by the first section of this act in respect of adverse claims, by which the court or judge may make rules and orders calling upon the claimant to appear and to state the particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of the claimant as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order the claimant to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also

In general when an issue is directed no action has been commenced against the sheriff. Here, some expense has been incurred. If an issue were directed that expense would be thrown away. I do not think there is any substantial difference between an action and an issue. [The court may impose terms.] All that the execution creditor requires is, that the claimants shall be put to prove their right. [Tindal C. J. That will be the effect of the rule suggested.]

After some further discussion, in which Storke Serjt. pressed for the sale of the horse, but declined giving an indemnity to the sheriff, Tindal C. J. proposed, as the best course, that the action against the sheriff should be suspended, that a feigned issue should be directed to try whether the property was in the claimants and the execution debtor, and that if the verdict should be found against the execution creditor, the action against the sheriff might proceed; but, upon Channell Serjt. calling the attention of the court to the statement in the affidavits upon which he had moved—that at the time of the seizure a clerk of the plaintiff's attorney had attended the officer, had pointed out the horse, and desired that the horse might be seized, telling the officer that it was the defendants' property; which statement was not answered; and that the sheriff had been ruled to return the writ so soon that he could not have made an application at an earlier period—the court ordered the rule to be drawn up—that the action of trespass should proceed, the name of the execution creditor being substituted for those of the sheriff and his officer; that the horse should be delivered up to the claimants, upon their giving security, within a week, to the satisfaction of the master, for the return of the horse, in the event of their claim turning out to be unfounded; that otherwise the horse should be sold, and the proceeds paid into court; and that the question as to costs should be reserved.

Rule accordingly (a).

[173] *CURLING v. MILLS*. June 6, 1843.

[S. C. 7 Scott, N. R. 709; 12 L. J. C. P. 316.]

A., by deed, "in consideration of the rents, covenants, and agreements hereinafter reserved and contained," on the part of B., covenants to grant to B., at his request, a lease of a house: habendum for twenty-one years from a day past, "but determinable as hereinafter mentioned." B. covenants to lay out a certain sum on the premises. And it is agreed that the lease shall contain a covenant for the payment of rent and other usual covenants; "and also a covenant, as it is also hereby agreed, on the part of A. for the quiet enjoyment, &c.; and it is also agreed that it shall be lawful for, and, in the event of a lease being executed, there shall be contained in the lease a proviso empowering, B. to determine the tenancy or the lease," &c.—Held, a present demise.—Before the date of the deed (September 1835), A. was the owner of a row of houses running from north to south, with a garden at the back of each (to the east). In the rear of the gardens, and divided from them by a wire-fence, was a shrubbery with a gravel walk, which was used in common by the occupiers of all the houses. This shrubbery was bounded on the east and north by the fence of J. S. By the instrument the premises demised to B. were described as "the first house south in the row called, &c., with the garden and shrubbery at the rear and north side thereof, and extending to J. S.'s fence either way, &c., and also liberty of way and passage to and for such person for the time being occupying the premises intended to be hereby demised in, along, and over the walk in the rear of the houses, &c., inclosed by a wire-fence from the garden-ground, or ground occupied with such several houses." The fence of J. S. ran along the south side of

to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and the claimant, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable."

By the 1 & 2 Vict. c. 45, the powers here given to the court are made exercisable by a single judge. Vide post, 189, n.

(a) And see *Melville v. Smark*, ante, vol. iii. p. 57; *Goldschmidt v. Hamlet*, post, p. 187; *Fenwick v. Laycock*, 2 Q. B. 108.

the garden belonging to the house demised to B., as far as the wire fence dividing the garden from the shrubbery. In September 1839, A. by indenture of lease, demised to C. another house in the same row, with a reservation of a similar right of way.—Held, that the premises demised to B. included at least some portion of the angle of the shrubbery at the back of his garden, between the wire-fence and the fence of J. S. to the east, and therefore that C. had no right to walk over the whole of the land comprised in that angle.

Trespass, for breaking and entering the plaintiff's close, called "the garden."

Pleas; first, not guilty; secondly, that the locus in quo was not the plaintiff's close. Upon both of which issue was joined.

Thirdly, that the locus in quo was the close, soil, and freehold of Mary P. Whitton; and leave and licence from her.

Fourthly, that the plaintiff had not, at any of the [174] times when, &c. any estate, right, or interest in the close in which, &c. save and except under the said M. P. W.; and that before the plaintiff was possessed of the close, or any part thereof, and before the times when, &c., to wit, on the 27th of September 1839, M. P. W., by indenture, granted to the defendant full and free right, liberty, and permission, of walking in and upon the close; wherefore, &c. Verification.

Replication, to the third plea, that, whilst the close was the close, soil, and freehold of M. P. W., and long before the giving and granting of the leave and licence of M. P. W. to the defendant, to wit, on the 18th of September 1835, M. P. W. demised the close to the plaintiff; habendum unto the plaintiff, his executors, &c. for twenty-one years from the 24th of June 1835, the plaintiff to be at liberty to determine the tenancy at the end of the third, seventh, or fourteenth year of the term, on giving six calendar months' notice thereof; by virtue of which demise, the plaintiff, on, &c., entered upon and was possessed of the close; and that he had not at any time given notice to determine the tenancy; and that he continued so possessed until the defendant, during the continuance of the said demise of his own wrong, broke and entered, &c. Verification.

To the last plea, that the plaintiff was possessed of the close long before and at the several times when, &c., and long before and at the time of the making of the said indenture as tenant thereof to M. P. W. under and by virtue of a certain demise thereof, from M. P. W. to the plaintiff, long before the several times when, &c., and long before the making of the indenture; without this, that before the plaintiff was possessed of the close, M. P. W., by the said indenture, granted unto the defendant full and free right, liberty, and permission, of walking in and upon the close, modo et forma; concluding to the country.

[175] The rejoinder took issue upon the demurrer mentioned in the replication to the third plea, and joined issue upon the replication to the fourth plea.

The surrejoinder joined issue upon the rejoinder to the replication to the third plea.

At the trial before Lord Denman C. J. at the last assizes for the county of Surrey, the following facts appeared.

The plaintiff was the occupier of a house, being No. 8 in Grove Crescent, Camberwell (being the last house south in a crescent running north and south); the defendant was the occupier of the house, &c. No. 6. At the back of each of the houses (to the east) was a small garden, and in the rear of the gardens was a wire fence separating them from a strip of land planted as a shrubbery, in which there was a six-foot gravel walk, which, before the agreement hereafter mentioned, appeared to have been used by the inhabitants of all the houses in the crescent. At each end of this walk (running north and south) was a circular turn. The whole of the premises were bounded, on the south and east, by lands in the occupation of Charles Baldwin (a).

On the 18th of September 1835, an agreement, under seal, was executed between Mary P. Whitton (who, it was admitted, was then the owner in fee of the whole of the houses), of the one part, and the plaintiff of the other part; the material points of which were as follows:

"The said M. P. W., in consideration of the rents, covenants, and agreements,

(a) See *Dykes v. Blake*, 1 Arn. C. P. Rep., where a plan of the premises in question is given.

hereinafter reserved and contained, on the part of the said John Curling, his executors, &c., to be paid, performed, and observed, doth hereby covenant with the said J. C., his executors, &c., that she the said M. P. W., her heirs or assigns, shall and [176] will at any time during the term hereinafter agreed to be demised, upon request made to her or them in writing under the hand of the said J. C., his executors, &c. for that purpose, and at his or their and her joint expense, grant and execute unto the said J. C., his executors, &c., and J. C. doth hereby covenant to accept a counterpart of a good and effectual demise or lease by M. P. W., her heirs or assigns, of all that messuage, tenement, and premises, being the first house south in the row of eight houses called Grove Crescent, in Camberwell Grove, with the garden and shrubbery at the rear and south side thereof, and extending to Mr. Baldwin's fence either way, together with the use of water, &c., and also full and free liberty of way and passage to and for such person or persons, for the time being, occupying the said messuage or tenement and premises intended to be hereby demised, and his and their respective families (not being servants) and friends in, along, and over the walk of six feet wide, in the rear of the houses forming the said crescent inclosed by a wire fence from the garden ground, or ground occupied with such several houses, the same walk having been set out and provided as a promenade or walk for their respective families (not being servants); habendum, unto J. C., his executors, administrators and assigns, for the term of twenty-one years, from the 24th day of June last, but determinable as hereinafter mentioned; yielding and paying for the same the rent of a peppercorn until the 10th day of November 1836; and yielding and paying for the same from the said 10th day of November to the 25th day of December following, the sum of 11l. 12s. 6d.; and yielding and paying for the same from the said 25th day of December for and during every subsequent year of the same term the yearly rent of 90l., clear of all tenants' taxes, deductions and abatements whatsoever, by four equal quarterly pay-[177]-ments, on the 25th day of March, &c., and the annual sum of 3l. 3s. for the supply of water, &c. (The instrument contained a covenant by the plaintiff, to lay out 125l. at the least within the first year after the date, in repairing, improving, and embellishing.) And it is hereby agreed and declared, that there shall be contained in the said lease and counterpart, by and on the part of J. C., his executors, &c., a covenant for the payment of the said yearly rent, and also of the said yearly sum of 3l. 3s. for the water, and also all taxes, &c.; and also a covenant that J. C. shall pay unto M. P. W. one eighth part (not, however, exceeding 2l. in any one year) of what she shall expend or incur in repairing, maintaining and keeping the road and ground, lawn, and plantation in front of the houses, and the fences, &c., and also the walk in the rear of the said ground; and the usual covenants to keep in repair and leave in repair. And also a covenant,—as it is also hereby agreed, on the part of M. P. W., her heirs and assigns,—for the quiet enjoyment of the premises hereby demised against any person or persons claiming under her or them, &c. And it is also agreed, that it shall be lawful for, and in the event of a lease being executed, there shall be contained therein a proviso empowering, J. C., his executors, &c. to determine the said tenancy, or the said lease, at the end of the third, seventh, or fourteenth year of the said term, on giving six calendar months' notice thereof."

On the 27th September 1839, M. P. W. executed a lease for twenty-one years of No. 6 to the defendant; wherein was reserved the use, as theretofore enjoyed by the occupiers of the same messuage, of the road or entrance in front of Grove Crescent, and of the walk of six feet in width, on the east of the gardens of the houses forming the Crescent.

The plaintiff, some time after he had taken pos-[178]-session under the agreement, removed the wire fence at the back of his garden, and planted flower-beds, with gravel walks between them, in the shrubbery, in the line of the six-foot gravel walk, so as to make that part a continuation of his own garden, and he put up a wire fence separating the part so planted from the remainder of the shrubbery containing the six-foot walk. The trespass complained of, was committed by the defendant in the exercise of a right claimed by him, to walk over the whole of this ground, which had formerly been part of the shrubbery.

It was objected at the trial, on the part of the defendant, first, that the agreement of the 18th September 1835, did not amount to a demise; secondly, that if it did, the interest in the locus in quo did not thereby pass to the plaintiff, as no exclusive right of possession had been therein conferred upon the plaintiff as against the defen-

dant; and, thirdly, that the locus in quo could not be described as a close called "The garden." His lordship expressed an opinion against the two former objections; and he left it to the jury to say, whether the place trespassed upon, was "a garden," and whether the plaintiff was in possession thereof, and whether the premises demised to him, included all the soil up to Baldwin's fence. The jury found in favour of the plaintiff upon all three points; and a verdict was entered for him, leave being reserved to move to enter a verdict for the defendant upon the second issue, if the court should think it was not satisfactorily proved that the plaintiff had such a possession as entitled him to maintain trespass, or upon the third issue if they should think the agreement did not amount to a present demise.

Bompas Serjt., in last term, obtained a rule nisi on the points reserved, or for a new trial, upon the ground that the verdict was against evidence.

[179] Channell Serjt. new shewed cause. The declaration charges a trespass in "a garden;" and although the locus in quo is called a shrubbery in the agreement, the jury have found that, in fact, it was a garden. [Tindal C. J. If the defendant had a right to walk in the six-foot walk, as he has justified that in his plea, ought there not to have been a new assignment for the trespass extra viam?] It is submitted that it was not necessary, as the plaintiff has named the close in his declaration; *Coker v. Crompton* (1 B. & C. 489, 2 D. & R. 719). The defendant here, does not justify for a right of way; he sets up a licence over the whole close. The substantial questions in the case are, whether the agreement amounted to a demise; and, if it did, whether the locus in quo was included therein. The plaintiff insists upon the affirmative of these propositions.

The agreement is under seal; it contains actual covenants by the plaintiff; there is an obligation on his part to lay out money on the premises; the periods of the commencement and determination of the term are spoken of; there is an agreement on the part of Mrs. Whitton, amounting to a covenant for quiet enjoyment, on which the plaintiff might have sued; and altogether the intention of the parties is clear, that the instrument should operate as a present demise for twenty-one years, determinable as therein mentioned; nor is that intention less clear, because the agreement stipulates for the execution of a formal lease. [Maule J. It appears that Mrs. Whitton could not insist upon the lease being executed. It lay with the plaintiff to require it. Tindal C. J. There are certainly no words of present demise in the instrument, except by inference.] Words of present demise are not essential to the operation of the agreement as a demise; *Bac. Abr.* title Lease (K).

Secondly, the locus in quo was included in the demise. [180] The premises demised are described as extending to Mr. Baldwin's fence either way; and as soon as it was ascertained where that fence was, the construction of the instrument lay with the judge. His opinion was in favour of the plaintiff; but, to avoid any doubt, he left the question to the jury, who also found for the plaintiff. It may be argued on the other side, that there was no demise of the locus in quo to the plaintiff, as there was a reservation of a right of way, in the six-foot walk to the plaintiff himself, and that there could not be an easement granted to him in premises of which he had already the legal estate. But the right of way is for the owners of all the houses; and all that was meant by the agreement was, that the plaintiff should have a right of way behind the other houses. The circular footpath was undoubtedly in existence before the demise to the plaintiff; but even supposing that to be included in the right of way, the defendant could not succeed on the present pleadings. The soil being in Mrs. Whitton, she had demised it to the plaintiff previously to the time when she assumed to grant to the defendant an easement which she had then no power to create.

Bompas Serjt. in support of the rule. The agreement did not amount to a demise. There are no words of present demise, and it contains covenants for a future lease. The covenant to lay out money, which has been relied upon on the other side, is the same as in building contracts, in which it is frequently stipulated that money shall be expended before a lease is granted. If this instrument were intended to operate as an actual lease, there would have been no necessity for any provision for a future lease, which should contain certain specified covenants. There is no covenant to pay rent. Even where rent has been reserved with a right to distrain, the instrument has been held not to amount to a demise, [181] where there has been a stipulation for a future lease; *Bicknell v. Hood* (5 M. & W. 104). Here the future lease is to

contain certain covenants ; but taking this to be a present demise, if no future lease is granted, will the tenant hold the premises for twenty-one years without being subject to any of the covenants, Mrs. Whitton not having the power to compel the execution of the lease? By the covenant for quiet enjoyment, nothing more was meant than that the plaintiff should have quiet enjoyment until the lease was granted, and that Mrs. Whitton had title to grant such a lease. The covenant as to the determination of the tenancy clearly points to the right to determine the tenancy after the lease should have been granted. [Tindal C. J. In what relation were the parties to stand in the mean time?] As in the case of building leases. The learned serjeant upon this point cited *Chapman v. Towner* (6 M. & W. 100), *Brashier v. Jackson* (ib. 549), *Jones v. Reynolds* (1 Q. B. 506, 1 G. & D. 62), and *Doe dem. Thompson v. Amey* (12 A. & E. 476, 4 P. & D. 177). [Maule J. referred to *Perring v. Brook* (7 C. & P. 360).]

But even assuming that this instrument did amount to a demise (h), the locus in quo was not included in it. The whole instrument must be read together. A right of way over the locus in quo, was clearly reserved to the plaintiff, and therefore the soil could not have been demised to him. He is to pay one eighth of the expense of keeping the path in order. [Maule J. There might be a demise of the soil to one party, and a con-[182]-current grant of a right of way over it to others, with a condition that they should all join in the expense of keeping the way in order. Coltman J. As you put it, you make it a question for the jury ; and they have found against you. Maule J. You treat it as a question of parcel or no parcel.] It is clear that the demise to the plaintiff was only of that portion of the garden which extended to where the wire fence had formerly run, reserving the right of way in the shrubbery beyond to the tenants of all the houses ; and if they all had a common right, there could be no possession in the plaintiff as against the defendant.

TINDAL C. J. It is often very difficult to say whether a particular instrument amounts to an agreement for a lease, or an actual demise. The general rule is correctly laid down in *Morgan v. Bissell*, namely, that the question depends on the intention of the parties, as it is to be collected from the instrument. That rule the courts have endeavoured to apply in all cases, by seeking to arrive at the intention of the parties. That intention it is most important to ascertain in the present case, as the question whether this instrument operates as a demise, is substantially the only one raised on the pleadings, whether we look to the plea of not possessed—which must mean not legally possessed—or to the other issue, where the point is more directly raised. And, looking at the instrument in all its parts, I think effect will be given to the intention of the parties, by construing it as an actual demise rather than by treating it as a mere agreement for a lease. It begins by stating, that “in consideration of the rents, covenants, and agreements hereinafter reserved and contained ;” on the part of the plaintiff, Mrs. Whitton covenants that she will, at the request of the plaintiff, “grant and execute an effectual demise or lease” to him. This clearly refers to the rents, covenants, and [183] agreements contained in the agreement, and not to those which are to be inserted in the formal lease. Then, passing by the description of the premises, we come to the habendum, which is “for the term of twenty-one years, from the 24th day of June last,” which rather seems to form part of the instrument itself. After the reddendum, it contains a covenant on the part of the plaintiff to lay out a certain sum within the first year after the date ; and then it proceeds to specify the covenants that are to be contained in the future lease ; which are covenants usually contained in such an instrument. The question is, what would be the relation of the parties between the execution of the agreement and the execution of the lease. And I cannot think it would be any other than that of landlord and tenant under the habendum and reddendum in the agreement. In further corroboration of this view, we find a clause towards the end of the instrument, that the lease shall contain “also a covenant, as it is also hereby agreed,” on the part of Mrs. Whitton for quiet enjoyment ; shewing that the instrument provides for a future lease, and also

(h) The question has generally arisen upon the construction of instruments not under seal. But now by the “act to simplify the transfer of property,” (7 & 8 Vict. c. 76), all demises in writing made after the 1st of January 1845, must be under seal, otherwise they are to operate as agreements only. Sealing by the lessor without any sealing on the part of the lessee, would appear to be sufficient under this statute ; sed quære et vide 8 & 9 Vict. c. 106.

for the quiet possession of the premises in the interval. There is also the further clause—"And it is also agreed that it shall be lawful for,—and in the event of a lease being executed, there shall be contained in the said lease a proviso empowering—the said J. C. P. to determine the said tenancy" in the way there mentioned. Now, what is this but shewing that in the interval before a formal lease was granted, a tenancy was to subsist? I think, therefore, this falls within the class of cases manifesting an intention between the parties that an absolute demise shall take effect, and that the issues turning on the fact of a demise were properly found for the plaintiff.

The second question is, whether the premises upon which the alleged trespass was committed are properly contained in the description of the part demised. The [184] premises are described as "all that messuage, &c., with the garden and shrubbery at the rear and south side thereof, and extending to Mr. Baldwin's fence, either way." I think that must mean the corner that was bounded by Mr. Baldwin's fence on both sides. If that be so, the spot where the defendant walked was clearly within the limit. Upon the whole, therefore, I think the verdict was right.

COLTMAN J. I also think that the instrument in question amounted to a present demise. The words at the beginning are very strong. If the statement had been that by the plaintiff's lease rent was to be reserved, the natural construction would be that none was reserved by the instrument itself. But the consideration is expressed to be the rents, &c., herein reserved; which shews that the demise was then to come into operation. And this construction is consistent with the other parts of the instrument. It speaks of "the demise herein contained," and of the determination of the said tenancy or the said lease.

As to the question whether the locus in quo formed part of the demised property, I think the jury came to a right conclusion. The construction put upon the deed by the defendant would not satisfy the words "either way;" as, if the premises demised to the plaintiff terminated at the line where the wire fence formerly stood, those premises would extend to Mr. Baldwin's fence only one way.

MAULE J. I also am of opinion that the instrument in question amounts to a demise. It appears clearly to have been the intention of Mrs. Whitton to deprive herself of, and to confer upon the plaintiff, the right to the possession of the property for three, seven, fourteen, or twenty-one years. It was not a formal lease; that was [185] contemplated to be made afterwards. Another argument strikes me, in addition to those of the rest of the court, in which I entirely concur, that in supposing this instrument not to operate as a demise, the lessor would not have the advantage of any of the covenants, unless the plaintiff himself required a lease to be executed.

With regard to the question whether the locus in quo was demised, the defendant insists upon, and has exercised, a right to go upon any part of that plot of land which is bounded on the north by the wire fence put up by the plaintiff, on the west by the line where the fence, which was removed by him, formerly stood, and on the south and east by Baldwin's fence. The trespass therefore was committed on a portion of the land included in the demise. It may be that the defendant has a right more extensive than the plaintiff is willing to allow, but still he has exceeded that right (a).

Rule discharged.

BADMAN v. PUGH. June 14, 1843.

An affidavit stating the insolvency of the defendant in answer to a rule nisi for judgment, as in case of a nonsuit, should shew that no step has been taken since the insolvency was known.—An affidavit in answer to a rule nisi setting up as an answer that the application was against good faith, should be precise and unambiguous.

Dowling Serjt. shewed cause against a rule for judgment as in case of a nonsuit, upon an affidavit made by the plaintiff, stating that he had been informed and believed, that since the commencement of the action the defendant had become embarrassed in his circumstances, and that in May last a negotiation took [186] place for staying all proceedings in the action, each party paying his own costs; upon which it was agreed that proceedings should be stayed, and that the present rule had been

(a) Cresswell J. was absent.

obtained in breach of good faith. According to the late cases, a plaintiff relying upon the insolvency of the defendant as an excuse for not going to trial, must shew that no step has been taken by him since the fact of insolvency came to his knowledge. But it is submitted, that when a negotiation is entered into by which a plaintiff is prevented from going to trial, the defendant is not entitled to move for judgment in case of a nonsuit upon the ground of a delay in which he was himself the principal party, and that he ought to pay the plaintiff the costs of bringing him unnecessarily before the court.

Channell Serjt. in support of the rule. The plaintiff's affidavit is vague and ambiguous. It contains no statement of the nature of the alleged negotiations, nor does it disclose any of the circumstances attending it. The affidavit is as bare upon the second point, as it is admitted by the plaintiff's counsel to be, upon the first.

MAULE J. Where a party swears last, he should be more precise and positive.

TINDAL C. J. He should not so swear as to leave the matter in doubt.

Per curiam. Rule discharged on giving a peremptory undertaking.

[187] GOLDSCHMIDT v. HAMLET. June 15, 1843.

[S. C. 6 Scott, N. R. 962; 1 D. & L. 501; 12 L. J. C. P. 304. Followed, *Graham v. Wilherly*, 1845, 7 Q. B. 512. Discussed, *In re Pearce*, 1885, 14 Q. B. D. 971.]

The goods of X. being seized under several writs of fi. fa. issued successively by A. and B., X. became bankrupt. Upon an issue tried under an order of interpleader obtained by the assignees of X. A.'s execution is set aside, as having issued on a judgment founded on a warrant of attorney. Held, that B. was entitled to be paid as if he had been the sole execution creditor, and that the assignees of X. were not entitled to take the benefit of A.'s execution.

The sheriff of Bucks levied under a fi. fa., issued in this action, for 380l. 3s. 6d. on the 17th of March 1841, at which, having previously issued warrants upon similar writs in *Linnitt v. Hamlet* and upon six subsequent writs of execution against the same defendant. On the 20th of March a fiat issued against the defendant. On the 30th of March, an order was made in all the causes—that the sheriff do bring the proceeds of the sale into court; that issues be tried, in which the execution creditors shall be plaintiffs, and the assignees defendants; that the question to be tried shall be, whether the executions are or are not valid as to each action; that the assignees do, on or before the 15th day of April next, select which execution (a) they will contest, or that a case be stated for the opinion of the court upon admitted facts; with power to name a barrister to decide upon any disputed facts; and with a stay of proceedings in the mean time. The assignees declined to contest the validity of the execution in this cause, and in four of the others. In one, the execution creditor withdrew from the contest; and in *Linnitt v. Hamlet*, where the judgment was on a warrant of attorney, an issue was tried, and decided in favour of the assignees.

Sir T. Wilde Serjt., obtained rules in this and in the three other actions, in which the assignees had not contested the validity of the executors calling upon them to [188] shew cause why the amounts directed to be levied should not be paid to the respective plaintiffs, out of the proceeds of the levies which had been paid into court under a judge's order "to abide the event of the issues now pending as to the validity of the execution or some of them, and to abide the further order of the court as to the executions on which respectively no issues were pending."

Bompas Serjt., also obtained a cross rule on behalf of the assignees of Hamlet, for the payment out to them of the whole sum levied and paid over under the executions.

Bompas Serjt., now shewed cause against the rules obtained by Sir T. Wilde Serjt. The 108th sect. of the 6 G. 4, c. 16, does not make the security by warrants of attorney void in case of bankruptcy. The proceeds of an execution on such a security are to be paid over to the assignees. No new right is given to subsequent creditors. Against all the other executions, the writs in which were not delivered to the sheriff

(a) It seems doubtful under the terms of the order, whether several issues, or one only, were to be tried.

till after the *fi. fa.* in *Linnitt v. Hamlet*. The execution in that action had sued out for the whole amount of the sum indorsed to be levied under it. It would have been different if the statute had said that an execution upon such a security should, in the event of a bankruptcy, be void altogether. [Coltman J. The words are, "provided that no creditor, though for a valuable consideration who shall sue out execution upon any judgment obtained by default, confession, or nil dicet, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid ratably with such creditors." Are not the subsequent execution creditors, whose executions stand unimpeached, "fair creditors" of the bankrupt?] Suppose a first mortgagee relinquishes [189] his security in order to prove, the second mortgagee is not to be let in; or suppose a settlement upon a wife and children, to be made after marriage, and therefore without valuable consideration, and that the husband conveys subject to the settlement, the settlement will be void as against assignees, but it will not let in the purchaser and enable him to take the estates discharged of the settlement. By the 135th section of 6 G. 4, c. 16, that act is directed to be construed "beneficially for creditors," that is, in the manner in which the general body of creditors are most benefited.

Upon the interpleader rule the court will look at the case in the same manner as a court of equity would have done. (a)

[190] Channell Serjt., for the plaintiff Linnitt. The construction of the 108th section has come before the court of Queen's Bench in two cases; *Wymer v. Kemble* (6 B. & C. 479, 9 D. & R. 511) and *Morland v. Pellatt* (8 B. & C. 722, 3 Mann. & Ryl. 411). If the warrants were void, the execution creditor would not be able, as the statute requires, to come ratably with the fair creditor of the bankrupt.

Sir T. Wilde Serjt., in support of his rules. A seizure in execution operates as a seizure under all the writs of *fi. fa.* then in the hands of the sheriff. *Jones v. Atherton* (7 Taunt. 56, 2 Marsh. 375). The second execution creditor has become the first execution creditor, upon that execution which was de facto the first, being withdrawn. It must be seen upon what ground the prior execution is defeated; but it is immaterial whether it is defeated before or after the seizure under a subsequent process.

Byles Serjt., for the sheriff, submitted that his client was entitled either to poundage or to the expense of keeping the property, the amount levied being between 5000*l.* and 6000*l.*

TINDAL C. J. Some confusion has been introduced into this cause by the argument which has been addressed to the court on behalf of the assignees. It is contended that the assignees are to stand in the place of the judgment creditor, upon an execution they have successfully impeached. But the assignees claim, not under the execution creditor, but under the bankrupt. The assignees cannot entitle themselves to claim the money from the sheriff, unless they can shew that they are claiming [191] under the execution

(a) The provisions of the interpleader act, 1 & 2 W. 4, c. 58, are framed, and the practice under it has been adopted, in a great measure, with reference to bills of interpleader in courts of equity. But the practice of these courts in cases of interpleader, is founded upon the ancient common law proceedings in enterpleader, chiefly in *detinue*, the defendant in which action might, and still may, issue a *scire facias* against a party claiming adversely to the plaintiff for the purpose of compelling the two antagonist parties, namely, the plaintiff and the garnishee (or person so warned (*garni*) by the sheriff under the *scire facias*) to settle their respective claims between themselves.

In reintroducing the practice of interpleader,—which had fallen into desuetude with the action of *detinue*, upon which it was most commonly founded, in consequence of the wager of law formerly allowed in that action,—the legislature appear to have resorted to the practice of courts of equity, which was generally known, instead of returning to the forgotten, though more appropriate, system of enterpleader of the courts of common law.

The consequence has been that those questions which formerly were matters of law and of pleading, placed on the record, with all the safeguards and remedies which the common law throws round its proceedings, are now dealt with summarily and finally, by the court, under the 1 & 2 W. 4, c. 58, or even by a single judge, under the 1 & 2 Vict. c. 45, s. 2.

"*Multa ignoramus*," says Lord Coke, citing Macrobius, "*quæ nobis non laterent in veterum lectio nobis esset familiaris*." 2 Inst. 166.

creditor, on whose behalf the seizure was made. I can see nothing in the 108th section which authorizes us to consider the assignees as parties claiming under the execution creditor. The assignees had an interest in disputing the validity of Linnitt's execution, and they have succeeded in defeating it. I think that these rules ought to be discharged.

COLTMAN J. I am of the same opinion. I think that the statute gave a right to the assignees to object to the preference obtained by the creditor through the medium of a warrant of attorney. My brother Bompas contends, that although the execution is void as against the assignees, it operates against other execution creditors, so as to prevent their being let in. It is not necessary to adopt that construction of the statute. If the provision, that no creditor suing out execution on a warrant of attorney shall avail himself of such execution to the prejudice of other fair creditors, had stopped there, no doubt would have arisen. It might have been contended that such creditor was to lose his debt altogether. Subsequent words shew that the object of the clause was to reduce such a creditor to the same position as the general creditors, leaving other execution creditors in the same situation as if their executions had issued before the fiat. It was intended only to affect those creditors who had issued executions upon warrants of attorney, cognovits, and process of foreign attachment, and to leave other creditors in the situation in which they would have been if no such proceedings had taken place. The effect of the construction contended for on behalf of the assignees would be, to deprive an execution creditor who had levied an execution in a hostile action, of the benefit which he ought to derive from the circumstance of the validity of a prior execution being destroyed by this enactment.

[192] MAULE J. I am of the same opinion, for the same reasons.

CRESSWELL J. The general rule is, that an execution is executed by seizure (a). It is the same thing whether an execution is first executed in point of fact, or whether it becomes a first execution by reason of a prior execution being superseded (b). Here, the execution in Linnitt's action was superseded; the others were not supersedable.

Byles Serjt., again applied for poundage (c); but the court refused to make any order.

Rules absolute to pay to the plaintiffs in this and the four other actions the amounts directed to be levied.

Cross rule discharged (d).

[193] COX v. BAILEY. June 3, 1843.

[S. C. 6 Scott, N. R. 798. See *Taylor v. Steele*, 1847, 16 Mee. & W. 667.]

Held, that an undertaking, whereby a party, describing a distress to be taken for rent claimed to be due to him, engages to indemnify the bailiff who makes the distress, does not require an agreement stamp.

Assumpsit. The declaration stated that, on the 26th of January 1841, the defendant represented to the plaintiff that James Lock was in possession of certain tenements as tenant thereof to the defendant, and was then indebted to the defendant in 11. 4s. for rent of the said tenements, and then requested the plaintiff to distrain for the said pretended arrears of rent, as the bailiff of the defendant; that thereupon, in consideration that the plaintiff, as the bailiff of the defendant, would seize and take the goods and chattels then found and being in and upon the said tenements, as a distress for the said pretended arrears, the defendant promised the plaintiff to indemnify the plaintiff and save him harmless against all actions at law, damages, costs, expenses, and loss, for or by reason of his so seizing and taking such goods and chattels; that

(a) Vide 1 N. & M. 189 (b); *Bird v. Bass*, ante, p. 143.

(b) See *The Prince's case*, 8 Co. Rep. 1.

(c) Vide *Rex v. Robinson*, 5 Tyrwh. 1095; 2 C. M. & R. 334; 1 Gale, Exch. 209; 4 Dowl. P. C. 447; *Scales v. Sargeson*, 4 Dowl. P. C. 231.

(d) Vide *Crossfield v. Stanley*, 4 B. & Ad. 87, 1 N. & M. 668; *Whitmore v. Robertson*, 8 M. & W. 463, 1 Dowl. N. S. 135; *Lackington v. M'Lachlan*, 5 Scott, N. R. 874; *Skey v. Carter*, ib. 877. As to proceedings by interpleader in actions of detinue and in quare impedit, traverse of office, and the few other cases in which interpleading is allowed at common law, see Fitzherbert's & Brook's Abridgments, tit. Enterpleader.

the plaintiff, relying upon the said representation, &c., afterwards, to wit, on the day and year aforesaid, entered into the said tenement, as such bailiff of the defendant, at his request as aforesaid, for the purpose of distraining for the said pretended arrears; and then, as such bailiff, and at such request, seized, and took as a distress for the said pretended arrears, divers goods and chattels of the said J. L. then found and being thereon, of great value, to wit, of the value of 5l., and impounded the same in his the plaintiff's custody, as such distress, until afterwards, to wit, on the 28th day of January, in the year aforesaid, when the plaintiff discovered that the said pretended arrears were not, nor was any part thereof, due or payable from J. L. to the defendant. Averment: that at the time of making [194] the representation and promise of the defendant, and at the time of levying the said distress, no part of the said pretended arrear was due or payable from J. L., nor was any part of the said sum of money, and that no money or other thing was due or payable from J. L. to the defendant for or in respect of the rent of the said tenements at any of the times aforesaid; yet the defendant did not, nor would, indemnify the plaintiff, or save him harmless, against actions at law, damages, costs, expenses, or loss, by reason of the plaintiff's so seizing and taking the said goods and chattels, but the defendant wholly neglected and refused so to do, and therein wholly failed. By means of which premises, an action at law was, to wit, on, &c. commenced and prosecuted by J. L. against the plaintiff in the court of Exchequer of Pleas, for so entering into and upon the said tenements, and seizing and taking the said goods and chattels; and such proceedings were thereupon had, that J. L. afterwards, to wit, on the 11th day of March in the year aforesaid, recovered against the now plaintiff in the said action, by the verdict of a jury, a certain sum, to wit, 5l., for his damages which he had sustained on occasion of the premises, and the now plaintiff was afterwards, to wit, on, &c. forced to, and did necessarily, pay to J. L. the said damages, and also another sum of money, to wit, 14l. 13s. 3d., for his costs and charges by him about his suit in that behalf expended, and was also then forced to expend, and necessarily did expend, divers moneys, and incur divers debts, in the whole amounting to 10l., in and about defending, settling, and putting an end to the said action, and was also, by means of the premises, put to great inconvenience, and was prevented for divers long space of time, amounting in the whole to five days, from attending to his necessary affairs and businesses, and from thereby acquiring divers great gains, which he might, and otherwise would, have acquired. To the plaintiff's damage of 50l.

[195] Pleas: first, that the defendant did not request the plaintiff to distrain for the said arrears of rent in the declaration mentioned, as bailiff to the defendant, modo et formâ; concluding to the country; secondly, non assumpsit.

At the trial before Erskine J., at the sittings at Westminster, in this term, the defendant's undertaking, to the effect stated in the declaration, was produced; but it was objected that it could not be read for want of an agreement stamp. The learned judge was of opinion that no stamp was necessary; and a verdict was taken for the plaintiff, damages 19l. 13s. 6d.; leave being reserved to the defendant to move to enter a nonsuit.

Bompas Serjt. now moved accordingly. By the 55 G. 3, c. 184, sched. part I., an agreement stamp is required upon any "agreement, or any minute thereof, &c., where the matter thereof shall be of the value of 20l. or upwards." Here, the value of the indemnity was uncertain. It might, and in fact did, exceed 20l., the plaintiff having proved that he was damaged to the extent of 25l., though, for the purpose of avoiding the force of this objection, he took his verdict for a sum under 20l. [Maule J. Where the value of the subject-matter of the agreement is uncertain, a 20s.(a)¹ stamp would, according to the argument now advanced, be necessary. The revenue would be no gainer by our so holding. The learned judge then referred to *Latham v. Ridley* (Ryan & Mood. 13) and *Chadwick v. Sills* (ib. 15). These two cases and common sense are directly against you. *Tindal C. J.* This case must be determined upon the words of the statute. How can it be said that an [196] agreement to guarantee against this contingency is an "agreement where the matter thereof is of the value of 20l. or upwards?" It may be of no value at all.]

Per curiam. Rule refused (a)².

(a)¹ Since reduced to 2s. 6d. by 7 & 8 Vict. c. 21, sched., and see ss. 1, 5.

(a)² Vide *Hill v. Ramm*, ante, vol. v. p. 789.

WEBB v. PAGE. June 15, 1843.

Under a plea of not guilty to a declaration in case against a carrier for hire, for not safely conveying goods, the defendant cannot set up that the goods were lost through the negligence of the plaintiff.

Case. The declaration stated that theretofore, to wit, on the 23d of September 1842, the plaintiff, at the request of the defendant, caused to be delivered to the defendant certain goods and chattels, to wit, five beds, &c. of the plaintiff, of great value, to wit, of the value of 240l., to be safely and securely carried for him the plaintiff by the defendant, to wit, from Maidstone to London, and to be delivered in London by the defendant for the plaintiff for reasonable reward to the defendant in that behalf; and that the defendant then had and received the said goods and chattels for the purpose aforesaid. Yet the defendant, not regarding his duty in that behalf, to wit, on the day and year aforesaid, by himself and his servants in that behalf, conducted himself so carelessly, negligently, and improperly, in and about the carrying of the said goods and chattels, to wit, from Maidstone to London, that, by and through the negligence and improper conduct of the defendant and his servants in that behalf, part of the said goods and chattels, to wit, two tables, &c. of great value, to wit, of the value of 20l., then became and were broken, damaged, spoiled, and injured, and other part of the said goods and chattels, [197] to wit, one large press-roller, &c. of great value, to wit, of the value of 10l., then became, and were and are wholly lost to the plaintiff; to the plaintiff's damage of 30l.

Plea, not guilty. At the trial before Maule J. at the adjourned sittings in London after last term, it appeared that the defendant, who was a lithographic printer in London, contracted to convey certain household furniture, lithographic presses, and other articles, belonging to the plaintiff, from Maidstone to London, for the sum of 2l. and sent a van and two horses to Maidstone for that purpose on the 23d of November 1842. The goods having been loaded, the van started on its journey to London. The two horses proving insufficient to draw the load, the weight of which was 52 cwt., a third was procured. In the course of the journey the van was upset in a ditch. On the arrival of the goods in London, part were discovered to be damaged by exposure to the weather, and insufficient and improper packing, and other part were lost.

The defendant proposed to give in evidence, that the van was almost entirely loaded by the plaintiff; that he had represented the weight of the goods as not exceeding 30 cwt.; and that the van was not reasonably adapted for carrying more.

The learned judge told the jury that the defendant, by pleading not guilty only, which merely denied the negligence charged in the declaration, had admitted the receipt of the goods upon a contract safely and securely to carry and deliver them, and consequently that the defendant could not, as the pleadings stood, set up as a defence that the plaintiff had packed the goods himself, or had misrepresented their weight; that the only question was, whether the defendant had omitted to do any thing which his contract bound him to perform,—telling the jury that if they thought the loss and injury complained of resulted from any negligence and omission on the de-[198]fendant's part, they must find for the plaintiff; but that if, on the other hand, they were of opinion that the injury arose from other causes, over which the defendant had no control, their verdict should be for him.

The jury having returned a verdict for the plaintiff, damages 5l.,

Bompas Serjt., on a former day in this term, obtained a new trial on the ground of misdirection; against which

Dowling Serjt. now shewed cause. It is submitted that the direction to the jury was perfectly correct; for the defendant, by pleading not guilty only, admitted that he received the goods without any condition or qualification whatever, to be safely carried and delivered, and therefore the defence he endeavoured to set up at the trial was clearly not open to him. By the new rules (Pleadings in Particular Actions, IV. 1) it is provided that "in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea." And amongst the examples given is the following. "In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the

goods by the defendant as a carrier for hire or of the purpose for which they were received." If the defendant, therefore, had intended to object that the plaintiff had packed the goods himself, or had made any misrepresentation as to their weight, he should have raised that defence by some other plea. Being aware, through his servants, of the nature of the goods, and the insufficiency of the van for conveying them, he was guilty of negligence in attempting to carry them to London in such a mode.

[199] Bompas Serjt. in support of the rule. The defendant in this case is not sued as a common carrier, but in the usual form as a bailee for hire. The only duty which arose out of the defendant's contract was, to take ordinary care of the goods; *Coggs v. Bernard* (2 Ld. Raym. 909). By the plea of not guilty, the defendant denies that the goods were lost through his negligence; and the question is, whether they were so lost owing to his negligence, or by the misconduct of the plaintiff. Evidence of such misconduct was clearly admissible; for it went to negative negligence on the defendant's part. In *Brind v. Dale* (2 M. & W. 775), to assumpsit against the defendant as a common carrier, to recover the value of goods delivered to him to be taken care of, and safely carried by him as such carrier, in his cart from N. to B., and there safely to be delivered by him for the plaintiff, but which were lost by his negligence; the defendant pleaded that when he received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen; but that he neglected and refused so to do, and that by reason thereof, and not by reason of any negligence of the defendant, the goods were lost. The plea was held bad on special demurrer, as amounting to the general issue. That case goes far to shew that if the defendant had pleaded that he had been misled by a misrepresentation of the plaintiff as to the weight of the goods, the plea would have been bad, and that the defence is admissible under the general issue. [Maule J. There the action was in assumpsit, and the plea of non assumpsit amounted to a denial of the receipt of the goods upon the terms stated. That case shews that if the defendant meant to deny that he had received the [200] goods upon the terms alleged, he ought to have taken issue upon that part of the declaration.] The defendant does not seek to deny the contract as set forth, but says that he is entitled to shew that the loss occurred through the negligence, not of the defendant, but of the plaintiff. All that the defendant undertook was, to carry goods to the amount of 30 cwt., according to the plaintiff's representation; and although the defendant received goods of the weight of 52 cwt., he was not aware of the fact. [Cresswell J. You admit that you received 52 cwt. of goods, and that the van provided was not calculated to convey them. The question is, who was responsible for carrying that weight of goods in that van?] Supposing the van to be unfit, the point still is, whether that was owing to the negligence of the plaintiff or of the defendant, and was matter for the jury. [Cresswell J. It could not be owing to the negligence of the plaintiff that the van was not adapted for carrying 52 cwt. *Coltman J.* This is a very different case from one in which a collision takes place between two carriages; for there the duty of the plaintiff is to take care of his own vehicle. Here, the plaintiff was not bound to superintend the packing.] If the facts had been pleaded as to the misrepresentation of the weight of the goods, whereby the whole were loaded in the van, the statement of those facts would only have amounted, at last, to a denial of negligence on the part of the defendant. A common carrier does not undertake to carry and deliver goods at all events; and under the general issue, he may set up the defence that the goods were destroyed by lightning. Here, it is equally open for this defendant to say that, instead of being the act of God, it was the negligence of the plaintiff, that occasioned the loss. Any thing which shews that the damage was not owing to the defendant's negligence, is admissible under not guilty.

[201] TINDAL C. J. It occurred to me when the rule was moved for, that there is upon the record an admission which prevents the defendant from giving evidence of what he calls negligence on the part of the plaintiff, in answer to the action. This is an action on the case; and the declaration, after stating that the plaintiff, at the request of the defendant, caused to be delivered to the defendant certain goods and chattels of the plaintiff, to be safely and securely carried for him, the plaintiff, from Maidstone to London, and that the defendant then had and received the said goods and chattels for the purpose aforesaid, alleges that the defendant, not regarding his

duty in that behalf, conducted himself so carelessly, negligently, and improperly, in and about the carrying of the said goods and chattels, that, by and through the negligence and improper conduct of the defendant and his servants, part of the goods were damaged and the other part were lost. To this declaration the only plea is not guilty, which, according to the rule of court that has been referred to, operates "merely as a denial of the loss and damage, and not of the receipt of the goods by the defendant, as a carrier for hire, or of the purpose for which they were received." The defendant therefore has gone down to trial with an admission that certain goods were put into the van for the purpose of being safely and securely carried from Maidstone to London, and that he received them for that purpose. No particular quantity of goods is specified in the declaration. At the trial, the defendant attempted to set up as a defence, that the plaintiff had misrepresented the weight of the goods, and had put into the van a larger quantity of goods than the defendant was aware of, and therefore that the injury was occasioned by the wrongful act of the plaintiff himself. It seems to me that the defendant was not at liberty, upon this record, to give evidence of that nature, but that he should either have pleaded that he was induced [202] by the misrepresentation of the plaintiff to take a greater load than the van could safely carry, or should have denied the acceptance of the goods for the purpose alleged, and that then he might have given in evidence that on which he now relies as a defence to the action. This case is distinguishable from a case of negligence in driving on the highway. There, the injury arises from a single act, the collision of the carriages; and it is in many cases impossible for the defendant to shew that he had been guilty of no negligence without shewing negligence on the part of the plaintiff. But here, the evidence was offered, not to shew what took place when the van was upset during the journey, but what occurred when the van, owing, as it is said, to the plaintiff's misrepresentation, was too heavily loaded. The case is also distinguishable from *Brind v. Dale* (2 M. & W. 775), where a plea—that the goods were received upon an express condition and agreement that the plaintiff should accompany and watch and protect them, but that he neglected and refused so to do, by reason whereof, and not by reason of any negligence of the defendant, the goods were lost,—was held bad, as amounting to the general issue. The action there was in assumpsit; and in that action such a plea is clearly bad; for evidence of the promise being conditional, goes to negative the unqualified promise alleged in the declaration. It appears to me that the defendant was properly held at the trial to be bound by the admission upon the record; and that the rule for a new trial must be discharged.

COLTMAN J. The ground upon which this rule was moved for, was, that my brother Maule had laid it down in broad terms, that if the defendant had omitted to do any act by which the goods might have been safely conveyed to their destination, he would be responsible. [203] That certainly would have been laying down the law too broadly. It does not appear that the learned judge gave any such direction to the jury. It was not necessary to lay down the precise degree of negligence that would render the defendant liable. It was admitted that there was sufficient negligence to make the defendant liable, provided it could be properly imputed to the defendant. The struggle was, to shew that the negligence was on the part of the plaintiff himself. It was contended that the plaintiff had no right to complain either of insufficient package or of over-weighting, inasmuch as the one was in part his own act, and the other the consequence of his misrepresentation. If any duty had been cast upon the plaintiff to ascertain the weight of the goods, or that they were properly packed, I confess I should have been disposed to think that the defence set up would have been open to the defendant. But I do not see that any such duty was cast on the plaintiff; and, though he assisted in the packing, he was not bound to exercise his judgment as to the mode in which the goods were stowed. With respect to the excessive weight, if there had been any fraud on the plaintiff's part, the question might have been different; but all that took place on the subject was in a conversation in London, when the plaintiff made a conjectural statement as to the weight of the goods, but nothing passed to bind the plaintiff to the weight he mentioned. It was the defendant's duty, on loading the goods, to see that the goods were properly packed, and that the carriage was sufficient for their conveyance. Upon the whole, it seems to me that there is no ground for giving to the evidence the effect contended for, and for saying that the case was not correctly left to the jury.

CRESSWELL J. I also am of opinion that the direction in this case to the jury was quite right. The question of the degree of care to be taken of the goods [204] does not arise; for it was admitted on all hands that there was negligence. The defendant by his plea admits that he received the goods for the purpose of safely and securely carrying them to London; and though not a common carrier, a duty was thereby imposed upon him to provide a proper conveyance, and to see that the goods were properly packed. The evidence clearly shews that in both of these respects, he failed in his duty: the van was not a proper one, neither were the goods properly packed. I do not think that the statement made by the plaintiff, as to the presumed weight of the goods, exonerated the defendant from the performance of his duty.

MAULE J. It appeared to me at the trial that this was a very clear case. The declaration alleges that the defendant received the goods for the purpose of their being safely and securely carried for the plaintiff from Maidstone to London. The plea admits that they were so received, and denies negligence in the performance of the duty resulting from the contract alleged, that is to say, it denies that the defendant had omitted any thing necessary for the safe conveyance of the goods. At the trial it was conceded that the goods had been improperly packed, and that the van was not a proper one for the purpose. And that being the state of things, the defendant sought to give in evidence, that he had been induced to take upon himself the conveyance of the goods by the fraud and misrepresentation of the plaintiff. It is impossible to read the new rules without seeing that this evidence was wholly inadmissible under the plea of not guilty (a). The very spirit of those rules is, that a plaintiff should have notice of the defence on which the defendant means to rely.

Rule discharged.

[205] BARNARD GREGORY v. C. F. A. W. DUKE OF BRUNSWICK
AND H. W. VALLANCE. May 31, 1843.

[S. C. 6 Scott, N. R. 809; 1 D. & L. 518; 13 L. J. C. P. 34. For subsequent proceedings see 1 Car. & P. 24; 6 Man. & G. 953; 3 C. B. 481. See *Mogul Steamship Company v. McGregor*, 1889-91, 23 Q. B. D. 614; [1892] A. C. 25; *Allen v. Flood*, [1898] A. C. 66; *Quinn v. Leatham*, [1901] A. C. 511; *Giblan v. National Labourers' Union*, [1903] 2 K. B. 623.]

In case for conspiring to prevent the plaintiff, who was about to perform as an actor at a theatre, from acquiring fame and profit in that performance, and for hiring persons to hoot, hiss, groan, and yell at the plaintiff during the performance, and for hooting, hissing, &c., together with such persons, a plea as to the hooting, &c. at the plaintiff, that the plaintiff was, on certain grounds specified in the plea, an unfit and improper person to appear before the public, was held bad, as containing no answer to the charge of conspiracy, but merely singling out, and attempting to justify, one of the overt acts of the alleged conspiracy.

Case. The declaration stated that, before and at the time of the making of the conspiracy, confederacy, combination, and agreement thereafter mentioned, the plaintiff was about to become an actor, and to use and exercise the profession or occupation of an actor, for the emolument, profit, and advantage of the plaintiff, and to perform, as thereafter mentioned, in public, as such actor, in the character of Hamlet, in the performance of a certain tragedy, in a certain theatre wherein such performance was duly authorized as by law required, to wit, in Covent Garden theatre, in the county of Middlesex, at the request of one Alfred Bunn, for reward to be therefore paid to the plaintiff by Bunn, the then manager of the said theatre; yet the defendants, together with other persons, whose names were unknown to the plaintiff, well knowing the premises, but contriving and maliciously intending to injure and aggrieve the plaintiff, and to bring him into public scandal, shame, and disgrace, and to injure the plaintiff in his said profession or occupation of an actor, and to prevent him from acquiring any fame, success, or reputation, gain or profit therein, and to oppress, vex, impoverish and ruin the plaintiff, before the plaintiff appeared and

(a) Vide *Millen v. Hawery*, Latch, 13; *Knapp v. Salisbury*, 2 Campb. 500; *Norton v. Scholefield*, 20 Law Journ. 393, Exch. T. 1842; Com. Dig. Pleader (3 M. 31), ante, vol. i. p. 571 (a).

performed in the said character of Hamlet, as thereafter mentioned, to wit, on the 13th of February 1843, wickedly and maliciously did, amongst themselves, con-[206]-spire, combine, confederate, and agree together to prevent the plaintiff from performing in public as such actor as aforesaid, in the character of Hamlet in the performance of the said tragedy in the theatre aforesaid, and to prevent the public audience which might be assembled to witness the performance of the said tragedy in the said theatre on the occasion when the plaintiff was to perform as aforesaid, from hearing or appreciating the performance of the said character by the plaintiff as aforesaid in the said tragedy, and to compel the plaintiff to desist from the performance of the said character, and to deter and prevent the manager of the said theatre from allowing or retaining the plaintiff to perform as such actor as aforesaid in the said theatre, and to prevent the plaintiff from exercising his said profession or occupation of an actor in the said theatre, and from gaining or acquiring any profit, fame, or reputation as an actor in the character aforesaid; that the defendants, maliciously contriving and intending as aforesaid, afterwards and before the plaintiff appeared and performed as thereafter mentioned, to wit, on, &c., in pursuance of, and according to, the said conspiracy, combination, &c., and in order to carry the same into effect, hired and engaged divers, to wit, 200 persons, whose names were unknown to the plaintiff, for gain and reward to them in that behalf, and caused and procured divers, to wit, 300 other persons, whose names were unknown to the plaintiff, to attend, and they did accordingly attend, as part of the audience in the said theatre on the occasion when the plaintiff was to perform as aforesaid, and did perform as thereafter mentioned, to hoot, hiss, groan, and yell at and against the plaintiff, and to make a great noise, outcry, uproar, and riot at and against the plaintiff during his performance of the said character on the occasion aforesaid, and to aid and assist the defendants and the persons [207] unknown first above-mentioned in carrying into effect their unlawful and malicious conspiracy, combination, confederacy, and agreement aforesaid; that afterwards, and before, and at the time of the committing of the grievances next thereafter mentioned, to wit, on, &c., the plaintiff became such actor as aforesaid, and used and exercised the said profession and occupation of an actor for his emolument and profit, and at such request of the said A. B., and for reward to be paid by him to the plaintiff as aforesaid, did appear and perform as such actor as aforesaid in the said character of Hamlet, in the performance of the said tragedy in the said theatre, before a public audience therein; and that the defendants, well knowing the premises, but maliciously contriving and intending as aforesaid, after the plaintiff had become such actor as aforesaid, and while he was so in the act of appearing and performing as such actor as aforesaid, in the character as aforesaid, in the performance of the said tragedy in the said theatre before the said public audience, and continually during all the time while the plaintiff was so appearing and performing as aforesaid; to wit, on, &c., in pursuance of according to the said malicious and unlawful conspiracy, &c., so had and made as aforesaid, and in order to carry the same into effect, did together with divers others of the persons unknown first above mentioned, and divers persons of the persons so hired and engaged, and caused and procured by the defendants to attend for the purpose in that behalf above-mentioned, then and there in the said theatre, and in the presence and hearing of the plaintiff and of the said public audience, hoot, hiss, groan, shout, and yell at and against the plaintiff, and make a great hideous and intolerable noise, outcry, uproar, and riot at and against the plaintiff, and persuade, instigate, cause and procure, lead and induce, divers and very many other persons then and there present in the said theatre also to join in, and who did by reason thereof [208] join them the defendants in then and there hooting, hissing, groaning, shouting, and yelling at the plaintiff, and in making such noise, outcry, uproar, and riot at and against the plaintiff as aforesaid, during the plaintiff's said performance in the said theatre, and in the presence and hearing of the plaintiff, and of the said public audience, insomuch that the plaintiff's said performance of the said character of Hamlet on the occasion aforesaid could not, by reason of the committing of the said grievances by the defendants as aforesaid, be heard, understood, or appreciated by the said audience then and there assembled in the said theatre as aforesaid; and inasmuch as the plaintiff was, by and through the same, and in consequence thereof, then compelled to desist from and discontinue, and did desist from and discontinue the performance of the said character of Hamlet on the occasion aforesaid, and before the plaintiff had finished or completed the performance thereof. Averment: that the said A. B. was, by reason of the induced and obliged

to refuse, and did refuse, to retain or allow the plaintiff to perform at subsequent times as an actor in the said theatre for gain and reward to the plaintiff, as the said A. B. otherwise might and would have done, and that also by reason of the premises the plaintiff had been brought into public shame and disgrace, and had been prevented from acquiring any applause, approbation, fame, or reputation as an actor, and had been and was prevented from exercising his profession and occupation of an actor, and from obtaining an engagement or employment therein, and had thereby lost and been prevented from acquiring all the gains and profits that he might and otherwise would have made and derived, from being retained and allowed by the said Alfred Bunn to perform as such actor as aforesaid in the said theatre, and from the exercise of his said profession or occupation of an actor, amounting to a large sum of money, to wit, [209] 3000l., and had been and was otherwise injured and damnified to the plaintiff's damage of 5000l. &c.

Fourth plea, as to so much of the said grievances as related to the hooting, hissing, groaning, shouting, and yelling at the plaintiff, and making a noise, outcry, and uproar at and against the plaintiff,—that for a long time, to wit, five years, before and up to and at the time of committing the grievance last mentioned, the plaintiff was the proprietor and publisher, to wit, at London, of a certain weekly newspaper, called *The Satirist, or the Censor of the Times*, divers and very many copies of which newspaper, to the number of ten thousand and more, during all that time had been and were, on the Sunday in every week, openly and publicly sold, circulated, published, and distributed by the plaintiff for a certain price and reward therefore paid to the plaintiff to and among the subjects of our Lady the Queen dwelling in London aforesaid and elsewhere; that during all that time the plaintiff had been and was in the habit and practice of writing, composing, printing, and publishing, and causing and procuring to be written, composed, printed, and published, in the said newspaper, and did on divers and very many occasions, to wit, weekly, and every week during that time, write, compose, print, and publish, and cause and procure to be written, composed, printed, and published, in the said newspaper, divers indecent, obscene, lewd, filthy, and disgusting articles, paragraphs, stories, verses, anecdotes, and sayings, to the great offence and scandal of the subjects of this realm, against good morals, and in open violation of the laws of this realm; that the plaintiff, so being such proprietor and publisher of the said newspaper as aforesaid, was also during all the time aforesaid in the habit and practice of writing, composing, printing, and publishing, and causing and procuring to be written, composed, &c., in the said newspaper, [210] and did on divers and very many occasions, to wit, weekly and every week during that time, write, compose, print, and publish, and cause and procure to be written, composed, printed, and published, in the said newspaper, divers false, scandalous, malicious, scurrilous, and defamatory libels of and concerning Her Majesty the Queen, and divers other false, scandalous, scurrilous, malicious, and defamatory libels of and concerning very many persons respectively, with intent, in so doing, falsely and wickedly to injure, defame, vex, harass, and aggrieve Her said Majesty and the said persons respectively, and to bring them respectively into ridicule, scandal, infamy, and contempt; that the plaintiff so being such proprietor and publisher of, &c. as aforesaid, did also, during all the time aforesaid, on divers and very many occasions, write, compose, print, and publish, and cause and procure to be written, composed, printed, and published, in the said newspaper, divers wicked, blasphemous, and seditious libels, with intent thereby to bring the laws, religion, and government of this realm into hatred, ridicule, and contempt; that the plaintiff during all the time aforesaid, was and still is a common libeller and defamer for hire and gain to him; that the plaintiff during all the time aforesaid was in the practice and habit of obtaining and receiving, and did on divers occasions during that time obtain and receive, divers large sums of money from divers persons for and in consideration of the plaintiff on divers occasions suppressing, and on divers other occasions promising to suppress, matter defamatory of such persons respectively, and which matter such persons respectively were induced to apprehend and believe would be published concerning them respectively in the said newspaper, unless they respectively made such payments to the plaintiff; that on divers occasions during the time aforesaid divers persons paid to the plaintiff divers large [211] sums of money respectively under fear and apprehension of being libelled and exposed to public obloquy and ridicule in the said newspaper; that the plaintiff during all the time aforesaid notoriously gained his livelihood by the dishonest and

disreputable means and practices aforesaid; that just before the committing of the grievance in the introductory part of this plea mentioned, the plaintiff, being such person as last aforesaid, and being such proprietor and publisher as aforesaid, and being known, and publicly reputed, to be guilty of such practices as aforesaid, appeared in the said theatre in the declaration mentioned, upon the stage thereof, as a public actor, with the intent then and there to perform before the persons then assembled in the said theatre, as such actor, in the said character of Hamlet in the performance of the said tragedy, and was then intending to become and be a public actor and performer of dramatic pieces on the stage, to wit, of the theatre aforesaid; to the great scandal, nuisance, and outrage of the persons in the said theatre so assembled and of the subjects of Her said Majesty in general, against public morals and decency, and to the great prejudice, damage, and detriment of divers and very many worthy, respectable, modest, and virtuous persons who, by reason of the appearance of the plaintiff on such stage as such actor, then were, and thereafter would be, prevented from attending the said theatre or being present at the performances there; wherefore the defendants, being then present in the said theatre as part of the said audience, did then, in order to compel the plaintiff to desist and forbear from appearing on the said stage, as such actor and performer, and to prevent, so far as in them lay, the said scandal, nuisance, and outrage, a little hoot, hiss, groan, and yell at the plaintiff, and make a little noise, outcry, and uproar, at and against the plaintiff, as, for the causes aforesaid, they lawfully might; which [212] were the grievances in the introductory part of that plea mentioned. Verification.

Special demurrer, assigning for causes,

1. That the said plea is pleaded only to a part of the grievances mentioned in the declaration, which part of the said grievances is not, in its nature, divisible from the conspiracy, &c. mentioned in the declaration, and which part of the grievances does not, of itself, constitute any cause of action, but does amount to a cause of action when taken in conjunction with the other parts mentioned in the declaration. 2. That supposing the plea to shew a justification of the hooting, &c. at the plaintiff, and making a noise, outcry, and uproar at and against him, if those acts stood alone, and not connected with any previous conspiracy so to do, yet the matters of the plea constitute no justification for doing the acts therein attempted to be justified, in pursuance of a previous unlawful and malicious conspiracy, &c. 3. That supposing the facts alleged in the said plea were true, yet they did not warrant the defendants, by law, in hooting, &c. at the plaintiff, and making a noise, outcry, uproar, and riot at and against him as mentioned in the said declaration, so as to cause the damage to the plaintiff therein mentioned. 4. That the audience in a theatre, present during a theatrical performance, have no right by law to hoot, &c. at an actor in such performance, and to make such a noise, outcry, and uproar against him as to injure or ruin him in his profession, or to amount to a riot, merely because he may be chargeable with offences unconnected with the stage, or with his performances as an actor. 5. That the grievances attempted to be justified in the said plea are not the same as the grievances, or any of them, charged in the declaration, inasmuch as the declaration charges the defendants with doing the several acts mentioned in the introductory part of the said plea, in pursuance of [213] the malicious and unlawful conspiracy, &c. set out in the declaration, and in order to carry the same into effect; whereas the said plea only justifies the acts mentioned in the introductory part thereof as standing alone, and done without any previous conspiracy to do them. 6. That the said plea amounts to the general issue, and to an argumentative, instead of a direct, denial that the defendants did the acts mentioned in the introductory part of the said plea, with the malicious intent in the declaration mentioned, and in pursuance of the previous conspiracy therein mentioned, and in order to carry the same into effect as alleged in the declaration; and also for that the said plea contains, and consists of, mere matters of evidence, tending to negative the malicious and unlawful intent, and the conspiracy charged in the declaration. 7. That the supposed facts set forth in the said plea did not, even if true, justify the defendants in hiring persons for gain and reward, to attend, and causing them to attend accordingly, in the said theatre on the occasion of the plaintiff's performance, to aid the defendants in carrying into effect the conspiracy mentioned in the declaration. 8. That the charges contained against the plaintiff in the said plea are too general and uncertain, and want particularity, so that the plaintiff cannot, by reason

of the generality thereof, know what particular charge will be brought forward at the trial in support thereof, nor what he must prepare to rebut, justify, or disprove by evidence. 9. That the said plea ought to have set forth and shewn the particular libels, articles, paragraphs, stories, verses, anecdotes, and sayings which the plaintiff is alleged to have composed, written, printed, and published, or caused and procured to be composed, written, printed, and published, and in what parts or numbers of the said newspaper, and at what times, the same were printed or published, and the names of the persons, or some of [214] them, from whom the plaintiff is alleged to have received the said sums of money for suppressing, or promising to suppress, matter defamatory of such persons; and the sums of money so received, and the times when received, and the names of the persons alleged to have paid to the plaintiff sums of money under fear and apprehension of being libelled and exposed to public obloquy and ridicule in the said newspaper, and the sums of money so received, and the times when they were received. 11. That without such information and particulars as above mentioned, it is impossible for the plaintiff to prepare for trial, or to know what facts will be set up by the defendants at the trial in support of the said plea. 12. That the said plea being pleaded to part only of the grievances in the declaration mentioned, ought to have had a formal commencement or statement—that the plaintiff ought not to have or maintain his action (a) against the defendants as to the grievances

(a) This twelfth assignment appears to be imperfect in not distinguishing between the conclusion, "*actionem suam versus prædictum defendentem habere, vel manutenere, non debet;*" and "*actionem suam versus prædictum defendentem inde habere, vel,*" &c. The former conclusion is proper only where the plea answers the whole declaration; although the converse does not hold, as the "*inde*" will apply to the whole declaration, if no part of the declaration is separated from the rest by the inducement to the plea. The language of the ninth of the general rules and regulations H. 4 W. 4, is this: "In a plea on subsequent pleadings intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment."

This rule was generally understood to mean,—that where the plea shewed that the plaintiff had no cause of action whatever, and where therefore, before the rule, *actionem non* would have been sufficient, and *actionem inde non* would have been unnecessary, the formula might be omitted altogether; that where the formula necessarily was *actionem inde non* it was to be retained; and that the rule did not at all affect the formula—*actionem ulterius non*.

This construction of the rule was first departed from in the case of *Bird v. Higginson*, 2 A. & E. 696, 4 N. & M. 505, where it was held in K. B. that the rule in question dispenses with the statement of *actionem non* and the prayer of judgment in a plea pleaded to the whole of one of several counts; as the "*whole action generally,*" must be taken to mean—the whole cause of action appearing in the count to which it is pleaded. As the division of a declaration into different counts, as contradistinguished from a division into distinct causes of action, is purely arbitrary, *Bird v. Higginson* amounts to a decision that a plea pleaded in bar of a particular cause of action, does not,—whatever confusion the omission may occasion,—require a commencement by *actionem inde non*. Accordingly in *Weeding v. Aldrich*, 9 A. & E. 861, 1 P. & D. 657, in trover for four deer, it was held that a plea justifying a conversion of one deer (by a seizure under a distress, post, 218, n.) was properly commenced without *actionem inde non* and without a prayer of judgment. The judgment of Lord Denman in *Weeding v. Aldrich* appears to have been founded upon the authority of a case in the Exchequer, *Putney v. Swann*, 2 M. & W. 72, 5 Dowl. P. C. 296, 2 Gale, Exch. 216, although the latter case was decided, not upon the above clause, but on a different branch of the same rule, and is not inconsistent with the words in question understood in their natural sense. The judgment of Coleridge J. in *Weeding v. Aldrich* proceeds upon a different ground, namely, that "taking this plea and the others together, they go to the whole action;" with reference to which it may be observed, that before the new rules, one commencement and one conclusion by *actionem non* would have been sufficient if the several matters of defence had been collected into one plea; but that if they had been pleaded severally, as in *Weeding v. Aldrich*, each plea must have had its proper commencement and conclusion by *actionem inde non*. It has, however, been since held in Q. B., that a plea of set-off to part of the debt demanded, and also a

[215] mentioned in the introductory part of the said plea, and a formal prayer of judgment at the conclusion thereof; and for that the said plea is too general, uncertain, ambiguous, and is otherwise informal and insufficient.

[216] Joinder in demurrer.

Shee Serjt. in support of the demurrer. This plea, which was evidently drawn to invite a demurrer, is clearly insufficient. [Tindal C. J. Rather to invite an issue.] In *Clifford v. Brandon* (2 Campb. 358) it was held that if persons come to a theatre with a predetermined purpose of interrupting the performance, and make a great noise and disturbance, they are guilty of a riot, although no personal violence be attempted, and no injury is done to the theatre. [Maule J. This is certainly a new mode of pleading.] The matter of complaint set forth in this declaration is, in its very nature, indivisible. A defendant is not to be allowed to pass over the sting of the libel, and content himself with answering the rest. In *Roberts v. Brown* (10 Bingh. 519, 4 M. & Sc. 407), which was an action for a libel, containing statements reflecting upon the conduct of Roberts as a witness, and concluding with saying, "Mr. J. made a splendid speech, and commented with cutting severity on the testimony of Mr. Roberts," judgment was given for the plaintiff, on a demurrer to a plea justifying the latter sentence only. In delivering the judgment of the court it was said by Tindal C. J., that, "the conclusion, that Mr. J. made a splendid speech, and commented with cutting severity on the testimony of the plaintiff," was calculated, in conjunction with what had gone before, to impress the readers with a notion that the severity was deserved, and the force of it felt by the plaintiff, from a consciousness of its justice. This latter passage, therefore, which the defendant has selected for the purpose of justifying, standing alone is ambiguous, and admits of a very different construction if taken in conjunction with the rest of the libel, and on that [217] ground the plea is bad. So here, hooting and hissing, taken by themselves, might not be unjustifiable. [Maule J. The declaration would have disclosed no ground of action if it had merely stated that the defendants hooted and hissed at the plaintiff. Tindal C. J. The gist of the action is the conspiracy; and the plea justifies only an overt act.] It appears by a note of the reporter to *Clifford v. Brandon* (2 Campb. 372), that Macklin, the comedian, indicted several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield; and it being proved that they had entered into a plan to hiss him as often as he appeared on the stage, they were found guilty under his lordship's direction (b). [Maule J. That is very like the present case.] The reporter, Lord Campbell, concludes by saying, that he has not been able to find any authentic account of the trial in *Macklin's case*. It is however mentioned in the *New Annual Register* for 1774, 1775, where Lord Mansfield is represented as saying, that an action would lie in such a case.

Another objection to this plea is, that the charge of misconduct which is set up is not sufficiently distinct. *JAnson v. Stuart* (1 T. R. 748), *Holmes v. Catesby* (1 Taunt. 543).

The objection as to the conclusion of the plea is founded upon *Upward v. Knight* (5 New Cases, 338, 7 Scott, 311). But the decision in that case does not appear to have been acquiesced in by the other courts. [Maule J. Where is it doubted?] In *Weeding v. Aldrich* (9 A. & E. 861, note, 1 P. & D. 657), where, in trover for several deer, a justification of the conversion—by a [218] distress damage feasant (a)—of

plea of payment to other part (not being the remainder) of the debt, are good without the actionem inde non; *Ratton v. Davis*, 1 Q. B. 496, 1 Gale & Dav. 21, 5 Jur. 408. And with this agrees *Benmar v. Neck* in Q. B., 2 Harr. & Woll. 178, and *Phillips v. Roderick*, in the Exchequer, 2 Jurist, 419.

In this court, however, the literal construction of the rule in question has been upheld in the only case in which the point appears to have been hitherto raised; *Upward v. Knight*, 5 N. C. 338, 7 Scott, 311, 1 Arn. 546.

(b) But it is added, that "the prosecutor declined calling upon them to receive the judgment of the court." The defendants had therefore no opportunity, if they had been so advised, of questioning the sufficiency of the indictment by a motion in arrest of judgment.

(a) In T. 27 H. 8, fo. 22, pl. 15, in detinue sur trover, it is said that the plaintiff had distrained the goods for rent due to him from the defendant. It was objected that the trover was not answered;

one deer was held to be properly concluded without *actio non* or a prayer of judgment. It was also held in *Putney v. Swann* (2 M. & W. 72), that *actio non* is necessary only where the plea is pleaded in bar of the further maintenance of the action, not where it is in bar of the action generally.

Talfourd Serjt. (with whom was Wordsworth), *contrâ*. Exception might have been taken to the declaration; [219] but no notice of objection to the declaration has been given. [Maule J. The omission of notice of objection will only be a ground for giving time to the party who ought to have received such notice, if he chooses to ask for it (a). If the practice were otherwise, we might pronounce a judgment against the party who had omitted to give the notice, in a case where our judgment would be reversed in a court of error (b).] The old action of conspiracy was for charging the plaintiff with the commission of a crime. An indictment lies for the mere act of conspiring; but no action can be maintained unless the plaintiff has been aggrieved by some overt act done in pursuance of the conspiracy. [Coltman J. Is not your argument that the hissing, &c. was not in pursuance of the conspiracy? Maule J. Any thing done under the conspiracy may be given in evidence under the general issue; and you might shew that nothing was done under the conspiracy. If your plea is, that the conspiracy relates to the hooting, &c. is it a plea to the whole declaration? Must it not be taken to apply to the hooting, &c. only?] Some years since it was intended to produce a representation of the murder of Mr. Weare on the stage; and it was announced that Probert, one of the parties implicated in that murder, would appear in the piece. The representation never took place; but if it had, would it not have been most proper to hiss such a piece and such an actor off the [220] stage? [Cresswell J. The question would still have been whether you could justify a conspiracy for effecting the object. Maule J. Sympathy is the proper ground, for the expression of feeling in a theatre, not conspiracy. Here, the plea justifies that which is not alleged in the declaration. The declaration charges no hissing, except hissing in pursuance of a conspiracy.] In *Clarkson v. Lawson* (6 Bingh. 587,

plea was good. The ground of this decision is stated by Lord Brooke, Bro. Abr. Detinue, pl. 2, to be that the finding is not traversable. And see *Whitehead v. Harrison*, 2 D. & L. 122. In case *sur trover* the mere taking and detaining as a distress damage feasant, does not amount to a conversion to the use of the defendant, who, instead of assuming any ownership of the goods, treats them as goods of the distrainee, withheld by the defendant for the sole purpose of causing the distrainee to make satisfaction for the damage done. The plea, therefore, in *Weeding v. Aldrich* would appear to be bad, as amounting to the general issue, no conversion being confessed. This seems to have been the opinion of Littledale J. in that case; with which opinion agree *Hill v. Hawkes*, 1 Roll. Rep. 44; *Agars v. Lisle*, Hutton, 10, Hobart, 187, 1 Brownl. 5. So, in *Salter v. Butler*, Yelv. 10, Cro. El. 901, Noy, 46, it was held that if a distress for rent be lawfully taken it is no conversion: *secus*, if it be not lawfully taken. Where, therefore, a defendant justifies under a distress,—which he necessarily affirms to be lawful,—he confesses no conversion. And see *Le Cittié de Colchester v. Le Cittié de Londres*, Sir W. Jones, 240; *Mires v. Soleby* 2 Mod. 244; *Cuckson v. Winter*, 2 Mann. & Ryl. 313; *Whitworth v. Smith*, 5 Carr. & P. 250. And as the landlord does not, by a lawful distress, make the goods his own by any conversion, he cannot maintain *trover* against a party who takes them away. For he had at common law a power to detain the goods as a pledge only; and the statute which authorises him to sell, gives him no property in the goods distrained upon; M. 20 H. 7, fo. 1, pl. 1; *Rex v. Cotton*, Parker, 112, 121; *Moneux v. Goreham*, per Probyn C. B., at Huntingdon, 29 MSS. of Serjeant Hill, 279, 2 Selw. N. P. 1351, 10th ed. In *The Chancellor, &c. of Oxford's case*, 10 Co. Rep. 53 b. it is said (57 a.) that the conversion ought to alter the action of detinue into an action on the case.

(a) And see *The Protector v. Geering*, Hardres, 85, 86; ante, vol. i. p. 16.

(b) The whole of the causes of demurrer assigned are in this case (ante, 212) set out. Although the argument proceeded upon the first, second, eighth, ninth, tenth, eleventh, and twelfth causes assigned, this court and a court of error (before which this case was afterwards brought, vide post, vol. vii.) would be bound to pronounce a judgment upon all the defects of form assigned as causes of demurrer, whether argued or not, and upon all the defects of substance, whether argued or not, and whether assigned as causes of demurrer or not.

4 Moo. & P. 356), and in *M'Gregor v. Gregory* (11 M. & W. 289 ; 2 Dowl. N. S. 769), it was held that the allegations in a declaration for libel are divisible. [Maule J. There are cases in which the allegations are divisible. The question is, whether they are divisible here.]

TINDAL C. J. It appears to me that this plea, which professes to be a plea in confession and avoidance, does not sufficiently confess and avoid the matter charged in the declaration. Every plea which is not in denial of the charge, must be in confession and avoidance of the whole, or of some part, of the declaration. Here, the defendants single out an overt act of an alleged conspiracy, and attempt to justify that alone. The charge of conspiracy and some of the overt acts remain unanswered. The defendants may, however, have leave to amend on payment of costs.

The defendants having determined not to amend, there was
Per curiam. Judgment for the plaintiff on the fourth plea.

[221] HAWLEY v. BEVERLEY. June 2, 1843.

[S. C. 6 Scott, N. R. 837.]

A. having accepted a bill drawn upon him by B. for money lent by B. to A., compounds with B. and his other creditors, and pays the composition. An indorsee of the bill afterwards sues A., and compels him to pay the amount with interest and costs. A. may recover the amount from B. as money paid to B.'s use.

Assumpsit, for money paid, money had and received, and upon an account stated. Plea, non assumpsit.

The cause came on for trial before Cresswell J., at the sittings for Middlesex, after Michaelmas term 1842, when a verdict was found for the plaintiff for 59l. 3s., subject to the opinion of this court upon the following case :—

The plaintiff for some time prior to, and at the time of, the making of the agreement hereinafter mentioned, carried on the business of a clock and watchmaker in the Strand. On the 16th of January 1839 the plaintiff accepted a bill of exchange drawn by the defendant who resided at Leeds, for the payment of 50l. to the order of the defendant at three months after date, dated Leeds the 16th of January 1839 ; upon which bill the defendant advanced to the plaintiff the amount, less an agreed discount. The defendant previously to writing the letters, and to the signature of the deed, herein-after mentioned, indorsed away the bill to Samuel Attack. At the date of the bill, and in March 1839, the plaintiff convened a meeting of his creditors, to be held at the residence of the plaintiff, No. 455 West Strand, in the county of Middlesex, for the purpose of laying before them the state of his affairs, and of endeavouring to induce them to accept a composition. Subsequently to this meeting, the defendant received a letter from Mr. L. H. Baugh, as follows :—

“London, Strand, 199, 8th March 1839.

“As a claimant upon the estate of Mr. Hawley of [222] the Strand, I am very sorry to state that he has been under the necessity of calling his creditors together, who met yesterday ; and I am requested by the creditors to inform you of his circumstances. It appears by a statement of his accounts, that he is indebted to you in 50l. The amount of his debts is 1334l., and the amount of the assets, by taking his stock at cost price, is 600l. ; but we cannot expect it to realise near that amount. The creditors, with a view to make the best of the estate, feel desirous to get your assent to such terms as shall be most beneficial to the creditors at large, and will feel obliged if you will either appoint some agent in London with power to assent to such terms as the creditors may agree upon, or write to Mr. Hawley before Thursday next, signifying your assent, as the creditors meet on that day with a view to make a final settlement of his affairs.

“Having looked over Mr. Hawley's books, and feeling satisfied that he has made a fair statement of his accounts, it is desirable that immediate steps should be taken to dispose of the stock, for the purpose of preventing the landlord making a seizure and thereby sacrificing two thirds of the property, and by which means they will be able to satisfy the landlord's demands.”

C. P. XII.—28*

Upon the receipt of this letter, and in consequence thereof, the defendant, on the 11th of March 1839, addressed and sent a letter to one Whitley, who at that time resided in Upper Thames Street, London. The letter has been lost or destroyed; but the defendant by it requested Whitley to attend the meeting of the plaintiff's creditors on the 14th of March, and for him, the defendant, to agree to any arrangement which the majority of the creditors might agree to. The defendant, at the same time, wrote to Mr. Baugh a letter as follows:—

[223] “68 Briggate, Leeds, March 11th, 1839.

“In reply to yours respecting Mr. Hawley's affairs, I have to inform you, that as it appears he has made a satisfactory statement to his creditors, I will consent to such mode of settlement as the generality of the creditors may deem it advisable to adopt for our mutual benefit. As, by your letter, you appear to think there is likely to be a sacrifice in disposing of the stock, I think it only fair that such of the creditors as feel disposed should have an offer of the advantage, and therefore beg to propose, for the consideration of the meeting, that I have two clocks sent, of 25l. value cost price, which will be equal to 10s. in the pound.”

He also at the same time wrote a letter to the plaintiff, of which the following is a copy:—

“68 Briggate, Leeds, March 11th, 1839.

“Annexed you have my reply to Mr. Baugh's letter complying with your request. I am sorry for you as well as myself, that you have not been more fortunate. As you appear to have satisfied your creditors with your statement, I hope you will be enabled to surmount your present embarrassment, and be more successful hereafter. As this transaction lies rather hard upon me, may I be allowed to call your attention to the selection of clocks, should my proposition be acceded to, and a packing case I shall expect to have to pay for.

“P.S.—I have written to Mr. Whitley, a friend of mine at 29 Upper Thames Street, requesting him to attend the meeting if he can; but as I am aware his engagements at home are such as render it rather uncertain, you will perhaps inform him the hour and place where the meeting is to be held on Thursday.”

Both of these letters were written upon one sheet of paper, addressed to, and received in due course of post by, the plaintiff.

[224] A meeting of the creditors of the plaintiff was duly held on the 14th of March 1839, at the plaintiff's residence, No. 455 West Strand aforesaid, and was attended by Whitley on the part of the defendant, in pursuance of the aforesaid authority and request; and, at such meeting, it was agreed by the majority of the creditors of the plaintiff, and, among them, by Whitley, who attended as aforesaid, that the plaintiff should assign to trustees, for the benefit of his several creditors, all his stock, fixtures, and book debts, the proceeds of which were to be equally divided among the several creditors, in proportion to the amounts due from the plaintiff to them respectively, and that the said creditors should execute to the plaintiff a release of their respective debts. In pursuance of this agreement a deed of assignment and release (a copy of which accompanies the case, and is to be considered a part of it) was prepared, bearing date the 27th of March 1839, and made between the plaintiff of the first part, the several other persons who names were thereunto subscribed and seals affixed, of the second part, and John Maniglier and Robert Kimpton of the third part. This deed was duly executed on the day it bore date, by the plaintiff and many of his creditors, and, among them, by Whitley for the defendant. Whitley was not authorised by the defendant by power of attorney.

The estate and effects of the plaintiff did not realise more than enough to pay a composition of 4s. in the pound. At the time of executing the deed Whitley selected a clock, part of the said estate and effects, in lieu of the estimated composition on the debt of the defendant; which clock was forthwith packed up and sent to the defendant at Leeds, and received by him. The defendant had previously by letter requested Whitley to select a clock in lieu of the amount of his composition. Attack, who, from the time the bill was indorsed to him, [225] had been the holder thereof, commenced an action in this court against the plaintiff in December 1841, to recover the amount

thereof. The plaintiff having no defence to the said action, paid Attack 50l., being the amount of the bill, and also 6l. 13s. for interest, and 2l. 10s. for costs of the action, making together 59l. 3s.

In February 1842, and after payment by the plaintiff of the said sum of 59l. 3s. as aforesaid, the defendant returned the clock which he had so received as aforesaid, to the now plaintiff, who, in consequence, immediately wrote and addressed to the defendant a letter, of which the following is a copy:—

“London, 28th February, 1842.

“I have received back the clock which you accepted in discharge of the dividend payable under the trust deed of assignment of my property and effects for the benefit of all my creditors; and inasmuch as I have since been called upon and have paid the full amount of your claim against me upon my acceptance in the hands of a third party (which acceptance ought to have been delivered up when the deed of release was executed), I decline receiving back the clock, and request that you will desire some one to call here for it, as it is my intention to commence an action against you for the recovery of the sum so paid upon my acceptance.”

To this letter the defendant, on the 4th of March 1842, replied as follows:—

“Leeds, March 4th, 1842.

“In reply to yours of the 28th ult. acknowledging the receipt of the clock, and threatening proceedings against me, I beg to refer you to Mr. Attack’s solicitor, who has instructions to appear. As he has had the conducting of this unpleasant business, I shall be guided by his advice; and if he leads me into error, I suppose I must abide by the consequences.”

[226] On the 30th of March, 1832, this action was commenced to recover back from the defendant the 59l. 3s. so paid by compulsion to Attack. The pleadings in the action, and all written documents hereinbefore mentioned or referred to, are to be considered and taken as part of the case.

The question for the opinion of the court is, whether the plaintiff is entitled to recover from the defendant the said sum of 59l. 3s., or any part thereof. If the court shall be of opinion in the affirmative, then the verdict so found for the plaintiff is to stand, and judgment is to be entered for him for the said sum of 59l. 3s., or for such part thereof as the court may be of opinion he is entitled to recover. If the court shall be of a contrary opinion, judgment is to be entered for the defendant.

Shee Serjt. having read the case, the court called upon

Channell Serjt. for the defendant. The bill was negotiated by the defendant before the arrangement between the plaintiff and his creditors took place. The defendant contends that he is not bound by the acts of Whitley, who had no power of attorney authorising him to act for the defendant. Whitley certainly attended the meeting; and probably the court will think that he had authority to assent. The payment of a small sum will not discharge a debt for a larger amount; but if several creditors agree, the assent of the other creditors is a sufficient consideration for the assent of each. But the payment in question must take effect either as a discharge to Hawley, or as a payment in satisfaction of the debt. If it operates by way of discharge of the plaintiff and not by way of satisfaction of the debt, it would not be money paid to the defendant’s use.

It might perhaps be put thus—that though the pay-[227]-ment might give rise to a claim of indemnity, it would not be money paid to the defendant’s use. [Maule J. It was the duty of Beverley to protect Hawley against the bill. That duty was imposed upon him by entering into the contract. Coltman J. Where an accommodation acceptor pays the amount of the bill, he pays it for the use of the party accommodated. This may turn out to be a case of the same description. Tindal C. J. When Beverley entered into the composition, he virtually represented to Hawley that the bill was in his possession. Otherwise no such composition would have been agreed to. He is not now at liberty to say that the bill was outstanding in the hands of a third person.]

Per curiam. Postea to the plaintiff.

DOE DEM. ROBERTS v. ROE. May 29, 1843.

Upon an attempt to serve the tenant with a declaration in ejectment, he went away, refusing to listen. The notice was read over to his clerk, and a copy of the declaration was delivered to the clerk upon the premises: Held, sufficient service.

Manning Serjt. moved for judgment against the casual ejector. His affidavit stated that the deponent on the 20th inst. called on and saw Daniel Fossick, the tenant in possession, in an office on the premises, and shewed him the declaration and notice, and explained to him the intent and meaning thereof, and proceeded to read over to him the notice; that whilst he was doing so Fossick took the notice and declaration out of the deponent's hands and shewed the same to a person standing near him, and then threw the same down on a desk, saying he would have nothing to do with them, and should not stop to hear the deponent read the notice, and left the office; but that before he did so the deponent told him he should leave the declaration [228] with his clerk; that Fossick thereupon said the deponent might do as he liked; and that the deponent then read over the notice to the clerk, and delivered the copy to, and left the same with, him, and explained to him the intent and meaning thereof.

The learned serjeant submitted that what had taken place amounted to a personal service.

TINDAL C. J. The service appears to be sufficient. Qui audit per alium, audit per se.

Per curiam. Rule absolute.

SHEARBURN v. SHUBRICK. May 31, 1843.

The court granted a rule to change the venue upon an affidavit as to the county in which the cause of action had arisen, sworn by the defendant's attorney.

Talfourd Serjeant, moved to change the venue from Middlesex to Surrey, upon an affidavit by the defendant's attorney that the plaintiff's cause of action, if any, arose in the county of Surrey, and not in the county of Middlesex, or elsewhere out of the county of Surrey. The affidavit had been objected to by the officers of the court, on the ground that it ought to have been sworn by the defendant himself. The learned serjeant, however, submitted that the attorney might have been present at the making of the contract. In the other courts as affidavit by the defendant's attorney is considered sufficient.

The master (Ray) certified, that in this court the defendant's own affidavit had always been required.

[229] TINDAL C. J. As the defendant's attorney swears positively, it seems to me that we have no right to assume that he swears falsely. He may possibly have been a witness to the contract. I do not see how we can reject the affidavit.

Rule absolute.

THE COMPANY OF PROPRIETORS OF THE PORT OF PORTSMOUTH BRIDGE v. NANCE
June 2, 1843.

[S. C. 6 Scott, N. R. 823.]

Toll is not payable for passengers' luggage in an omnibus, or for a sheep and lamb in a basket on the omnibus, or for a man riding a horse, under an act imposing toll, separately, on carriages—on portmanteaus, trunks, &c.—on passengers and travellers,—on sheep, lambs, &c.,—and on horses ridden or not ridden.

Assumpsit for tolls. Plea, non assumpsit.

The following case was stated for the opinion of the court by a judge's order, made in pursuance of the 3 & 4 W. 4, c. 42, s. 25.

By an act passed in the first and second year of the reign of Victoria (1 Vict. c. xi.), "for establishing a floating bridge or bridges over the harbour of Portsmouth, from or near a place called Gosport Beach, in the parish of Alverstoke, in the county

of Southampton, to the opposite shore, to or near a place called Portsmouth Point, in the parish of Portsmouth, in the said county, with proper approaches thereto," the plaintiffs were incorporated, and they were thereby empowered to build, maintain, and keep in repair, a floating bridge or bridges.

By the eightieth section of that act the plaintiffs were empowered to demand, collect, take, and receive before any travellers, passengers, or persons, or any horses, beast, cattle, or carriages should be permitted to go or pass upon the said bridge or bridges, or any of the landing places thereto, or through or past any toll houses, toll bars, or gates erected, or to be erected, in pursuance of the powers given by the act, certain tolls, [230] or such tolls (not exceeding the respective tolls in the said act mentioned) as they should from time to time think proper.

By the ninety-second section it is provided that the said tolls shall be paid for each time of going upon or passing or re-passing the said bridge; and by the ninety-fourth and ninety-fifth sections the plaintiffs are required to affix a table of the tolls payable at the said bridge at or near each landing place, or on the toll gate or toll bar, or toll house to be erected in pursuance of the act; and that it shall not be lawful for them to demand or take any tolls, but for and during such time as such table of the tolls so payable shall remain so affixed.

By the ninety-ninth section it is provided that such tolls shall be charged equally in respect of the same description of articles, matters, or things, cattle or carriages; and that when any reduction or advance of such tolls shall be made, it shall be done equally and impartially (a).

The statute contains provisions for the imposition of additional tolls in certain cases, not applicable to the questions at issue in this action, and for the appointment of toll collectors, and the collecting and leasing the tolls thereby granted; and it imposes certain penalties for the taking of a greater or less toll than the parties, in pursuance of the powers of the statute, shall direct to be taken; which provisions will be found in various sections of the statute from the 81st to the 104th inclusive.

By a further act passed in the third year of Victoria (3 & 4 Vict. c. 54), for amending and enlarging the powers of the first-mentioned act, certain penalties are imposed on any person who shall be guilty of any of the acts therein specified, or do or cause to be done any other [231] act in order, or with intent, to evade the payment of the tolls or any part thereof granted by the said first-mentioned act; which provision will be found in the seventeenth section of such secondly-mentioned act.

Copies of the act accompany this case; and it is agreed that they shall form part thereof, and that the court or either party shall be at liberty, on the argument, to refer thereto as if they were fully set out in this case.

Pursuant to the powers so given to the plaintiffs, they completed a floating bridge over the harbour of Portsmouth; and the same was opened for the use of the public on the 4th of May 1840.

The defendant was the proprietor of an omnibus with four wheels, which was duly licensed and constructed to carry, and did carry, passengers for hire from and to Portsmouth over the said bridge, to and from the station of the London and South Western Railway at Gosport, the distance being about a mile, and the fare of each passenger being 1s. On the 1st of March 1843, the said omnibus, drawn by two horses, and conveying eighteen persons riding therein and thereon in conformity with the licence and construction thereof, viz. fifteen passengers for hire, the defendant himself also as a passenger, a driver, and a conductor, both duly licensed in that behalf, with six carpet-bags and twelve portmanteaus packed upon the said omnibus, of which five carpet-bags and ten portmanteaus were the luggage belonging to the said passengers, and having also a sheep and a lamb in a basket on the top of the said omnibus, arrived at the said bridge on its way from Portsmouth to the said railway station, and a servant of the defendant riding on horseback accompanied the said omnibus. At the toll-house erected in pursuance of the first-mentioned act at the eastern extremity of the said bridge, when the said omnibus and the said horse arrived at the said bridge, there was affixed a table of the tolls payable under the first-mentioned act, of which the following is a copy:—

For every horse or other beast drawing any coach, chariot, berlin, landau, phaeton,

(a) See *Clark v. The Leicestershire and Northamptonshire Union Canal Company*, in Error from Q. B., H. Vac. 1845.

hearse, chaise, or other such like carriage, with four wheels, if drawn by one horse or other beast, 1s. ; and if drawn by two or more horses or other beasts, 9d. for each horse, or other beast, beyond the first.

(Then followed several provisions in respect of horses, &c., drawing other carriages, carts, &c., and in respect of horses, &c., not drawing, and oxen, &c.)

For every sheep, lamb, hog, boar, sow, or pig, the sum of 1d.

For every passenger or person merely using the floor or deck of the bridge, the sum of 1d.

For every passenger or person entering or using the best room or cabin of this bridge, the sum of 3d.

For every portmanteau, trunk, carpet-bag, or other luggage, belonging to any passenger not exceeding 1 cwt., the sum of 1d.

And for each and every cwt. above the first cwt. an additional 1d. for each and every cwt.

The horses so drawing the omnibus were not unyoked or detached therefrom during any part of the time the same was upon or using the said bridge, but continued yoked and attached thereto during all the said time, and until the arrival of the said omnibus at its destination at the said railway station ; nor did the passengers, driver, or the conductor, or the defendant leave or get out of or off such omnibus during any part of the time, but continued riding in and upon the same as before its arrival at the said bridge until its arrival at the said railway station ; nor were the said carpet-bags and portmanteaus or any of them, or the said basket, or the said sheep, or the lamb, removed from the said [233] omnibus during the time the same continued upon or using such bridge, but the same respectively continued upon the said omnibus from the time of their being put upon the same at Portsmouth until the arrival of the said omnibus at the said railway station ; nor did the said servant leave or get off the said horse during any part of the time such horse was upon or using the said bridge ; but he continued to ride upon the same during all such time and until his arrival at the said railway station.

The defendant duly paid the toll in the said table mentioned, in respect of the horses drawing the said omnibus, and also the said toll of 3d. in respect of the horse which the defendant's servant was riding, but refused to pay, or allow the collector to receive, the toll of 1d. each demanded by the toll-collector in respect of the said passengers, driver, and conductor, so respectively riding in and upon the said omnibus as aforesaid, or any of them, or the toll of 1d. each in respect of the said carpet-bags and portmanteaus, or any of them, or the toll of 1d. each in respect of the said sheep and lamb, or the toll of 1d. in respect of the defendant's servant riding the said horse as aforesaid, the defendant denying that the plaintiffs were entitled to any toll in respect of the said passengers, driver, conductor, or luggage, sheep, or lamb, or of the defendant's servant so riding the said horse ; whereupon, in order to procure the passage of the said omnibus, so laden as aforesaid, over the said bridge, and of the defendant's servant so riding as aforesaid, the defendant agreed that if the plaintiffs were entitled by law to demand and take any of the tolls, so demanded as aforesaid, he, the defendant, would pay such of the said tolls if they would suffer the said omnibus and also the defendant's servant to pass over the said bridge ; and relying on that agreement, the [234] plaintiffs accordingly did suffer the said omnibus and the said servant to pass.

The defendant agreed to waive all objection to the form of the action, and also any objection that might be raised on the ground that the liability to toll (if any) did not attach to the defendant, but to the passengers themselves, it being the object of the parties to try the right of the plaintiffs to demand and take the tolls so demanded.

The questions for the opinion of the court are, first, whether the plaintiffs were entitled to demand and take the tolls so demanded by them, in respect of the said passengers, driver, conductor, carpet-bags and portmanteaus, sheep and lamb, so being in and upon the said omnibus, and of the defendant's servant so riding the said horse, or any part thereof.

If the court shall be of opinion that the parties were entitled to a toll in respect of any of the said carpet-bags and portmanteaus, then, secondly, whether they were entitled to such toll in respect thereof as separate and distinct carpet-bags and portmanteaus, or by weight as goods, wares or general merchandize ; and whether any and what difference as to the mode or rate of charge existed between such portion

thereof as belonged to the passengers in and upon the said omnibus, and the portion which did not belong to any of such passengers.

If the court shall be of opinion that the plaintiffs were so entitled, then the defendant's plea is to be withdrawn, and the plaintiffs are to be at liberty to sign judgment by confession, for the amount of the said tolls, or so much thereof as the court shall determine that the plaintiffs were entitled to demand and take. But if the court shall be of opinion that the plaintiffs were not entitled to demand and take any part of the said toll, then the defendant is to be at liberty to [235] sign judgment of non-pros., or otherwise, as the court shall direct.

Channell Serjt. for the plaintiffs. Before the plaintiffs can take tolls, they are required by their act to affix a table of the tolls payable at their bridge (*supra*, 230). This they have done. It will be necessary to draw the attention of the court to the particular objects of the act, which are very different from those in the ordinary case of acts imposing tolls on roads, or on bridges. Though this is called a bridge, it is in reality a boat propelled by machinery or by steam. [Tindal C. J. It is a ferry boat.] From the 80th section, it appears that tolls may be taken from "travellers," which seems to be a larger word than "passengers." The language of that section is large enough to embrace all travellers, whether sitting in an omnibus or not. [Maule J. You ask to be allowed to put the tolls on the loading and upon the carriage which contains it as well.] Besides the toll upon the horse, a separate toll was due on the rider as a passenger. The company are not to lose the tolls of the passengers because they bring horses with them. [Tindal C. J. Do you include gentlemen riding in their own carriages as passengers liable to pay for themselves, and then suggest that there should be an additional toll for their carriages? If so, the company might ransack every carriage for carpet-bags. If the bill had asked for this, the clause would have been struck out in the House of Lords. Whoever seeks to impose tolls must support his claim by plain words.]

Per curiam. Judgment for the defendant.

[236] WILSON AND ANOTHER v. TUMMAN AND FRETSON. June 15, 1843.

[S. C. 6 Scott, N. R. 894; 1 D. & L. 513; 12 L. J. C. P. 306. Applied, *Ancona v. Marks*, 1862, 7 H. & N. 695. See *Brook v. Hook*, 1871, L. R. 6 Ex. 96. Applied, *Morris v. Salberg*, 1889, 22 Q. B. D. 620. Discussed, *Keighley v. Durant*, [1901] A. C. 246; *Connor v. Butler*, [1902] 2 Ir. R. 576. Adopted, *O'Keeffe v. Walsh*, [1903] 2 Ir. R. 712.]

Where A. does an act as agent for B., without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit, under the act of A.

Trespass, de bonis asportatis. Plea, by each defendant separately, not guilty.

At the trial before Parke B., at the last assizes for the county of York, the following facts appeared.

In November 1842, the plaintiffs took possession of the goods in question, under a deed of assignment from Jeremiah New, to whom the goods had previously belonged, and in whose house they still were.

On the 3d of December 1842, these goods were seized and taken away under some process directed to the sheriff in respect of a debt due from New to Tumman. Neither of the defendants authorized this seizure before, or at the time, it was made. Both the defendants were, on the same day, served with notice that the plaintiffs claimed the goods.

On the 3d of December, the defendant Fretson, who was Tumman's attorney, gave a notice in writing to Mrs. Fearn,—to whose house the goods had been removed the day before,—in which he said, "I am coming about the goods which were seized," and desired her not to part with the goods to any person except Tumman. On the 5th of December Fretson sent her a written indemnity for retaining them.

On the 19th of January 1843, notice was given to the defendants that an action would be brought against them and the sheriff and his officers for the seizure. The person who served Tumman with the notice asked if he had any claim on the goods; to which he answered "Yes, I have; and a just claim, I consider."

Upon this evidence the learned judge directed the jury, that as the order given by Fretson had not [237] been acted upon by any refusal on the part of Mrs Fearn to

deliver the goods to the plaintiffs, the only question for their consideration was, whether the seizure on the 3d of December was made by order of the defendants or either of them. That an order to seize the goods was in this case necessary, to charge the defendants with the trespass; that although the subsequent assent and ratification by B. of an act done by A., professing to act for and on account of B. is sufficient to make that act the act of B., by relation, here, the sheriff's officers acted as ministers of the law, without any intention to act as agents of the party suing out the process; that as to Fretson, the question of ratification did not arise, inasmuch as the seizure could not be for his benefit. The learned judge therefore asked the jury to find, whether the defendants, or either of them, gave any previous authority for making the seizure, and whether the defendant Tumman had authorized or had merely given a subsequent assent to a seizure. The jury found that neither of the defendants had originally authorized the seizure, but that Tumman had subsequently sanctioned and authorized such seizure. The learned judge directed the verdict to be entered for both of the defendants, reserving leave to the plaintiffs to move to enter a verdict for 2l. 16s. against Tumman, if the court should be of opinion that his ratification made him liable as a trespasser.

Bompas Serjt. in the following term moved to enter a verdict for 2l. 16s. against Tumman, or for a new trial on the ground of misdirection.

Upon the first branch of his motion he referred to Com. Digest, Trespass C. 1, *Barker v. Braham* (2 W. Bla. 866), *Hull v. Pickersgill* (1 Bro. & Bingh. 282, 3 J. B. Moore, 612), and *Wilson v. Barker* (4 B. & Ad. 614, 1 N. & M. 409).

[238] In support of his application for a new trial, he relied upon the indemnity given by Fretson to Mrs. Fearn.

TINDAL C. J. You may take a rule for entering a verdict against Tumman; there is no pretence for making Fretson a trespasser.

June 1.—Byles Serjt. now shewed cause. It does not appear whether the goods were seized under process or not. [Cresswell J. The words used by Fretson were, "I am coming about the goods that were seized." Bompas Serjt. It was left to the jury; and they found that the goods had been taken under process. Maule J. The judge reports that he said there might be a difference between a seizure under process, and a seizure by a stranger alleging that he was authorized by the defendant to seize. Bompas Serjt. I am bound to admit that the officers seized as acting for the sheriff. Maule J. They claimed an authority by law, but did not claim to act by the authority of Tumman.] It is true that no writ was put in, and that the nature of the legal process under which the seizure was made, did not appear. It may have been a distringas to compel an appearance. The writ is actually in court, though the defendants are not entitled now to produce it. Neither did it appear for what purpose, or for whose use, the seizure was made. There are numerous cases, beginning as far back as the reign of Henry IV., which shew that a subsequent adoption of a trespass will not affect a third person, unless the act were originally done in his name, or for his use. The same rule prevails in matters ex contractu. There can be no adoption of an act or contract unless the act be done, or the contract made, in the name of the principal, or for his use. The principle, indeed, goes much further. Not only is a party unable to take advantage of an act which was not done in his name, or expressly [239] to his use, but he cannot defend himself under such act. 7 H. 4, s. 35 (a); *Wilson v. Barker*;

(a) The case cited here, and also in 2 M. & S. 487, as 7 H. 4, 35, is evidently the case in H. 7 H. 4, fo. 34, pl. 1, which was a decision of Gascoigne, C. J. of K. B. at nisi prius, and is thus reported:—"An inquest was charged between two parties on a writ of trespass of certain cattle taken against the peace, in which the defendant had justified as bailiff for services arrear to his lord; whereas the plaintiff said that he was not bailiff of his lord at the time of the taking. And the plaintiff said in evidence, that the defendant took the beasts claiming heriot for himself, so that he could not at that time be bailiff to another. And after their charge, Gascoigne said to them, that if the defendant took them claiming property in himself by way of heriot, although the lord afterwards agreed to that taking for the services due to him, still he could not be said to be his bailiff for that time. But if, without command, he had taken (the cattle) for services due to the lord, and the lord had afterwards agreed to the taking, he should be adjudged as bailiff, although he was not his bailiff in any place before the taking, Quod nota." With respect to the last part of the Chief Justice's statement, it is however observable that Lord Brooke, after abridging or rather tran-

in which the distinction taken by Lord Coke in 4 Inst. 447, is [240] referred to and recognised by Parke J. The same distinction is applied to actions *ex contractu* in *Saunderson v. Griffiths* (5 B. & C. 904, 8 D. & R. 643), and in *Vere v. Ashby* (10 B. & C. 298). Suppose the goods to have been seized under legal process, or, to put it most unfavourably for the defendants, under a writ of *fi. fa.*; if the execution creditor took a bill of sale, he would be liable in trespass, in case it turned out that the goods seized under the execution, were the goods of a stranger, and not the goods of the execution debtor. But if the execution creditor merely received the proceeds of the sale of the goods, though he might be liable in trover, he would not be a trespasser; *Parsons v. [241] Lloyd* (3 Wils. 341), is a very different case from the present. There, a *ca. sa.* against Parsons was set aside for irregularity. The imprisonment of Parsons could not therefore be justified by Lloyd, who had sued out the process, and against whom the case stood precisely as if he had directed the arrest to be made without having sued out any writ of execution. Here, the process has not been impeached. To make Tumman liable for the wrongful act of the officers, it should have been shewn, either that he was personally active in the seizure, *Balme v. Hutton* (9 Bingh. 471, 3 Moo. & Sc. 1); or that these particular goods were seized by his previous or contemporaneous authority.

Bompas Serjt. (with whom was Cleasby), in support of the rule. The seizure was made on account of Tumman, and for his use. *Parsons v. Lloyd*. [Cresswell J. In

scribing this case, adds, "Quod quære inde, for if he was once a trespasser without authority, the agreement cannot help him, for an action was vested before." Bro. Trespas, pl. 86. In T. 22 E. 4, Fitz. Baylye, pl. 4, a distinction is taken between a person acting as bailiff and a person acting as servant, a precedent authority being said to be necessary for the latter, though not for the former. Vide *Chambers v. Donaldson*, 11 East, 65.

In *Buller's case*, 1 Leon. 50, it was held that a plea to a cognizance of a distress for rent, taken by the defendants, as bailiffs to A.—that two strangers had right to the locus in quo, and that the defendants, by their command, took the cattle as damage feasant; *absque hoc*, that the defendants took the cattle as bailiffs of A. was good.

Among the *regulæ juris* which Gregory IX. and Boniface VIII. appended to the Decretals (in imitation of Justinian's concluding title "*De regulis juris*," in the Digest,) is a rule or maxim which accurately enounces the principle laid down in the year-book of 7 H. 4, "*Ratum quis habere non potest, quod ipsius nomine non est gestum*." The learned Friar, Anacletus Reiffenstuel, in commenting on this rule, after shewing its reasonableness from the nature of *ratihabition*, adds, "*Cui accedit etiam illa ratio, quod si quis ratum habere valeret id, quod ipsius nomine non est gestum, facile præjudicium emergere posset tertio, cum quo negotium gestumest; cum is, forsan, ex justâ causâ negotium cum tali habere noluisset, ac propterea, si scivisset, negotium nomine illius agi, à negotio, v. g. contractu, abstinuisset*." Reiffenstuel, *Tractatus de regulis juris*, Ingolstadt, 1733, p. 41. This observation, founded upon a consideration of the uncertainty in which third persons would be placed if A. might adopt as his own, an act which was represented by the agent as the act of B., is similar to that which is implied in the foregoing *quære* of Lord Brooke. In confirmation of the distinction. Reiffenstuel refers to the text of the canon law for an illustration, which he appears to have regarded with no ordinary complacency. "*Probat et declaratur responsio ulterius clarissimo, multum allegabili exemplo Juris—c cum quis, 23, de Sentent. Excommun. in 6 ibi.—Cum quis, absque tuo mandato, manus iniecit in clericum tuo nomine violentas, si hoc ratum habueris, excommunicationem, latam à canone, incunctanter incurris; cum ratihabition retrotrahatur, et mandato debeat comparari. Si vero injectio eadem tuo nomine non sit facta, tunc, licet pecces ratam habendo eandem, non tamen propter hoc excommunicationis vinculo innodaris; cum quis ratum habere nequeat, quod suo nomine non est gestum*."

And see P. 9 H. 6, fo. 1. pl. 1; H. 15 H. 7, fo. 17, pl. 11; *Anon.* 2 Leon. 196, case 146; *Fuller and Trimwell's case*, ib. 215; *Routh v. Thompson*, 13 East, 274; *Hull v. Pickersgill*, supra, 237, referred to by Parke J. in *Muskett v. Drummond*, 10 B. & C. 153, 157, 5 Mann. & Ryl. 210, 214; *Foster v. Bates*, 12 M. & W. 226, 232; *Governor, &c. of the Poor of Bristol v. Wait*, 3 N. & M. 359, 368, 369; 4 N. & M. 804, per Little-dale J.; *Battley v. Lewis*, ante, vol. i. 155, 581, n.; *Battley v. Bailey*, 1 Scott, N. R. 143; *Story*, on Agency, sect. 242, n. 2; post, 243 (b).

that case Lloyd had directed the issuing of a ca. sa. against Parsons; and no question could arise, as here, upon the authority. Maule J. Were the sheriff's officers the agents of Tumman in making the seizure? It is submitted that they were. In *Menham v. Edmonson* (1 B. & P. 369) it was held that an execution-creditor, who had given a bond to the sheriff, was liable for the acts of the sheriff's officer. [Maule J. There, the bond, being given before, operated as a command, and not as a ratification.] But whether the execution-creditor indemnifies the sheriff or not, the latter is the agent of the party by whom he is set in motion. *Kelcey v. Minter* (1 New Cases, 721, 1 Scott, 616); *Groves v. Cowan* (10 Bingh. 5, 3 Moo. & Sc. 352). [Maule J. It was not shewn that at the time of the seizure, the officers assumed to act under any authority from Tumman. Coltman J. As the nature of the process under which the officers [242] proposed to act is not shewn, how does it appear that the seizure was to the use of Tumman?] The act of the officers being adopted by Tumman, it is immaterial whether the seizure was made with or without process, and whether it was made by parties professing to act on account of Tumman or not.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This case comes before us on a rule obtained by the plaintiffs, by leave of the learned judge at the trial, to enter a verdict for them against the defendant Tumman, for 2l. 16s. if the court should think that his subsequent ratification made him liable, as a trespasser, for the original seizure.

The seizure of the plaintiffs' goods was made by some officers of the sheriff, without any precedent authority from Tumman, who appeared upon the evidence at the trial to be a plaintiff in some suit, the nature of which did not transpire, but who is found by the jury, not to have given any precedent authority to take the goods of the plaintiffs, but to have ratified the taking after it was made. The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant, of a taking under such circumstances, is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not.

That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, [243] and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year-book, 7 Hen. 4, fo. 35 (i.e. H. 7 H. 4, fo. 24, pl. 1. Vide ante, 239 (a))—that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it, at the time, as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson C. J. in Godbolt's Reports, 109 (b). "If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? can he also father his misdemeanor upon another? He cannot; for once he was a trespasser, and his intent was manifest."

In the present case the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Tumman, but the agents of a public officer or minister, obeying the mandate of a court of justice. They did not assume to act, at the time, as agents or bailiffs of the then plaintiff Tumman, but they acted as the servants of another, viz., the sheriff, by virtue of the process directed to him by the court. And this forms the distinction between the present case and that of *Parsons v. Lloyd* relied upon in the argument. In the present case the sheriff, or the sheriff's officers, seized under process, which is not suggested to have been void or irregular, but must be taken to be valid process. In the case in

(b) P. 110. There Shuttleworth Serjt. said, "What, if he distrain generally, not shewing his intent, nor the cause wherefore he distrained, &c.? Ad hoc non fuit responsum." Ih.

Wilson, [244] the writ had been set aside as irregular; and, consequently, the arrest had been made without any authority. In that case, therefore, the sheriff had acted, not under any authority of the court, but under the direction of the plaintiff in the original action, who, by suing out void process, was in the same situation as if he had orally desired the sheriff or his officer to make the arrest. And on the latter supposition, where a ca. sa. or fi. fa. has been set aside for irregularity, it becomes a nullity, and no doubt the sheriff acts as the servant, and by the command, of the plaintiff who sued it out, and who is consequently liable, as a principal, for the act of his agent.

If the defendant Tumman had directed the sheriff to take the goods of the present plaintiffs, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But where the sheriff, acting under a valid writ by the command of the court and as the servant of the court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action.

On the ground of this distinction, we think the defendant Tumman is not shewn to be a trespasser, and that the rule must be discharged.

Rule discharged.

[245] TAPFIELD v. J. HILLMAN, W. THOMSON, T. A. MANTELL, H. MANTELL, AND J. CAPSON. June 8, 1843.

[S. C. 6 Scott, N. R. 967; 12 L. J. C. P. 311; 7 Jur. 771.]

An assignment, by way of mortgage, from a lessee to his lessor of furniture and stock in trade in, about, upon, and belonging to an inn, with a power, upon non-payment, to enter into, possess, hold, and enjoy the inn for the residue of the assignor's term therein, and "to take, possess, hold, and enjoy all the goods, chattels, effects, and premises," passes nothing but what was in, upon, or about the inn at the time of the assignment.—Secus, if power had been given to enter upon default, and take the goods, chattels, and effects then in, upon, or about the inn; per Tindal C. J.

Trespass, for breaking and entering the plaintiff's dwelling house at East Grinstead, Sussex, called the Swan Inn, &c., expelling the plaintiff and his family, and seizing, taking, and carrying away, and converting to the use of the defendants, certain cattle, goods, and chattels of the plaintiff.

The defendants pleaded first, not guilty; then two pleas to the entry and expulsion; and fourthly, as to so much of the declaration as related to seizing and taking the cattle, goods, and chattels,—that the plaintiff was not possessed of the same, or of any of them, modo et formâ; on all which pleas issue was joined.

At the trial before Patteson J., at the last Sussex assizes, it appeared that the plaintiff had occupied the Swan Inn at Forest Row, near East Grinstead, as tenant to Hillman and Thomson, who were brewers at Lewes. The demise was "for a year from the 29th of September 1838, and so on from year to year, until the expiration of three months' notice in writing, to be given by either party to the other, expiring on a quarter day in any one year," at 54l. rent.

The defendants Hillman and Thomson having agreed to lend the plaintiff 200l. upon the security of his furniture, stock, and effects, by an indenture bearing date the 25th of January 1839, the plaintiff assigned to Hillman and Thomson "all and singular the household furniture, plate, linen, china, glass, brewing utensils, post-chaises, carriages, horses, flies, harness, stock in [246] trade, goods, chattels, and effects of him the said John Tapfield, in, upon, about, or belonging to all that inn or tavern called or known by the name of the Swan Inn, at Forest Row, aforesaid, and also the tap, yard, stables, buildings, and premises, adjoining or belonging thereto, as the same now are in the tenure or occupation of the said John Tapfield, and all the right, &c. : to have, hold, &c. unto the said Hillman and Thomson, as their own property and effects absolutely." The deed contained a proviso for redemption, on

payment of the principal sum on the 25th of January 1841, or such earlier day as Hillman and Thomson, &c., should by seven days' notice in writing appoint, with interest at 4l. per cent. in the meantime; and also a declaration and agreement, that after default in payment of the said sum of 200l. and interest, or any part thereof, contrary to the tenor and effect of the before-mentioned proviso, it should be lawful for Hillman and Thomson, or the survivor, &c., peaceably and quietly to enter into, &c., all and singular the said inn, &c., and premises "for all the estate and interest of the said J. Tapfield therein, and to take, possess, hold, and enjoy, all and every the goods, chattels, effects, and premises, to and for his and their own absolute use and benefit;" and also to sell, assign, or dispose of the same and reimburse themselves all costs, &c., and the 200l. and interest, paying the surplus, if any, to Tapfield. And it was further declared and agreed, that until default should be made in payment of the said sum of 200l., or the interest thereof, contrary to the proviso thereinbefore contained, it should be lawful for Tapfield, his executors, &c., to hold, make use of, and enjoy all and singular the said premises expressed to be thereby assigned, without any hindrance, interruption, or disturbance of, or by them, Hillman and Thomson, their executors, &c.

On the 28th of September 1842, being the day before [247] the expiration of the plaintiff's tenancy, Hillman and Thomson entered upon the premises under colour of the mortgage deed, and seized the whole of the effects, including stock in trade and other property which were not on the premises at the date of the deed.

On the 30th of September, Hillman and Thomson put the defendant Clapson in possession, as their tenant.

On the 1st of October, the sheriff entered under an execution upon a warrant of attorney given by Tapfield to one Wood, by virtue of which he seized all the property that came on the premises subsequently to the date of the mortgage. Clapson having thereupon brought an action against the sheriff in the court of Exchequer, the latter obtained a verdict, which that court refused to disturb.

The present action was brought for the seizure of those goods which were not upon the premises when the mortgage was executed.

The learned judge told the jury that, under the mortgage deed, Hillman and Thomson were only entitled to such property as existed, in specie, at the time that deed was executed; and the jury found a verdict for the plaintiff, damages 10l., being the value of the articles not comprised in the mortgage deed.

Talfourd Serjt., in Easter term last, obtained a rule nisi for a new trial, on the ground of misdirection.

Channell Serjt. (with whom was E. James) now shewed cause. This case was correctly left to the jury, inasmuch as nothing passed by the mortgage deed but the effects that were upon the premises at the time when that security was given. It is far from being clear that an assignment can be made to comprise property which is not in existence at the time; but that point does not arise here, for the deed does not profess, [248] neither does it convey the slightest intimation, that the parties meant to include property which might be subsequently acquired.

Talfourd Serjt. (with whom was Ogle), in support of the rule. Looking at the situation of the parties and the nature of the property, it is clear that the parties must have meant to comprise the effects that would be upon the premises from time to time; for otherwise the security would be of little or no value. The words of the deed are large enough to carry what must have been the intention of the parties into effect.

TINDAL C. J. It seems to me that the mortgage to the defendants Hillman and Thomson only comprised the effects then upon the premises. If the intention of the parties was that the security should extend to subsequently acquired property, that intention ought to have been clearly expressed. What the plaintiff assigns by the deed, is, "all and singular the household furniture, &c., stock in trade, goods, chattels, and effects of him the said J. Tapfield, in, upon, about, or belonging to all that inn, &c., and also the tap, yard, stable, buildings, and premises adjoining or belonging thereto, as the same now are in the tenure or occupation of the said J. Tapfield." It is clear that the granting part of the deed does not extend to property brought upon the premises after the execution of the mortgage. The power of entry contains an authority "to take possession, hold, and enjoy all and every the goods, chattels, effects, and premises." It would have been very easy to have so framed the power of entry

as to make it extend to all effects found upon the premises at the time that such power should be enforced, had such been the intention of the parties. If the usual schedule had been appended to the deed, clearly nothing would have passed [249] that was not upon the premises at the time. It appears to me that there is nothing in the deed to justify the seizure of the property subsequently acquired, and consequently that this rule must be discharged.

COLTMAN J. It is not improbable that the parties intended that the security of the mortgagees should extend to the stock and effects brought upon the premises from time to time to replace that which was disposed of and consumed by the plaintiff in the course of his business. We can, however, only look to the language of the deed; which clearly is not sufficient to include property not on the premises at the time the deed was executed.

MAULE J. I also think that the learned judge put the proper construction on this deed at the trial. Although we may conjecture that the intention of the parties was that the mortgage deed should embrace after-acquired property, still, even if we could see with certainty that they had such an intention, it would not prevail unless the deed contained words sufficient to carry the intention into effect. The absence of a schedule is in favour of the notion that the deed was meant to convey after-acquired goods; for it would have been easy, in a schedule, to particularise existing goods, but not future goods. However, it may also have been omitted on account of the trouble and additional expense. The granting part of the deed clearly does not include the renewed stock and effects; and the power to re-enter and take possession relates to the same things that are before mentioned. If the proviso for entry had been meant to embrace something beyond that which passed by the granting part of the deed, that would have been a thing so unusual as to require it to be clearly and unequivocally expressed.

[250] CRESSWELL J. I agree with the rest of the court that my brother Patteson put the right construction upon this deed.

Rule discharged.

IN RE MARIA ANN PICKERSGILL. June 13, 1843.

The court directed an acknowledgment under 3 & 4 W. 4, c. 74, s. 79, to be received and filed under s. 85, where the affidavit verifying the certificate of the commissioners, was sworn before A. B., "minister of the British chapel at Moscow," it being deposed to in an affidavit by the secretary of the Russia Company in London that A. B. was in the habit of administering oaths to British subjects there, and certified by two merchants at Moscow, that there was no English notary public or British consul or vice-consul, within four hundred miles of that city.

Talfourd Serjt. moved that the proper officer might be directed to receive and file a certificate of acknowledgment of the execution of a deed by Mrs. Pickersgill, pursuant to the 3 & 4 W. 4, c. 74, s. 85, together with the affidavit verifying the same,—upon an affidavit, sworn before Matthew Camidge, who described himself as "Minister of the British Chapel, Moscow." This affidavit was accompanied by a certificate from two merchants resident at Moscow, stating "that there is no English notary-public, or British consul, or vice-consul, within 400 miles of Moscow, the nearest being at St. Petersburg." The learned serjeant produced an affidavit in which Cope, the deponent, stated "that he was the secretary of the Russia Company in this country, who have several chaplains resident in the empire of Russia; that he was acquainted with the Rev. Matthew Camidge of Moscow, minister of the chapel there; that the said Matthew Camidge was in the habit of administering oaths to British subjects there, and that the signature at the foot of the certificate [meaning the affidavit] thereto annexed, was in the handwriting of the said [251] Matthew Camidge." In *Davy and Maltwood, In re* (ante, vol. ii. 424), reported also as *Bayley, Ex parte* (2 Scott, N. R. 523), the court, upon the authority of *Handyside, In re*, held that the affidavit verifying the certificate of the due taking of such an acknowledgment, may, in Russia, be sworn before a British consul, it appearing that magistrates in that country have no authority to administer oaths.

TINDAL C. J. This case falls within the principle of prior decisions, and particularly that of *Davy and Maltwood, In re*.

Per curiam. Let the certificate be filed.

Rule accordingly.

SMITH v. UPTON. June 13, 1843.

Notice of trial by proviso having been given in an action brought by the assignee of a patent for an infringement, in which action the validity of the patent was put in issue, the court, at the instance of the plaintiff, postponed the trial on the ground that in a scire facias brought by the defendant to repeal the patent, a rule was pending in B. R. for entering a verdict for the patentee.

Case, for infringing a patent, upon the validity of which several issues were taken in the pleadings.

A scire facias, returnable in Chancery, had issued against Bynner, the patentee, to repeal this patent, of which Smith, the plaintiff in this court, was assignee (a), [252]

(a) The scire facias to repeal letters-patent was formerly obtained upon a petition to the crown, the prayer of which was grantable as of course, the petition being in the nature of a petition of right; *Eurl of Kent's case*, H. 21 E. 3, fo. 47, pl. 68; T. 44 E. 3, fo. 16, pl. 3; Fitz. Traverse, pl. 41; Bro. Peticion, pl. 11; *Cheller's case*, M. 9 H. 4, fo. 4, pl. 17. But, although, in *The Earl of Kent's case* it was said that the petition was the suppliant's original writ, oyer of the petition was not allowed.

The petition for a scire facias is in the nature of a prayer for a remedy for an injury which the suppliant has sustained by the act of the crown in granting to another that which belongs to the suppliant, or in which he has an interest, either specially, or, as in the case of an invention, in common with other subjects. The remedy to be obtained is, the cancelling of the letters-patent, after calling upon the grantee, by scire facias, to shew cause why the grant should not be repealed. The proceeding is in the nature of an action against the crown for the wrong sustained at the hands of the sovereign, acting upon a false suggestion. Post, 259 (d).

So, a petition of right lies against the crown for a tort done by the King's officers for the King's profit; as for a disturbance in the perception of tithes; *Prior of Christ-church's case*, 31 Edw. 1, 1 Rot. Parl. 59 b., and Ryley, Plac. Parl. 218; for tithes subtracted by the King's officers, 8 Edw. 2, 1 Rot. Parl. 319 a.; for a wrongful distress, *John Mowbray's case*, 33 E. 1, 1 Rot. Parl. 163 a., and Ryley, 218; for wool wrongfully taken to the King's use, *Michael de Harcla's case*, 33 E. 1, 1 Rot. Parl. 163 a., and Ryley, 248; for wheat seized under pretence of a royal commission, 14 Edw. 2, 1 Rot. Parl. 320 a.; for trespasses to land, 18 E. 2, 1 Rot. Parl. 416. In the last case Robert de Clifton brought a petition of right, in parliament, for the injury done to his meadows, by the King's keepers of Nottingham Castle, in digging trenches through his land, for a supply of water to the King's mills. A commission ad inquirendum having issued, the facts stated in the petition were, in substance, found by inquisition; whereupon the suppliant presented a second petition in parliament, not, as before, a petition of right, but a petition of grace, in which he asked for an appointment to a certain lucrative office in reparation of his losses; both he and his ancestors having found it more easy to establish their right than to obtain satisfaction. In the judgment in *The Queen and Lord Viscount Canterbury*, reported as *Lord Canterbury v. The Attorney-General*, 1 Phillips's Rep. 306, it is truly stated (p. 313) that the petition set out in *Robert de Clifton's case*, (which was his second petition,) was not a petition of right. His first petition, though not set out on the parliament roll, is recited in the commission ad inquirendum, which is set out; and that appears to have been a very formal petition of right. Robert dying in 1326, (Calend. Inq. post Mortem, 2) a similar petition was prosecuted by Gervase de Clifton, for the injury which his lands had sustained, in the time of Robert, by these acts of the officers of Edward II. P. 22 E. 3, fo. 5, pl. 12, Fitz. Abr. Peticion, pl. 3. In the *Calendarium Rotulorum* patent, of 11 E. 2, find, No. 28, a patent, "De inquirendo de Gervasio de Clifton, de trenchais factis per medium pratorum suorum, et tenentium suorum, apud Wyleford, in cedula." This elder Gervase was the cousin and ancestor of Robert, the father and ancestor of the second Gervase, and was the descendant of a former Gervase de Clifton, seised temp.

upon which also issues were taken involving questions as to its validity. The record being delivered by the Lord Chancellor to the court of Queen's Bench for trial, a [253] verdict was found for the Crown (a) at the Queen's Bench sittings after last Trinity term.

(a) The chancellor, though sitting as a common law judge, has no power to summon a jury, and Chancery and B. R. are for this purpose, as one court.

Quia placitum de "non est factum" in cancellariâ terminari non potest, cancellarius adjornavit partes in curiâ coram ipso rege, T. 13 E. 2, Abbrev. Placit. in Dom. Cap. Westm. 336. On the great value of this work, see Sir H. Nicolas, Contents of Records, 45.

A record is brought by the chancellor into B. R. propriâ manu, without writ, as the two courts are "one place"; but it cannot come from Chancery into the Common Pleas without a writ of mittimus; Dict. in C. P. per Shardelow, Justice, M. 10 E. 3, fo. 59, pl. 62.

And see Offic. Brev. 329.

Hen. 3, Testa de Nevill, 13 b. In 17 Ed. 2, the king took the homage of Robert de Clyfton, heir of Gervase de Clifton, for his lands in Nottinghamshire; 1 Abbr. Rot. Orig. in Cur. Scacc. 271 b. Among the inquisitions ad quod damnum, taken (or rather returned, as Gervase was then dead) in 18 Ed. 2, the following entry appears:—"No. 217 Gervasius de Clyfton, Wyleford, de trenchiis ibidem factis per custodem castri de Nottingham," &c. Calend. Inq. ad quod Damnum, 271. (As to the tenure of Wilford, see Testa de Nevill, 13 b. Plac. de Quo Warranto, 612.) Proceedings therefore were taken by three successive lords of Wilford; of which the last two, at least, were petitions of right.

So, in the case of torts by the king's tenants, permission to sue the wrongdoers to judgment and execution, was granted, upon a petition of right, *De Grey's case*, 15 & 16 Ed. 2, 1 Rot. Parl. 397, No. 59.

Parties who have been compelled to pay to the crown debts already paid, or from the payment of which they were exempted, are to recover the amount by petition; Ord. 5 Edw. II., 1 Rot. Parl. 284 a.

The general result of the cases seems to be, that where the subject is entitled to a right which the crown withholds, or has suffered a wrong which the crown ought to redress, the remedy at common law, (or by magna charta, 1 Rot. Parl. 421, No. 18), is by petition of right. Formerly petitions were often presented in cases where the proper remedy was by action. In such cases the course was, not to reject the petition, but to indorse it with a direction to the suppliant to pursue his remedy before the ordinary tribunals. A petition presented by John Cyfrewast for lands seized by the king's escheator, without saying to the king's use, was thus answered. "If the land mentioned in the petition be in the king's hands, let certain persons be assigned to inquire whether the petition is true or not, and of other necessary things; and the inquest being returned in Chancery, let right be done him. And if the land be in the hands of others, let him have a writ at the common law;" 4 Ed. 3, 2 Rot. Parl. 37 b. And see further as to petitions of right for recovery of pecuniary demands,—*Westmilne's case*, for bread and meat sold to the late king, 6 Ed. 1, 1 Rot. Parl. 1 b.; *Everle's case*, for an annuity granted by Henry III., 33 Edw. 1, 1 Rot. Parl. 10 a. 164 b. Ryley, 251; 14 Howell, 58; *Abbot of Wardon's case*, for an annuity granted by Henry III., 33 Ed. 1, 1 Rot. Parl. 54 b., 170 a., Ryley, 262, 14 Howell, 61, 62; *Aynesham's case*, for work as a mason, 33 Ed. 1, 1 Rot. Parl. 164 b., Ryley 251; *Estratyn's case*, for wages and loss of horses, 33 Ed. 1, *ibid*; *Basyn's Executors' case*, for the price of wax, 35 Ed. 1, Ryley, 334; *Fitzwalter's case*, for services in Gascony, 33 Ed. 3, 1 Rot. Parl. 169 a.; Ryley, 259; *Beismey's case*, for the price of a horse, 33 Ed. 1, 1 Rot. Parl. 164 b., Ryley, 251; *Lodelawe's case*, for money paid for the king, 33 Ed. 1, 1 Rot. Parl. 169 b.; *Abbess of Fontevrault's case*, for an annuity, 18 Ed. 1, Ryley, 52; *John de la Dolyne's case*, for wages, 33 Ed. 1, Ryley, 247; *Abbot of Oseney's case*, for a rent-charge, 33 Ed. 1, Ryley, 245; *Hernigod's case*, for arrears of a rent-charge issuing out of land in the king's hands, 35 Ed. 1, 1 Rot. Parl. 195 b., Ryley, 329, 14 Howell, 82; *Yerward's case*, for arrears of pay, 14 Ed. 2, 1 Rot. Parl. 378 a., Ryley, 414; *Cottingham's case*, for a surcharge of rent, 14 Ed. 2, Ryley, 402; *Bissop's case*, for the price of oats, 14 Ed. 2, Ryley, 408; *Abbot of Faversham's case*, for rent of

[254] In the following term the court of Queen's Bench (a) granted a rule nisi for a new trial.

Notice of trial by proviso having been given in the action in this court,

[255] Byles Serjt., on an affidavit stating these facts, and alleging that the present

land seized by the king, 4 Ed. 3, Ryley, 646, 14 Howell, 60. By lords, for their rents of lands in the hands of the king by reason of wardship, P. 24 E. 3, fo. 24, pl. 5, and of attainder, M. 4 E. 4, fo. 23, pl. 1; *Adam le Clerk's case*, for the value of a ship lost in the king's service, 8 Ed. 2, 1 Rot. Parl. 317 b.; case of certain sergeants who having paid their moneys to the Knights Templars for their board (pro victu), after the seizure of the Templars' lands, had been dictated by the king, until the lands were aliened; 8 Ed. 2, 1 Rot. Parl. 319 a.; *The Burgesses of Windsor's case*, for rent payable in respect of tenements formerly of the Earl of Cornwall, then in the king's hands, 14 Ed. 2, 1 Rot. Parl. 383 b.; *Custance Haliday's case*, for simple-contract debts owing to her late husband by Thomas, Earl of Lancaster (attainted),—answered "Rex non tenetur solvere debita comitis,"—15 & 16 Ed. 2, 1 Rot. Parl. 415 b.; *Isak's case*, for work done, and goods sold, M. 11 H. 4, fo. 28, pl. 53; *Sir John Pugley's case*, T. 7 H. 6, fo. 44, pl. 22, for money levied upon a fine, the judgment pro fine having been reversed; *Paston's case*, H. 4 E. 4, fo. 43, pl. 4, after reversal of outlawry, for the value of goods seized, and accounted for in the exchequer; for a rent-charge, Bro. Abr. Peticion, pl. 29, citing 13 E. 4, fo. 6, (by mistake for M. 13 E. 4, fo. 5, pl. 15); and 31 Eliz. *Wicks v. Dennis*, 1 Leon. 190; for a pension out of the civil list, at the suit of an assignee, *Oldham v. Lords of the Treasury*, 6 Sim. 220; and see *Priddy v. Rose*, 3 Merivale, 94.

One answer was made to several petitions of right in respect of moneys seized, had and received, or paid to the king's use, goods and chattels seized, wages, and debts in general. A general commission having been issued a few years before to make inquiry through all the counties of England, into demands of that nature, Rot. Patent. 26 Ed. 1, m. 21, all the suppliants were answered, that "the king had ordered them to be satisfied with all possible speed;" 33 Ed. 1, 1 Rot. Parl. 165 b. And see 3 Mann. & R. 460, Abbrev. Placit. 228 a., 235 a., 241 b., 258 a., 260 a., 261 a., 313 a., 323 a., 324 a.; *Abbot of Hyde's case*, 33 E. 1; Ryl. 248; *Floria de Belhous's case*, 33 E. 1, 1 Rot. Parl. 165 b., Ryl. 253; *Town of Hastings's case*, 33 E. 1, 1 Rot. Parl. 377 b., Ryl. 414; 1 Rot. Parl. 146 a.; 192 a., b.; 194, No. 17; 371, No. 8, 9; 372, No. 15, 16; 388, No. 7, 9; 390, No. 20; 400, No. 74; 408, No. 124; 425, No. 36; 429 b., 437, No. 25, 27; 438, No. 32; 440, No. 44; 441; 479, No. 109; 2 Rot. Parl. 41, No. 50; 75, No. 11; 214, No. 39. (In that case, the commission ad inquirendum issued to a justice of C. P., two barons of the Exchequer, and another person); 4 Rot. Parl. 161 a.; 470 a.; 506 b.; 5 Rot. Parl. 393 a.; 403 a.; Ryl. 249, 263; H. 2 E. 3, fo. 18, pl. 2; M. 20 E. 3, Fitz. Abr. Assize, pl. 124, per Seton, K. S.; P. 24 E. 3, fo. 24, pl. 5; T. 24 E. 3, fo. 55 b. pl. 40, per Wilby or Wilughby J.; 29 Ass. pl. 31; 33 Ass. pl. 10; 43 Ass. pl. 21; M. 2 H. 4, fo. 10, pl. 47; P. 2 H. 4, fo. 17, pl. 26; T. 2 H. 4, fo. 23, pl. 11; H. 8 H. 4, fo. 21, pl. 8; M. 9 H. 4, fo. 4, pl. 17; M. 10 H. 4, fo. 4, pl. 8; H. 11 H. 4, fo. 52, pl. 30; H. 3 H. 6, Fitzh. Dette, pl. 17; *Duchess of York's case*, (as to whose title see Worsley's Isle of Wight, 45, 67, app. lviii.) T. 9 H. 6, fo. 27, pl. 30; T. 34 H. 6, fo. 51, pl. 18; T. 36 H. 6, fo. 60, pl. 1; H. 9 E. 4, fo. 51, pl. 14; M. 1 H. 7, fo. 3, pl. 3; M. 3 H. 7, fo. 13, pl. 19; T. 7 H. 7, fo. 11 b., per Brian C. J.; M. 13 H. 7, fo. 6 a., per Mordant K. S.; M. 20 H. 7, fo. 6, pl. 16; H. 21 H. 7, fo. 2 b., per Palmes Serjt.; Rast. Ent. Peticion; Co. Ent. Petition; *Melria's case*, 3 Inst. 215, 216, Sir F. Moore, 639; *The Bankers' case*, 14 Howell, 1; 1 Vez. sen. 446; 7 Price, 150, 163; 1 Roll. Abr. 534, G. 1; T. Raym. 178; 2 H. 4, 3 Rot. Parl. 474, No. 95; Fitz. Peticion, pl. 19; Vin. Abr. iv. 381, v. 548; Chitt. Prerog. 339; Mann. Exch. Prac. 2d ed. 84.

(a) After the record is removed for the purpose of trial, it commonly remains in B. R. until final judgment is given; coming back into Chancery only for the purpose of execution, by cancelling the record upon which the sci. fa. issued, when judgment is given for the crown. See the record of a sci. fa. to obtain execution upon a recognizance in Chancery, against lands in the tenure of the vendee of the conusor; *Jeffreys v. Morton*, 2 Wms. Saund. 26, where it was held, contrary to the opinion of Lord Coke, in 4 Inst. 80, that after trial judgment must be given, and execution awarded in B. R. But see 1 Roll. Abr. 534, G. pl. 1; Hindmarch on Patents, 415. And see Abbrev.

defendant was the prosecutor of the scire facias, and that the questions raised upon the [256] pleadings in this cause were substantially the same as those in the proceedings upon the scire facias, obtained a rule calling upon the now defendant to shew [257] cause, why the trial should not be postponed until the sittings after next Michaelmas term.

Channell Serjt. now shewed cause. The pendency of proceedings between these

Placit. 336, No. 107; M. 21 H. 7, fo. 35, pl. 44; Bro. Abr. Judgment, pl. 135; Rast. Ent. 461; Staundf. Prerog. 72, 73, 78. In *Digge's case*, 1 Co. Rep. 157 a. an issue joined in Chancery in a Monstraunce de Droit, was delivered into B. R. by Egerton C. S., and was tried, by nisi prius, at the Rochester assizes. The postea, containing a special verdict, was returned into B. R. where final judgment was given for the defendants, who were the queen's grantees of a wardship. In *Mark Steward's case*, 9 Co. Rep. 99 b. a similar issue was delivered into court by Bromley C.; and judgment was given in B. R. against the queen. In *L'Evesque de Bristol et son Feme v. Procter*, 1 Roll. Rep. 287, in scire facias upon a recognizance in Chancery, the issue was sent into B. R. After the trial, the judgment was arrested for a mis-awarding of the jury process. The parties being willing to replead, the question was, whether the repleader should be in B. R. or in Chancery; and it was held, that as the record, and not the tenor of the record, was removed into B. R., the subsequent proceedings must be in that court. In *Rex v. Holland*, Aleyn, 14, Style's Rep. 20, 1 Roll. Abr. 534, 535, 6 Vin. Abr. 549, upon a traverse of an inquest of office, the venire facias juratores was awarded in Chancery, returnable in B. R. In M. 24 E. 3, fo. 73, pl. 91, where the plaintiff in a scire facias on a recognizance in Chancery sent into B. R. for trial, was nonsuit, it was held, that a new scire facias was properly brought in B. R. where the record remained. And see Bro. Abr. tit. Jurisdiction, pl. 48, citing (erroneously) 24 E. 3, 45 (instead, ut videtur, of M. 24 E. 3, fo. 73, pl. 91); West's Symboleograph, 117, 2 Wms. Saund. 27, 6 Vin. Abr. 549.

Where judgment is given in Chancery upon a demurrer, in a case pending in the Petty-Bag Office, a writ of error lies in B. R. to revoke such judgment, for errors in process, or errors of fact; as error coram nobis lies in B. R. for errors in process, or of fact, occurring in judgments given in B. R.; and that court and the court of Chancery are, for this purpose, considered as "one and the same place." M. 10 E. 3, fo. 59, pl. 62.

It would appear, however, that writs of error, upon judgments in Chancery, for errors of fact or in process, may be made returnable in Chancery. *Countess of Pembroke's case*, 42 Ass. fo. 262, pl. 22. In that case, the only question was, whether the errors could be examined in Chancery without a writ of error in "a higher court, to wit, the court of Parliament." The necessity or the propriety of going into B. R. by writ of error, was not suggested.

Where, after judgment in B. R. upon records sent from Chancery, errors of fact or errors in process are discovered, they are redressed in B. R. *Davokes v. Payton*, Style's Rep. 218.

But for errors in law, the appeal is direct,—from the court of Chancery to the House of Lords. *Rex v. Edmund Bassett*, 2 H. 4, 3 Rot. Parl. 461, 462, 463; H. 37 H. 6, fo. 14, pl. 3; T. 11 E. 4, fo. 8, 9, pl. 14; Bro. Abr. tit. Error, pl. 95; *Squibb's case*, Lord Hale, Jurisdiction of the Lords, 49, and Macqueen, Pract. House of Lords, 371; *Rex v. Sir Oliver Butler*, 3 Lev. 220, and 2 Ventr. 344; *Rex v. Cary*, 1 Vern. 131, and 1 Eq. Cas. Abr. 129; *Rex v. Offley*, Macqueen, 372; two *Anonymous cases*, ibid.; *Saint v. Jackson*, ibid. It is true that it is laid down, generally, by the text writers that error lies in B. R. upon judgments in the Petty-Bag Office, 1 Roll. Abr. 744, 745, Error (H), pl. 1; Crompton Jurisd. of Courts, 11 b.; Com. Dig. tit. Pleader (3 B. 3); 3 Bla. Comm. 48; (and see Bac. Abr. Error, 14); and the same was asserted by Plowden in argument, in *The Earl of Leicester's case*, Plowd. 393 a. But on looking into the authorities upon which this position is supported, it will be found that they all relate to matters for which error coram nobis would lie. The cases are, T. 18 E. 3, fo. 25, pl. 17; 17 Ass. fo. 52, pl. 24, which is the same case, totidem verbis; 29 Ass. fo. 166, pl. 47; *L'Evesque de Bristol et Feme v. Sir Stephen Procter*, 1 Roll. Rep. 287, which are all cases of error in process. The other authorities referred to in support of this position, are, Dyer, 215, and 4 Inst. 79, 80; but Dyer is evidently not reporting any thing which occurred in his own time; he is merely inserting short notes of some cases which he had seen in the Year Book of Edw. III., that relating to error from the

parties in another court, is [258] no ground for postponing the trial to the injury of the defendant's business, which cannot be carried on advantageously whilst this action is hanging over his head.

[259] Byles Serjt., in support of his rule, referred to *Waller v. Bateman* (a). [Tindal C. J. In that case the trial was postponed by consent (b). The present application, though not assented to, will save much expense, and is in the plaintiff's own delay.]

TINDAL C. J. As it is alleged, and is not denied, that the defendant in this court, is the moving party in the scire facias, there can be no good reason why he should force this cause on to trial, whilst the rule for entering a verdict against him upon the issues joined in the proceeding by scire facias, is undetermined (c). The present rule should be made absolute, upon the terms of the plaintiff's paying to the defendant any costs [260] which may have been incurred in preparing for trial at the sittings after this term.

The rest of the court concurring,
Rule absolute accordingly (a)².

court of Chancery being the case in T. 18 E. 3, and in 17 Ass. already adverted to, Lord Coke, in 4 Inst. 80, refers to 10 E. 3, fo. 61. The book of 10 E. 3 has only 60 folios, but the reference was no doubt intended to be made to a case reported in M. 10 E. 3, fo. 59, pl. 62, in which the only question was as to the sufficiency of the process, and whether the sufficiency of process in Chancery can be examined in the court of Common Pleas without a mittimus, as it can in B. R. Supra, 253, n.; vide tamen *Blaxton's case*, Latch, 3; and see *Rex v. Lord Yarborough*, 2 Bligh, N. S. 147; 1 Dow & Clark, 178.

Any cause pending in the Petty-Bag Office, or common-law side of the court of Chancery, may be adjourned by the Chancellor into B. R. (or sent by mittimus into C. P.) either before or after issue, or demurrer, joined; 2 Saund. 27.

Where there are issues both of law and of fact in the Petty-Bag Office, the whole record is sent into B. R. for determination; as there cannot be a judgment of the Chancellor upon one part of the record and a judgment in B. R. upon other part of the same record. But as the crown, when defendant, may plead, and when plaintiff, may reply, several matters, there seems to be no reason, where there is an issue in law, going to the whole cause of action, why the Chancellor should not give final judgment upon that issue, without sending the record into B. R. for the purpose of trying other issues which have become immaterial. Where, in an ordinary action, several issues are taken, and one of them is decided in such a way as to put an end to the cause, whatever might be found upon the other issues, the court has power, without consent of parties, to discharge the jury from trying the other issues. Vide *Dibben v. Marquess of Anglesea*, 2 C. & M. 722, 4 Tyrwh. 925, 10 Bingh. 568; *Tolson v. Kaye*, post, 536; *Duckworth v. Harrison*, 4 M. & W. 432, 444, 7 Dowl. P. C. 71; *Maloney v. Stockly*, ante, vol. iv. p. 648; *Rex v. T. Johnson*, 5 A. & E. 488, 6 N. & M. 870. A fortiori, it would seem, might the Chancellor refuse to send an issue into the court of Queen's Bench for trial, for the purpose of deciding that which had become immaterial, and thereby compel the party, who might wish to question the decision of the court upon the issue of law, to resort to the jurisdiction of an intermediate court of error, in the Exchequer Chamber, instead of going immediately to the House of Lords.

(a)¹ 1 Webster's Pat. Cases, 615. And see the cases of *Wallon's Patent*, and *Haworth's Patent*, ib. 486, n. (n).

(b) Quære, as to any consent having been given in that case. In a recent case of *Bentley v. Goldthorp*, the plaintiff having obtained two verdicts, and rules for new trials having been granted in both, and a sci. fa. pending, Tindal C. J. made the cause a remanet on the ground that more of the public time ought not to be consumed until the rule had been heard.

(c) And see *Muntz v. Foster*, post, 734, 1017, T. T. 1844. In that case the defendants in this court, had obtained a writ of scire facias to repeal letters patent granted to Muntz. The trial of the issues joined in the scire facias had been delayed in B. R. without any default on the part of the defendants in C. P., the prosecutors of that writ. This court, however, refused to stay the proceedings in the action until the issues in the scire facias should be determined. Ideo quære.

(a)² In practice, the petition for the writ of scire facias, mentioned supra, 252, has

[261] MAY AND CHEESMAN v. TAYLOR. June 3, 1843.

[S. C. 6 Scott, N. R. 974; 12 L. J. C. P. 314; 7 Jur. 515.]

In an action by trustees, the plaintiffs are not bound by the statements of a party admitted to be cestui que trust, unless the nature of the interest of such party in the trust estate be shewn.—Semble, that if it distinctly appear that such party alone is entitled to the benefit resulting from the action, his statements will be admissible in evidence for the defendant.

Covenant. The declaration stated, that by indenture made the 10th of February 1837, between the plaintiffs of the first part, Dame Elizabeth Twysden of the second part, and the defendant of the third part, the plaintiffs, at the request and by the direction of the said Lady Twysden, did demise, and the said Lady Twysden did demise, ratify, and confirm, unto the defendant, certain messuages, &c., and certain lands, consisting partly of hop-gardens and partly of arable land: habendum, from Lady-day 1837, for seven years. The defendant covenanted that he would, at the proper and usual times, according to the custom of the country, during the term, plough, sow, manure, cultivate, fallow, and manage all the arable lands thereby demised, in all respects in a good and husbandlike manner, according to the best system of husbandry practised in the immediate neighbourhood thereof; and manure and manage all the hop-lands thereby demised, in a good and husbandlike manner, according to the best system practised in the immediate neighbourhood thereof; and also would not, during the term, grub up or remove any of the hedges,

been abandoned, and the writ issues upon the Attorney-General's fiat, which is obtained by the subject upon the terms of entering into a bond with two sureties to pay to the defendant, i.e. the garnishee, his costs, in case the Crown does not obtain a verdict; the proceeding between the Crown and the garnishee being in the form of a prosecution at the suit of the Crown. *Re v. Neilson*, 1 Webst. Pat. Cases, 671, n. a.

The grounds upon which the writ of scire facias to repeal letters patent issues are stated by Lord Coke, 4 Inst. 88; but all the cases in the books, usually referred to, relate to grants of markets, royalties, lands, offices, or matters whereof it is alleged that a second or subsequent grant to the prejudice of a prior grant made to, or of some other prior title existing in the suppliant prosecutor or party asserting that he is injured. On this ground it is said that the writ of scire facias issues ex debito justitiæ. *Sir Oliver Butler's case*, 1 Ventr. 44. See also *Dyer*, 276, and *Brewster v. Weld*, 6 Mod. 229. Per Lord Lyndhurst C. in *Re v. Neilson*, 1 Webst. 671, where Sir F. Pollock, A. G., cites a recent case to shew, that where a question arose as to whether a second grant had been made of the same land, in one of our colonies, the subject had not a right, mero motu, to a scire facias. Tamen quære. Where patents are obtained, granting exclusive privileges, as in the case of patents for inventions, every subject has an interest in seeking a revocation of the grant, and thereby relieving himself, as well as others, from the restriction imposed. But it seems that two persons cannot join in a scire facias to repeal a grant by letters patent, ib. 673, unless they have a joint interest. 3 M. & R. 460.

In the case of writs of scire facias issued for the purpose of obtaining the repeal of letters patent, according to a practice recently introduced, the Attorney-General, on petition, will interpose to stay proceedings in case of the security for costs being insufficient, or to reform the writ, where it contains improper suggestions. Ib. 671.

The rule referred to in the principal case, for setting aside the verdict for the Crown, having been discharged, on the ground that the specification claimed too much, Sir F. Pollock, A. G., stayed the proceedings, a petition to amend the patent, by disclaimer, under the statute 5 & 6 W. 4, c. 83, s. 1, having been presented to him. A disclaimer was subsequently entered.

And see further as to writs of scire facias to repeal grants by letters patent, *Staufd. Prerog. cap. 23*; *Bro. Abr. tit. Repellance*; 1 Richardson, *Pract. C. P.* 391, 393, 398.

Misleading in matter of form shall be prejudicial in no case in Chancery, although it be in a thing in which they hold plea according to the common law; T. 14 E. 4, fo. 6, 7, pl. 8, 1 Roll. Abr. 372, 4 Vin. Abr. 381.

underwood, or fences of the demised land, without the consent in writing of the plaintiffs, their executors, administrators or assigns; that the defendant, his executors, or administrators, would not, during the term, do or cause to be done or committed any manner of waste upon, or destruction in or upon, the messuages, lands, and premises thereby demised, or any part thereof; and that the defendant, his executors, and administrators would, at the end and expiration of the term, leave upon the said lands and premises, eighteen acres of hops, in a [262] proper state and condition. Breach (inter alia), that the defendant did not, nor would, at the end and expiration of the said term, leave upon the said lands and premises, eighteen acres of hops, or any number of acres of hops, in a proper state or condition.

Upon this and some other breaches the defendant brought 40l. into court, and pleaded that the plaintiff had not sustained damage to a greater amount.

The plaintiffs replied damage ultra; upon which issue was joined.

At the trial, before Lord Denman, at the last Kent assizes, it was stated, on the part of the plaintiffs, that they were suing as trustees for Lady Twysden. It was shewn that the defendant had grubbed up five acres of hops. The following letter was produced on the part of the defendant:—

“Hadlow Castle, 24th October, 1838.

“Lady Twysden informs Mr. Taylor that she has consulted Mr. May with respect to his displanting four or five acres of hops at Little Mill; and as Mr. May heard that some few acres had been injured by the worm; if so, (sic) he, Mr. May, is convinced the plant will be of little service to Mr. Taylor if it remains. Therefore Lady T. consents to Mr. Taylor displanting four or five acres; but that quantity must not be exceeded.”

It was objected that this letter was inadmissible in evidence, as not being written by, or by the authority of, the plaintiffs, and because a contract under seal cannot be dispensed with by parol (a)¹, and that if it could, [263] the defence should have been pleaded. His lordship was of opinion that upon the issues joined, the letter afforded no answer to the action; but he admitted it in evidence as affecting the amount of damages. The jury having returned a verdict for the defendant,

Channell Serjt., in the following term, obtained a rule nisi for a new trial, on the ground of the improper reception of evidence.

Shee Serjt. now shewed cause. The letter was properly admitted as a declaration (a)² by a party who was identified in interest with the plaintiffs on the record. The action was confessedly brought for her benefit in enforcing the performance of the covenants of a lease in which, though she was not nominally the covenantee, she was both a consenting and a demising party. [Maule J. Was there any evidence to shew that Lady Twysden acted as the agent of the plaintiffs, in the management of this farm?] That certainly did not appear. There are many authorities which shew that

(a)¹ The distinction appears to be this: there can be no dispensation with a contract under seal except by a release under seal. Accord and satisfaction before breach is therefore a bad plea in covenant, because it amounts to a dispensation. But accord and satisfaction after breach is a good plea, because the subject matter of the payment and acceptance in satisfaction is, not the covenant,—which still remains entire,—but the damages sustained by the particular breach of it for which the action is brought. So, where the cause of action does not accrue merely by the deed, but by some matter of fact, as the accrual of rent. Vide M. 7 E. 3, Fitzh. Abr. Issue, pl. 9; H. 45 E. 3, fo. 4, pl. 9; *Joan Thirning's case*, T. 1 H. 5, fo. 6, pl. 1; *Donne v. Cornewall*, T. 1 H. 7, fo. 14, pl. 2; M. 10 H. 7, fo. 4, pl. 4; *Blake's case*, 6 Co. Rep. 43 b.; *Aldin v. Blague*, Cro. Jac. 99, S. C. per nom. *Eden v. Blake*, Noy, 110; *Snow v. Franklin*, 1 Lutw. 359, (overruling the opinion of Haughton J. as reported in *Rabbetts v. Stoker*, 2 Roll. Rep. 187, but not as reported in *Robards v. Stoker*, Palmer, 110); *Kaye v. Waghorn*, 1 Taunt. 430; *Cordwint v. Hunt*, 2 J. B. Moore, 660; *West v. Blakeway*, ante, vol. ii. p. 729, 3 Scott, N. R. 199, 218; Com. Dig. tit. Accord (A 1). Here, the consent in writing of the lessors, is expressly required.

(a)² Considered merely as a declaration, the letter would seem to amount to nothing more than a statement of the writer's opinion, well or ill founded, that the displanting of the hops would not be injurious to the property.

the letter was admissible in evidence with reference to the amount [264] of damages. *Hanson v. Parker* (1 Wils. 257); *Bauerman v. Radenius* (7 T. R. 663, 2 Esp. N. P. C. 653); *Rez v. Hardrick* (11 East, 578); *Roll v. Ansley* (16 East, 141); *Dowden v. Fowle* (4 Campb. 38); *Rez v. Lower Whitley* (1 M. & S. 636); *Harrison v. Vallance* (1 Bingham, 45, 7 J. B. Moore, 304); *Woolway v. Rowe* (1 A. & E. 114, 3 N. & M. 849); *Doe dem. Rolandson v. Wainwright* (8 A. & E. 691, 3 N. & P. 598); *Welstead v. Levy* (1 Moo. & Rob. 138).

Channell Serjt. None of the cases which have been cited, prove that the declarations of a third party are admissible, where it is not shewn that such party is really the sole party interested. Here, for anything which appeared, Lady Twysden may have been cestui que trust for life only, without power to deal with a covenant to the benefit of which other parties may have been entitled. He was then stopped by the court.

TINDAL C. J. It does not appear to me that the parties are sufficiently identified, upon the evidence, for us to be able to say that this is really and substantially the action of Lady Twysden. It does not appear what is the character and nature of the trust. If it were a little more investigated it may turn out that there are trusts in the settlement in which, among a variety of other interests, there is an estate for life in Lady Twysden, in respect of which these parties may be trustees for the receipt of rents and profit for her use and benefit; that is, only making them trustees for her to a certain extent: and of the damages to be recovered in this action, some may be such as would not go to her, but ought to be laid out on the estate. In that case, it would be hardly consistent with their duty as trustees, [265] either to bring, or to be restrained from bringing, an action, as she might think proper; as it might be their duty to do if they were simply trustees for her alone. I think, therefore, that the nature of the trust was not sufficiently investigated before this letter was put in. The case must go down for a new trial.

COLTMAN J. I am not prepared to say what the effect would be, provided it were clear that the whole of these damages, when recovered, were to go exclusively for the benefit of Lady Twysden. It may be, if that case were made out, that the evidence would be admissible. That will be a point to be considered when the question arises. At present, it seems to me that the matter does not appear by any means with that sort of distinctness which is necessary for the determination of that point. It may be that these damages, when recovered, instead of going into her pocket, ought to be laid out for the benefit of the estate, in which various persons, as remaindermen, are interested. In that case, the well-established principle, that the declaration of a stranger is inadmissible, would apply.

MAULE J. In this case the letter was given in evidence to prove certain matters therein stated. The common way of proving matters of fact on a trial before a jury, is, by a witness who may be examined on oath in open court: and no evidence, except that kind of evidence, is admissible to prove a matter of fact, unless it be a document or statement which has some special reason for its admissibility. This, however, is the declaration of a party who is not called as a witness (a). Undoubtedly, if she were the party on the record against whom her own declaration was given in evidence; [266] if this, for instance, had been the declaration of one of the plaintiffs themselves, it would have been admissible. The cases shew that the rule with respect to the declarations of a plaintiff, is to be considered as applying to a declaration made by a person not named as party to the record, but who is really and substantially interested as plaintiff; and in the same way, who, though not named as defendant, is, really and substantially, defendant. It is incumbent on a party offering such a letter in evidence, to shew, that the person making the declaration, (that is, here, Lady Twysden,) is the real plaintiff, although other parties appear as plaintiffs on the record. That however was not done here. It was very properly admitted, by my brother Shee, in answer to a question from myself, that there was nothing to shew that Lady Twysden was acting as the agent of the trustees in the management of this estate. There was no evidence, at all, of that kind. The argument has been put upon the only ground in which it could be supported, namely, that the plaintiffs are trustees for Lady Twysden. It certainly appears by the statement of the learned counsel for the plaintiffs, and also

(a) Lady Twysden was called by the defendant, upon her subpoena, but did not appear.

on the record, that in the lease in question the plaintiffs are described as the trustees of Lady Twysden. But it would be impossible to lay down so general a rule as this, that where trustees bring an action their *cetteux que trust* become plaintiffs, or that in an action against trustees, their *cetteux que trust* are defendants. The cases shew that, although the trustee and *cestui que trust* may have something in common, there may still exist that which will prevent them from being identified in substance and interest. In the absence of all proof that the plaintiffs, as such trustees, are so identified with their *cestui que trust*, I think that the letter was improperly received in evidence, and that there ought to be a new trial.

[267] CRESSWELL J. I am of the same opinion. This letter can only be received in evidence either as an act done, or as a declaration made, by Lady Twysden. It appears, by the proceedings in evidence, that the defendant held under a lease granted by the plaintiffs; in which certain covenants were entered into between the parties. I do not find any thing to shew that Lady Twysden had a right to interfere, or to control the management of the cultivation of that farm, or to do any act to defeat the right of the plaintiffs to sue on the covenants entered into with them by the defendant. Any act of hers would have been irrelevant, and would have had no bearing on the case. So, any declaration made by her is not admissible, there being no such unity proved between these parties as is necessary to let in the declaration of a person not appearing on the record. It seems to me, that the plaintiffs, in bringing and maintaining this action, are not acting as the agents of Lady Twysden; and that this rule must be absolute.

Rule absolute.

SMITH v. TRUSCOTT. June 15, 1843.

The court will not grant an attachment against a party served with a subpoena *ad testificandum*, unless, at the time of the delivery of the copy, the writ itself is produced; even when the witness, being an attorney, has previously evaded the service of such subpoena.

Bompas Serjt. obtained a rule nisi for an attachment against a witness, for not attending the trial in this case in pursuance of a subpoena, with which he had been served. The witness, who was an attorney, was stated to have previously evaded the service of the writ.

[268] Channell Serjt. This rule cannot be made absolute, as it is not shewn that the writ of subpoena was produced to the witness at the time he was served with a copy. *Garden v. Creswell* (2 M. & W. 319, 5 Dowl. P. C. 461).

Bompas Serjt. The witness, who was a professional man, did not require the production of the writ. No such objection was made at the time of the service. Although, in ordinary cases, the production of the writ is necessary, its production may be waived by a professional man, who is well aware that it is in his power to call for the writ, if he is not satisfied with the copy. The court will not allow one of its officers to evade the service of its process, and then to defeat that process on the ground of a slight informality in the service of the writ, which might not have occurred had it been possible to effect the service at an earlier period.

TINDAL C. J. The misconduct of the witness cannot be allowed to affect the result of this application. The fate of the rule must be governed by the practice of this court; which agrees with that of the Exchequer in the case cited. But I think that, under the circumstances, the rule should be discharged without costs.

Per curiam. Rule discharged, without costs.

[269] WHALLEY v. WILLIAMSON AND SMITH. June 15, 1842.

[S. C. 6 Scott, N. R. 948.]

Pending the taxation of an attorney's bill he petitions for and obtains his discharge under the insolvent debtors' act. More than a sixth is taxed off. The attorney is personally liable for the costs of the taxation, notwithstanding his discharge.

In 1840, Smith brought an action against Passman for a debt of 124l. 2s. 3d., to which Passman pleaded a set off, for work done by him, as attorney for Smith. Passman

delivered signed bills, amounting to 141l. 1s. 9d., and on the 11th of April, Smith obtained the usual order for taxation. Before the taxation was completed, Passman petitioned the insolvent debtors' court, and obtained his discharge. In his schedule was set forth an undisputed debt of 124l. 2s. 3d. to Smith. Smith applied for a dividend, which was refused until the taxation should be completed. The taxation was accordingly proceeded with, and instead of 141l. 1s. 9d., the amount found to be due from Smith to Passman was only 23l. 16s. 2d. This sum the insolvent commissioner deducted from the 124l. 2s. 3d.; and Smith received a dividend upon the balance of 100l. 6s. 1d. The costs of the taxation amounted to 25l. 2s. 10d.

Bompas, having obtained a rule calling upon Passman to shew cause why he should not pay Smith the costs of the taxation and of that application,

Talfourd Serjt. now shewed cause, upon his affidavits stating that the greater part of the costs of taxation had been incurred before Passman petitioned for his discharge, and that Smith had had ample time to complete the taxation before the petition was presented.

Passman having ceased to have any interest in the result of the taxation, Smith had no right to proceed with it at his, Passman's, expense. To hold Passman liable for the costs of the taxation, would be to deprive [270] him of the benefit to which he was entitled under the statute.

Bompas Serjt. in support of the rule. This is an application of course. The court has no power to deprive Smith of his costs, the amount of which did not become due from Passman until the conclusion of the taxation, which was after Passman had obtained his discharge. The assignee cannot be liable for the costs of the taxation. The learned commissioner has therefore properly deducted the amount of the costs as taxed from the admitted debt due from Passman to Smith. Smith's remedy is only against Passman. He is to receive the indemnity which the statute gives him, and the burthen of paying which it imposes on the attorney who has set up such an unjust and exorbitant demand.

The learned serjeant referred to *Higgins v. Woolcott* (a).

TINDAL C. J. If no insolvency had intervened, the costs of the taxation would have been set off against the amount of the taxed costs. But, upon the whole, it appears to me to be more safe to follow the words of the act (b). The rule will, therefore, be made absolute. I think, however, that, under the circumstances, it should be without costs.

The rest of the court concurring,

Rule absolute, without costs.

[271] HUGHES v. POOL. June 15, 1843.

Where a defendant under terms to plead issuably, delivers a plea so framed as to leave it doubtful whether any answer is given to one of the counts of the declaration, the plaintiff may sign judgment generally.

Assumpsit. The declaration contained two counts; one upon a bill of exchange accepted by the defendant, the other upon an account stated. The defendant, who was under terms to plead issuably, pleaded five pleas. By the first, which was pleaded to the first count, he traversed the acceptance; by the second and third, he traversed two indorsements; the fourth plea was a special plea of fraud and covin; the fifth plea stated that the bill was drawn for the accommodation of the drawer, and was accepted without consideration, and that the bill was indorsed by the drawer, and the first indorsee without consideration. Each of the last four pleas commenced with the

(a) 5 B. & C. 760. S. C. per nom. *Dickens v. Woolcott*, 8 D. & R. 589.

(b) The twenty-third section of 2 G. 2, c. 23, concludes thus:—"And the said respective courts (i.e. any courts of law or of equity in England) are hereby authorized to award the costs of such taxation to be paid by the parties, according to the event of the taxation of the bill, that is to say, if the bill taxed be less by a sixth, then the bill delivered with the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills."

formula—"And for a further plea," without stating whether it was addressed to the first count, otherwise than as appeared by the nature of the defence set up.

There was no plea purporting to be addressed to the second count.

The defendant being under terms to plead issuably, the plaintiff signed judgment.

Shee Serjt., having obtained a rule to shew cause why the judgment should not be set aside, for irregularity,

Bompas Serjt. now shewed cause. The pleas affording no answer to the second count, the plaintiff was entitled to treat them as a nullity. [Tindal C. J. Pleading issuably means pleading issuably and honestly to the whole declaration. A defendant under terms to plead issuably, is not at liberty to deliver a plea tending to involve the plaintiff in the intricacies of a demurrer.]

[272] Upon this intimation of the opinion of the court, Shee Serjt. produced an affidavit of merits.

TINDAL C. J. The defendant may be let in upon payment of costs, taking short notice of trial, adding a plea of non assumpsit to the second count, and limiting the special pleas to the first count.

Rule accordingly (a)¹.

[273] DOE DEM. COCK v. ROE. June 15, 1843.

An affidavit of the service of a declaration in ejectment upon two tenants holding in severalty, distinct portions of the premises, must shew that each was served. A statement that they were served, is insufficient.

Bompas Serjt. moved for judgment against the casual ejector, upon an affidavit, stating that the premises were in the possession of several distinct occupiers, as to two of whom it was objected by the master, that the affidavit did not shew that each of the tenants was served, and that, consistently with the allegation, namely, that they had been served, one copy only of the declaration might have been served in point of fact. [Maule J. The two tenants may have different landlords (a)². The affidavit is clearly insufficient.]

Per Curiam. Rule refused as to these tenants.

(a)¹ Supposing the words "and for a further plea," necessarily to import that a plea so introduced, is pleaded to the whole action, the last four pleas would be bad as containing no answer to something which they professed to answer; and as the defendant was under terms to plead issuably, the plaintiff, instead of demurring, might sign judgment. But if the word "further," in the subsequent pleas, is to be considered as indicating that these pleas were addressed to the same subject matter as the first, (which is perhaps the more natural construction of the language of those pleas,) the case would stand thus:—there would be a declaration consisting of two counts, with issuable pleas to the first count, and no plea to the second count. In such a case, if the defendant was not under terms to plead issuably, the plaintiff would be bound to reply or demur to the pleas, and to take judgment upon the second count by nil dicit. If he pleaded or demurred without taking such judgment, the whole action would be discontinued. The defendant would however be perfectly justified in omitting to put upon the record any answer to the second count, no one being bound to plead to a demand, the correctness of which he has neither the ability nor the wish to dispute. If an action is brought upon a bill of exchange which the defendant has accepted, and for the price of a horse which he never bought, the plaintiff would not appear to have any legitimate motive for compelling the defendant to traverse or to confess and avoid his acceptance, whether the latter is or is not under terms. But a defendant under terms to plead issuably has no right to deliver a plea upon which a reasonable doubt may arise, whether the plaintiff is entitled to sign judgment as to part of the declaration, or whether he ought to demur.

(a)² Vide 11 G. 2, c. 19, s. 12, which requires tenants to give notice to their landlords of declarations in ejectment, served upon them, under the penalty of three years' improved or rack rent.

This provision does not apply to the case of the tenant of a mortgagor served with a declaration in ejectment on the part of the mortgagee. *Buckley v. Buckley*, 1 T. R. 647. There, although it is not so stated, the party served with the declaration, may

[274] F. S. THOMAS v. N. DUNN. June 15, 1843.

A rule nisi having been obtained by a defendant for depositing with the master of the court, a contract declared upon, with liberty for the defendant, his attorney and witnesses, to inspect, on an affidavit stating that the signature thereto was a forgery, the court made the rule absolute to the extent only of directing that the defendant and his witnesses should have inspection of the documents in the hands of the plaintiff's attorney, upon payment of costs.—The application should have been made at chambers.

Assumpsit. The declaration stated that, before, and at the time of, the making of the promise thereafter next mentioned the defendant proposed to arrange a certain collection of the defendant, in a certain building, and to have the exhibition of the said collection of the defendant established and conducted, to wit, at London; that, at the time of the making of the said promise, the defendant requested and authorised the plaintiff to make such arrangements and agreements as might appear to the plaintiff to be for the defendant's interest; that thereupon, to wit, on the 30th day of September 1841, in consideration that the plaintiff would enter into the employ of the defendant as, and would be and act as, the agent of the defendant for the purpose of superintending the building in which the defendant proposed to arrange his said collection as aforesaid, and for the purpose of establishing and conducting the exhibition of the said collection whilst in London, at a certain salary, to wit, the salary of six guineas by the week, the defendant promised the plaintiff, to retain and employ the plaintiff as the agent of the defendant for the purposes aforesaid, and to continue to retain and employ him as such agent as aforesaid, whilst the said exhibition should be in London, at a salary of six guineas by the week; and that the termination should be dependent on the due fulfilment of the engagements of the plaintiff as such agent, and upon the ability of the defendant to pay the plaintiff his salary from the receipts of the said exhibition; that the collection was afterwards, to wit, on, &c. arranged in the [275] said building; that, although the defendant did then retain and employ the plaintiff to be, and he the plaintiff entered into the employ of the defendant, as, and then became and was, and acted as, the agent, for the defendant for the purposes aforesaid; and although the plaintiff did then and thereafter, at all times, until the dismissal thereafter mentioned, duly fulfil the engagements of the plaintiff, as such agent, and duly perform the purposes for which he was so appointed as aforesaid, and although, on a certain day after making the said promise, and before the said dismissal, to wit, on the 1st day of January 1842, and thence until and after the time of the said dismissal, and thence until the commencement of this suit (being a period of more than a week, to wit, a period of twenty weeks) the said collection was, and the said exhibition thereof took place and was, in London; and although the receipts of and from the said exhibition were, at the time of the dismissal thereafter mentioned, and thence for a period of more than a week, to wit, to the commencement of the suit, sufficient, and much more than sufficient, to pay the plaintiff his salary; and although the defendant, during the time aforesaid, was able to pay the plaintiff the said salary from the receipts of the said exhibition; and although the plaintiff was at, and at all times after, the said dismissal, ready and willing, and then offered to the defendant, to continue in the said employ, and to be and act as such agent as aforesaid, and to fulfil the engagements of the plaintiff as such agent as aforesaid, and to conduct the exhibition of the said collection whilst in London; of all which the defendant, before and at

be presumed to have come into possession antecedently to the mortgage; in which case he would, by the operation of the mortgage conveyance, be, from that time, tenant, not to the mortgagor but to the mortgagee, to whom the reversion had, by the mortgage deed, been assigned. The principle of the judgment would, however, apply to a person let into possession by the mortgagor subsequently to a mortgage.

But even as against the tenants of a mortgagor, or as against persons holding *proprio jure*, such an affidavit as that upon which the motion in the principal case was made would appear to be insufficient, there not being necessarily any privity between the distinct occupiers of several tenements, which the claimant in ejectment may choose to make the subject of the demise.

the time of the said dismissal, and at all times, had notice. Yet the defendant did not, nor would, continue to retain and employ the plaintiff as such agent; but then, to wit, on the 1st day of January 1843, dismissed and discharged the plaintiff from so being such agent, and then and thence [276] at all times to the commencement of the suit, refused to allow the plaintiff to be or to act as such agent, or to pay the plaintiff the said salary of six guineas by the week; and, by means of the said dismissal and discharge, and the said breach of the defendant's said promise, the plaintiff hath lost the salary, benefits, profits, and advantages which he would otherwise have acquired and derived from continuing to be and to act as such agent.

The defendant pleaded, first, non assumpsit; secondly, that after the contract and promise, and before any breach thereof, to wit, on the 30th day of August 1841, the said contract and promise were mutually rescinded by the plaintiff and the defendant: verification; thirdly, fraud and covin: verification.

The replication joined issue upon the first plea, and took issue on the rescission and fraud alleged.

Shee Serjt., in the early part of the term, obtained a rule, calling upon the plaintiff to shew cause, why the contract declared upon should not forthwith be deposited with the masters of the court, with liberty to the defendant, his attorney and witnesses, to inspect and examine the same,—upon an affirmation of the defendant, stating that the signature, which alone he had been allowed to inspect, was not in his handwriting, or written with his permission or knowledge, or by his authority, and that he never verbally, or in writing, made any such contract. Although such applications were formerly refused, they are now granted at chambers almost as a matter of course. The learned serjeant referred to *Jessell v. Millingen* (1 Moo. & Sc. 605).

Bompas Serjt. now shewed cause, upon an affidavit stating, that a copy of the agreement had been delivered [277] by the plaintiff's attorneys to the defendant's attorneys, with an offer of an inspection of the original in the hands of the plaintiff's attorneys.

The court never takes a document belonging to a suitor out of his possession. Where a strong case of forgery is stated, the court goes no further than to allow the document to be inspected in the hands of the party to whom it belongs (a).

Shee Serjt., was heard in support of his rule.

[278] Tindal C. J. This rule asks for too much. I am not aware of any case which would warrant our compelling the plaintiff to deposit the contract with the

(a) In actions upon instruments under seal, and in cases where the defence rests upon bonds and other deeds, and in cases where the defendant justifies or excuses himself, under an instrument under seal, the party is bound to bring the instrument into court, and to produce it before the justices there, the formula being, indifferently, either *profert in curiam* or *profert in curiâ*. The instrument is supposed to be in court during the term in which the *profert* is made; and, if its authenticity be denied, it ought to remain there until that question is determined. "Note, that when a deed is denied (*dedit*) it remains in court, because it must be tried, and it shall be delivered to the inquest to see the deed and the manner in which it is made (*le manier de cet fait*). But when the deed is confessed, it shall be delivered to the parties." M. 38 H. 6, fo. 13, pl. 27. And see Co. Litt. 231 b.; *Wymark's case*, 5 Co. Rep. 74. It is said, that during the time the deed remains in court therefore, it is as much in the power of the court to grant *oyer* of a deed as of a writ; *Simpson v. Garside*, 2 Lutw. 1644; and see *Roberts v. Arthur*, 2 Salk. 497, Com. Dig. Pleader (P. 1).

It would, therefore, seem that with respect to deeds of which *profert* is made, the party against whom a deed is pleaded would have a right to examine and inspect the instrument during the time it was supposed to be in court. Yet in *Chetwind v. Marnell*, 1 B. & P. 271, this court refused to order the plaintiff, in an action on a bond, to allow an officer of the stamp duties to inspect it, on a suggestion that it was forged. In that case there had been *profert*, *oyer*, and a plea of *non est factum*. But none of these circumstances appear to have been noticed by the counsel or by the court; and the motion was treated as an attempt to make the plaintiff produce, out of his possession, that which might be the means of convicting him of a capital felony. And see *Hildyard v. Smith*, 1 Bingh. 451, J. B. Moore, 586; *Smith v. Winter*, 3 M. & W. 309, 6 Dowl. P. C. 386; *Woolner v. Devereux*, 3 Scott, N. R. 224, 9 Dowl. P. C. 672.

masters (a)¹. The rule may be made absolute for inspection by the defendant and his witnesses in the usual way, upon payment of costs. The defendant should, however, have gone to a judge at chambers.

Per curiam. Rule absolute accordingly (b).

MOREDON v. WYER AND FINLEY. June 15, 1843.

In an action against A. and B., who are partners, service of notice of declaration by delivering a notice to A. at the place of business, and putting into his hands a similar notice, with a request that he will deliver it to B., is not a good service as against B. Interlocutory judgment having been signed against both, it was set aside as against B., the costs of the application to be costs in the cause.

Notice of declaration in an action for goods sold and delivered, was served personally on the defendant Wyer, at the place at which he, and the other defendant, Finley, carried on business as pawnbrokers. The notice addressed to Finley was left with Wyer, with a request that he would give it to Finley. This he undertook to do; but whether he had done so or not, [279] did not appear. Interlocutory judgment having been signed,

Halcombe Serjt., on behalf of Finley, moved for a rule calling upon the plaintiff to shew cause why this judgment should not be set aside as to him, with costs. He referred to Archb. Pract. p. 141, 7th ed. A rule nisi having been granted,

Bompas Serjt. now shewed cause. Service at the place where the joint business was carried on, is sufficient. Though the affidavit, on which the rule was obtained, does not shew that there was a partnership debt, in the absence of any suggestion to the contrary, that will be presumed to be the case (a)². [Tindal C. J. Would service upon a clerk or a servant at the place of business have been sufficient?] It is submitted that it would (vide *Hoare v. Robinson*, 9 Dowl. P. C. 533).

Halcombe Serjt. was heard in support of the rule.

TINDAL C. J. The interlocutory judgment must be set aside as regards Finley. The costs of this application may be costs in the cause (c).

Per curiam. Rule absolute accordingly.

[280] SAYER v. HERBERT. June 15, 1843.

In debt on judgment for the costs of a demurrer in an action in B. R. upon which error was brought, the court refused to stay the proceedings until the writ of error should be disposed of, but ordered, that upon the defendant's giving the plaintiff judgment, no execution should issue until the errors were determined.

Debt, on a judgment in the Queen's Bench, for 24l. 16s., the costs of a demurrer, in an action in which Herbert was plaintiff, and Sayer defendant.

(a)¹ An order was afterwards made in Chancery for the depositing of the contract with Mr. Maugham, the Secretary of the Law Society.

(b) Samuel Mucun and Muriel Judea, petunt versus Herbertum filium Herberti, 300l. de catallis de debito Israel: per quandam cartam; et producit (sic) duos Christianos, et duos Judeos, paratos ad hoc probandum, sicut curia consideraverit. Herbertus dicit quod carta illa falsa est, &c. Et producit sigillum suum eburneum, et plures cartas, sigillo illo sigillatas, tam de abbaciis quam de confirmacionibus terrarum. M. 10 Johann. Abbrev. Plac. in Dom. Cap. Westm. asservat. 62 a. As to this work, vide ante, 253 (a), 355, post.

(a)² Quære, whether one partner has an implied authority to accept process for another, even in respect of a partnership debt. But until there has been a verdict or a confession, it does not appear whether any debt exists. To allow one defendant to accept process for his partners on the ground of the action being brought for a partnership debt, is to allow one partner to bind another by an admission of the existence of a particular partnership debt.

(c) In the, not unusual, event of the plaintiff's succeeding in the cause, the defendants would have to pay the costs incurred by Finley in resisting irregular proceedings, and also the costs incurred by the plaintiff in attempting to hold the advantage which he had improperly gained.

Manning Serjt., upon an affidavit stating that before the commencement of this action, Herbert had brought a writ of error upon the judgment, moved to stay the proceedings in this court until the writ of error should have been disposed of. The writ of error is not pleadable either in abatement or in bar of the action. *Christie v. Richardson* (3 T. R. 78), *Benwell v. Black* (ib. 643), *Snook v. Mattock* (5 Ad. & Ell. 239, 6 N. & M. 783).

A rule nisi having been granted,

Bompas Serjt. now shewed cause. The court will not prevent the plaintiff, who has no security by bail, from exercising his undoubted right to bring an action upon a judgment obtained by him. [Tindal C. J. Though we can suspend the issuing of execution pending the writ of error, I doubt whether we have the power of staying the proceedings.] The plaintiff is willing to stay his proceedings, provided the defendant will give security *judicatum solvere*. [Cresswell J. To require that, would be, in effect, to require bail in error. The only condition we could impose would be, to require that the defendant should give judgment, with a stay of execution. But if judgment is given, how are you both off?] With that the plaintiff would be satisfied. The learned serjeant referred to *Bates v. Lockwood* (1 T. R. 637).

[281] Manning Serjt., in support of the rule. The plaintiff is not entitled to the terms which he now seeks to obtain. In the present state of the law, if there is no substantial ground of error, the plaintiff will be at liberty to issue execution, and this action is unnecessary and vexatious. If any substantial ground of error exists, it is unreasonable that the plaintiff, instead of waiting until the errors are disposed of, should require a second judgment to be recorded against the defendant.

Per curiam :—The proper course will be, for the defendant to give the plaintiff judgment in this action, with a stay of proceedings until the errors are determined.

Rule absolute accordingly (a).

End of Trinity Term.

[282] CASES DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY VACATION, IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in banco in this vacation were, Tindal C. J., Maule J., Coltman J., Erskine J.

DOE DEM. BACON AND ANOTHER v. DAME ISABELLA ANN BRYDGES. June 29, 1843.

[S. C. 7 Scott, N. R. 333; 13 L. J. C. P. 209.]

In ejectment for lands in Kent, the plaintiff's case depended upon shewing that the lands in question had been disavell'd by a private act, which was alleged to have been passed in the 2 & 3 Edw. 6. The act, after proper search, could not be found. As secondary evidence of its contents, there was produced an office-copy of a special verdict returned upon the trial of a feigned issue in Hil. 13 & 14 Car. 2, wherein the jury found that at a parliament, &c., holden, &c., it was enacted, &c., in these words following, to wit, &c.; the act was then set out, whereby certain lands in Kent, including some held by one W. T., were disavell'd. There was evidence to identify the lands in question with those held by a person of that name at the time the act was stated to have passed.—Held, that the special verdict, being *res inter alios acta*, was not admissible *per se*, and that it was not receivable as containing an authenticated copy of the act, inasmuch as it was strictly the finding of a matter of fact, not professing to set forth a copy of the act according to its tenor, nor stating the title of the act, so as to identify it with the lost act.—In order to shew that the act in question had been passed, a calendar was put in, purporting to contain sixty titles of acts passed in the 2 & 3 Edw. 6, of which that which was numbered 40, purported to be "An act for disavelling lands in Kent." It was proved to be the practice to enter upon this calendar, acts of parliament with their respective numbers, as soon as they received the royal assent. The earlier part of this calendar was made in 1640.—*Quære*, whether this calendar was admissible.

Ejectment, for certain lands in Midley, (part of Romney Marsh,) in the county of

(a) And see *Wade v. Rogers*, 2 W. Bla. 780.

Kent, laying the demise from parties claiming title under a con-[283]-veyance from the heir of the surviving trustee of the mortgagee of Sir Samuel Egerton Brydges (vide post, p. 301).

At the trial before Lord Denman C. J. at the last assizes for the county of Kent, it appeared that the lessors of the plaintiff claimed under a conveyance by the representative of the surviving mortgagee of Sir Samuel Egerton Brydges; and that the defendant, who was the widow of Sir John William Head Brydges, the brother of the mortgagor, defended for a moiety of the lands, claiming under the will of her husband.

The principal question in the case was, whether the lands in question had been disgavelled. The earliest document in point of date put in evidence on behalf of the plaintiff, was a fine of Hilary term 37 Hen. 8, between "William Twysden" plaintiff, and Richard Scot, Gent., and Mary his wife, deforcianta, of 300 acres of fresh marsh, and 200 acres of salt marsh, in Mydley, Brokeland, and Ivechurch, Kent.

It was then proposed to shew that in the 2d and 3d Edw. 6 a private act was passed, by which all the manors, lands, tenements, &c. of "William Twisenden" (inter alios) were disgavelled.

The act itself was not produced; and in order to render secondary evidence admissible, it was proved [284] that a fruitless search had been made among the parliamentary rolls in the enrolment office, the rolls of original acts in the parliament office, and the records in the House of Lords, and in the Rolls Chapel. A document was then produced by a clerk of the House of Lords, headed "Long Calendar, of Acts passed from 12 H. 7 to 33 G. 2," the earlier part of which appeared to have been compiled in the year 1640. It also appeared that in the office, another calendar was kept, called the Short Calendar; and it was shewn that the practice had been to enter upon the Long Calendar such acts as were passed, numbered in succession, as soon as they received the Royal Assent, but not before. The Long Calendar was objected to on the part of the defendant, upon the ground that it did not appear by what authority it had been compiled; and that the entries therein were not contemporaneous with the passing of the statutes. The document was however admitted. It appeared from it that in the 2 & 3 Edw. 6, sixty acts were passed; and it contained the title of an act "for disgavelling lands in Kent;" which act was numbered 40. The roll of that session contained only fifty-four acts; and No. 40 was not among them, though Nos. 39 and 41 were. It was further proved, that in the journals of the House of Commons of the session 2 & 3 Edw. 6, were the following entries; "21st Feb. 1548. A bill for gavelkind lands in Kent;" "25th Feb. Bill for gavelkind;" which last entry was repeated under the date of the 26th, with the letter J. in the margin, which was said to denote the third reading of the bill.

It was then proposed to put in some extracts from the printed journals of the House of Lords, of the session in question; but this evidence was objected to on the part of the defendant, and rejected by his lordship, as it appeared that the original journals of that time were in manuscript, and that such journals were in [285] existence (or at least were not shewn not to be so), and also that the inquiry after them had not been made of the officer having charge of them, who was not called.

The secondary evidence tendered of the act in question was, first, an examined copy of a record in the cause of *Wiseman v. Cotton* (reported 1 Lev. 79, Hardr. 325; Sir T. Raym. 59, 76; 1 Keb. 288, 372, 492, 505; 1 Sid. 77, 135), in Hilary term, 13 & 14 Car. 2, which was kept among the records of the court of King's Bench, under the charge and superintendence of the Master of the Rolls, by authority of the act of the 1 & 2 Vict. c. 94. This record contained a special verdict, finding that in the 2 Edw. 6, an act was passed (which was set out in hæc verba) for the purpose of disgavelling the lands of several parties, including "William Twisenden;" but no judgment (b) was set forth upon this record (c).

[286] On the part of the defendant it was objected, that this record was not admissible against her, being *res inter alios acta*; and also that it was incomplete, as it

(b) As to judgment in cases of feigned issues, vide *Snook v. Mattock*, ante, 280

(c) Which contained as follows, the original being in Latin, except the recital of the disgavelling act, which was in English. "Roll. 476.

"Pleas, before our Lord the King at Westminster, of the term of St. Hilary, in the thirteenth and fourteenth years of the reign of our Lord Charles the Second, by

[287] contained no judgment, but only the finding of the jury. 1 Stark. Ev. 298, 2d ed.

On the part of the plaintiff it was urged, that the re-[288]-cord was admissible as such, or at least that it was so as containing a copy of the lost act, which was free

the grace of God of England, Scotland, France, and Ireland, king, defender of the faith, &c.

Witness, ROBERT FOSTER.

ROBERT ROLLE

"As yet of the term of St. Hilary.

Witness, R. FOSTER.

"Kent (to wit): Be it remembered, that, on Thursday next after the octave of St. Hilary in this same term, before the Lord the King at Westminster, came Ralph Wiseman, gentleman, by William Livesay, his attorney, and brought here into the court of the said Lord the King, then here, his certain bill against John Cotton, knight and baronet, in the custody of the marshal, &c., of a plea of trespass upon the case; and there are pledges of prosecution, to wit, John Doe and Richard Roe.

"Which bill followeth in these words: to wit, Kent, to wit, Ralph Wiseman, gentleman, complains of John Cotton, knight and baronet, being in the custody of the marshal, &c., for this, to wit; that whereas, on the first day of June, in the 13th year of the reign of the Lord Charles the Second, now King of England, &c. at Farningham in the county aforesaid, a certain discourse was had and moved between the said Ralph and John, of and concerning the manor of Farningham, in the county of Kent, and of and concerning divers lands and tenements in Farningham and elsewhere, in the county of Kent, devised to the said John by Anthony Roper, knight, then deceased, as the said John then asserted: and thereupon the said Ralph affirmed that the said manor of Farningham, and the said lands in Farningham and elsewhere, in the said county of Kent, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony Roper were not devisable by the custom of Kent: upon which the said John, afterwards, to wit, on the said 1st day of June in the thirteenth year aforesaid, at Farningham aforesaid, in consideration that the said Ralph, at the special instance and request of the said John, had paid to the same John 12d. of lawful money of England, undertook and to the same Ralph then and there faithfully promised, that if the said manor of Farningham, and the lands in Farningham and elsewhere, in the county of Kent, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony Roper, were not devisable by the custom of Kent, then he the said John, 40s. of lawful money of England to the same Ralph, when he thereto afterwards should be requested, well and faithfully would pay and content; and the same Ralph in fact saith, that, although the said manor of Farningham, and lands in Farningham and elsewhere, in the county of Kent, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony were not devisable by the custom of Kent aforesaid; nevertheless the said John, his promise and undertaking aforesaid not regarding, but contriving and fraudulently intending the said Ralph in this behalf craftily and subtilly to deceive and defraud, the said 40s. to the said Ralph hath not yet paid; although to do this the said John by the aforesaid Ralph afterwards, to wit, on the 1st day of August, in the thirteenth year aforesaid, at Farningham aforesaid, was requested; but he to pay him hath hitherto wholly refused and still refuses; whereby the same Ralph saith that he is injured, and hath damage to the value of 5l., and thereof he brings suit, &c.

"And the said John, by John Hawkins, his attorney, comes and defends the force and injury, when, &c., and saith that the said Ralph, his action aforesaid thereof against him, ought not to have or maintain; because he saith that the said manor of Farningham and lands in Farningham and elsewhere, in the county of Kent, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony were devisable by the custom of Kent; and this he is ready to verify, wherefore he prays judgment if the said Ralph, his aforesaid action thereof against him ought to have or maintain, &c.

"And the said Ralph saith, that he by any thing by the said John above in pleading alleged, from having his action aforesaid thereof against him ought not to be precluded, because he saith that the manor of Farningham and lands in Farningham and elsewhere in the county of Kent, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony were not devisable by the custom of Kent, as the same

from suspicion, and authenticated by the verdict of a jury; [289] and *Freeman v. Phillips* (4 M. & S. 486), and *Bullen v. Michel* (2 Pri. 399, 4 Dow. 297), were relied upon.

The record in question was admitted by his lordship.

Ralph by his declaration aforesaid above hath alleged; and this he prays may be inquired of by the country. And the said John thereof likewise, &c.

"Therefore, let come thereon a jury before the Lord the King, at Westminster, on Wednesday next after eighteen days of Easter, and who neither, &c., and to recognise, &c., because as well, &c.; the same day is given to the parties aforesaid, there, &c. At which day, before the lord the king at Westminster, came the parties aforesaid by their attorneys aforesaid; and the sheriff returned the writ aforesaid, in all things served and executed, together with the panel of the names of the jurors of whom none, &c. Therefore it was commanded to the sheriff that he should distrain the jurors aforesaid, by all their lands, &c.; and that of the issues, &c., so that he should have their bodies before the Lord the King at Westminster on Tuesday next after five weeks of Easter, to make a jury aforesaid between the parties aforesaid, of the plea aforesaid. The same day is given to the parties aforesaid, there, &c.

"At which day before the Lord the King at Westminster, came the parties aforesaid by their attorneys aforesaid. And the jurors of that jury being called likewise came, who to speak the truth of the premises having been elected, tried, and sworn, say upon their oath, that in the parliament of Lord Edward the Sixth, late King of England, at Westminster, in the county of Middlesex, on the 4th day of November, in the second year of his reign, held and published by prorogation, it is (amongst other things) enacted, ordained, and established by the authority of the same parliament, in these words following; that is to say, 'The King our Sovereigne Lord, for diverse consideracions, his Majestie mooveing, by the authoritie of this his High Court of Parliament, enacteth, ordaineth, and establisheth, that as well of the lordshippes, mannors, lands, tenements, woods, pastures, rents, services, revercōns, remainders, advowsons, and all other hereditaments sett, lying, and being within the county of Kent, of the which Sir Thomas Cheyney, Knight of the Most Honorable Order of the Garter; Sir Anthony Santleger, Knight of the Order; Sir Robert Southwell, Knight; Sir John Baker, Knight, Chancellor of the Tenthies; Sir Edward Wootton, Knight; Sir Roger Chomeley, Knight, Chiefe Baron of the King's Majesties Exchequer; Sir Thomas Moyle, Knight; Sir John Gate, Knight; Sir James Hales, Knight, Serjeant-at-law; Sir Walter Hendle, Knight; Sir George Harper, Knight; Sir Edmund Walsingehame, Knight; Sir Henry Isley, Knight; Sir John Guylford, Knight; Sir Humfrey Style, Knight; Sir George Blage, Knight; Sir Thomas Kempe, Knight; Sir Martin Bowes, Knight; William Roper, Esquire; Thomas Culpepper, of Begebury, Esquire; Thomas Wilford, Thomas Harlackenden, Reynold Pakham, John Culpepper of Aylesford, William Twisenden, Thomas Darrell of Scotney, Robert Rudston, Thomas Roberts, Herbert Finch, William Culpepper, Stephen Darrell, Richard Covert, John Mayne, Thomas Watton, John Tuston, Xpöfer Blower, Walter Mayne, Thomas Harman, Thomas White, Thomas Lovelace, Esquires; Thomas Hendle, Gent.; Thomas Culpepper, Gent, sonne and heire apparent of the said John Culpepper, Peter Hayman, and Thomas Argall, Gent.; or any of them, is or be seised to his or their use or uses in fee-simple or in fee tayle, the which bee nowe of the tenure or nature of gavill kynde, and heretofore have bene departed, or bee departable, betweene heires males by the custome of gavilkind, shall from henceforth bee clearly changed from the said custome and nature of gavelkind, and in no wise hereafter be departed or departible by the said custome, tenure, and nature of gavelkind betweene heires males; but shall from henceforth be, to all intents, construccōes, and purposes as landes att the comon lawe of this realme, and in such manner and forme as if the said lordshippes, mannors, lands, tenements, and other hereditaments had never bene of the said nature of gavilkind; any usage or custome in the said county of Kent, heretofore had, accepted, or used to the contrary notwithstanding; savinge always and reserving to all and every son and sons, and bodies politique and corporate, and to their heirs, assignes, and successors, and to every of them, other than the said Sir Thomas Cheyney, Knight, &c. &c. (setting out the former names, including that of William Twisenden), or any of them, and to every of them, against any other of them, all such right, title, interest, use, possession, reversion, remainder, increase, condicōns, leases, fees, offices, rents,

[290] On behalf of the plaintiff it was next proposed to put in evidence a document, purporting to be a copy of the same act, which came from the custody of a Mr. Milner, the proprietor of an estate called Preston Hall, in the county of Kent, and lord of the manor of Preston, in the same county. This document, which was proved to be in the handwriting of the time of Queen Elizabeth or King James I., was found among the muniments of title in the possession of Mr. Milner, in whose family the manor of Preston had been for about a century. For the purpose of connecting some of the lands men-[291]-tioned in this copy of the act, with those held by the Milner family, the counsel for the plaintiff put in an indenture, dated the 5th of November, 3 & 4 Phil. & Ma., purporting to be a confirmation of the estate of Thomas Culpepper, (suggested to be the person mentioned in the copy of the act, as the son and heir of John Culpepper of Aylesford,) by Sir Thomas Pope, therein described as

annuities, commons, and all other comodities and hereditaments whatsoever they or any of them might, could, or ought to, have had, before the makinge of this act, or to or in any of the said lordshippes, mannors, landes, tenements, woods, pastures, rents, services, remainders, advowsons, and other the premisses, as if this present act had never beene had or made.' As by the act aforesaid, amongst other things, appeareth. And the jurors aforesaid further upon their oath say, that the said Henry Isaley, in the aforesaid act of parliament named, at the time of the enactment of the act of parliament aforesaid, was seised, in his demesne as of fee-simple, of the aforesaid manor of Farningham and other lands in the declaration aforesaid mentioned; and that the aforesaid manor and tenements, at the time of the enactment of the aforesaid act of parliament, were of the nature and tenure of gavelkind, and were, before, departed and departible between the heirs male by the custom of gavelkind; and that all lands in the county of Kent of the nature of gavelkind were devisable by custom: and the jurors aforesaid further upon their oath say, that the manor of Farningham and other the lands and tenements in the declaration aforesaid mentioned, afterwards, by mesne conveyances, came to the aforesaid Anthony Roper, Knight, in the declaration aforesaid named, and that the said Anthony Roper, Knight, was seised of the said manor and lands in the declaration aforesaid mentioned, in his demesne as of fee-simple; and that the said Anthony Roper, Knight, afterwards, to wit, the 20th day of January, in the seventeenth year of the reign of Lord Charles the First, late King of England, &c., at Farningham aforesaid, of such estate in the aforesaid manor and lands in the declaration aforesaid mentioned, as aforesaid, died seised. And if upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall appear to the court of the Lord the King here before the King himself that the aforesaid manor of Farningham and lands in Farningham, and elsewhere in the county of Kent, whereof the said Anthony Roper, Knight, died seised, at the time of the death of the said Anthony, were not devisable by the custom of Kent, then the same jurors say upon their oath aforesaid, that the aforesaid manor of Farningham and lands in Farningham and elsewhere in the county of Kent, in the declaration aforesaid mentioned, whereof the said Anthony Roper, Knight, died seised, at the time of the death of the said Anthony, were not devisable by the custom of Kent, as the said Ralph above against the said John Cotton hath declared: and they assess the damages of the same Ralph, on occasion of the premises in the declaration aforesaid mentioned, beyond his costs and charges by him about his suit in this behalf expended, at 40s., and for those costs and charges at 40s. And if upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall appear to the court here before the King himself that the manor of Farningham and lands in Farningham and elsewhere in the county of Kent, in the declaration aforesaid mentioned, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony, were devisable by the custom of Kent, then the same jurors say upon their oath aforesaid, that the aforesaid manor of Farningham and lands in Farningham and elsewhere in the county of Kent, in the declaration aforesaid mentioned, whereof the said Anthony Roper died seised, at the time of the death of the said Anthony, were devisable by the custom of Kent, as the said John Cotton above in pleading hath alleged. And because the court of the Lord the King here, of rendering their judgment of and upon the premises, is not as yet advised, a day thereon is given to the parties aforesaid to appear before the Lord the King at Westminster unto the . . . day next after . . . to hear their judgment thereof; because the court here thereof is not, &c."

lord of the manor of Dytton, Brampton, and Syfflaton; and also the court-rolls of the manor of Preston, from which it appeared that one Thomas Culpepper, or Coldpepper, was lord of that manor in 1684.

On the part of the defendant, this copy of the act was objected to, on the ground that there was no evidence to connect the manor of Preston with any of the lands mentioned in the disgavelling act.

His lordship, however, being of opinion that there was some evidence upon the subject, admitted the copy, which was in the same terms as that set out in the record in *Wiseman v. Cotton*.

Another copy of the act was then tendered on behalf of the plaintiff, which was produced from among the muniments of title of Sir Edward Filmer, the lord of the manor of Tremworth, in the county of Kent. For the purpose of connecting this manor with the lands disgavelled by the act in question, an inquisitio post mortem of Reginald Kemp was produced, dated the 30th October, 10 Jac. 1, which stated Reginald to have been the son of Sir Thomas Kemp (one of the names in the act); and that he, at the time of his death, was seised, in his demesne as of fee, of the manor of Tremworth; which manor was proved to have been in the Filmer family from the year 1648. This copy of the act purported to have been examined with the original, at the office of Mr. Scobell, by Henry Smith, clerk in parliament; and it was proved that the handwriting of the document was in the character of the time of the Commonwealth.

[292] This document was objected to upon the same ground as that urged against the Preston Hall copy. It was admitted by his lordship, and was in the same terms as the act set out in the record of *Wiseman v. Cotton*.

On the part of the plaintiff, a book was also tendered, containing a similar copy of the act. This book came from the custody of a party, who stated that it had been given to him in 1829 by a person who did not appear to be in any way connected with the Twysden family: but it contained several entries in the handwriting of a Sir Roger Twysden (who was suggested to be the great grandson of the William Twisden or Twisenden mentioned in the act). His lordship, however, having expressed some doubt as to the admissibility of this book, it was withdrawn.

A considerable body of documentary evidence was then adduced on the part of the plaintiff, for the purpose of identifying the property affected by the disgavelling act as belonging to William Twisden or Twisenden, with the premises, the possession of which, the present action was brought to recover. Many portions of this evidence were objected to at the trial; and several of the objections were renewed in the course of the subsequent application for a new trial; but as the judgment of the court proceeded solely upon the question as to the admissibility of the secondary evidence of the disgavelling act, it appeared to be unnecessary to set out more of the evidence than is above stated. Lord Denman C. J. told the jury that the main questions for them to decide were, first, whether the alleged disgavelling act, of the 2 & 3 Edw. 6 had, in fact, passed; and secondly, whether the lands in question were part of the lands affected thereby.

The jury returned a verdict for the plaintiff.

Bompas Serjt. in last Easter term obtained a rule nisi for a new trial, upon the grounds of misdirection, [293] that evidence had been improperly received (especially as regarded the disgavelling act), and that the verdict was against the evidence (a).

Sir T. Wilde and Channell Serjts. (with whom was Peacock) in Trinity term (June 5th and 10th) shewed cause.

First, as to the evidence of the disgavelling act having passed. The calendar produced was sufficient for that purpose. The objection against it was, that it appeared to have been compiled in the time of Charles I. and not at the time when the act in question was passed; but that is no valid objection. The list of the rolls was made for the convenience of reference; and it must be assumed, from its adoption and use, that it was made by the authority of the House of Lords, and that the party entrusted with the task of preparing it, performed his duty properly. Whether it was copied from a previous book, or was made by a party upon examination of the rolls, cannot

(a) The arguments are only reported upon the questions whether the disgavelling act of 2 & 3 Edw. 6 had passed, and as to the admissibility of the secondary evidence of that act. Vide supra, p. 292.

now be ascertained ; but, either way, its correctness sufficiently appears from its general conformity with the existing rolls. This is not like the case of a deed, which parties must preserve at their own peril. The document in question was intended for the public use, and the present parties had no control over it. [Maule J. You put it as one of that class of cases where entries made by a deceased person, in the course of his business, are receivable.] Exactly so. And it was not offered as evidence for the jury, but for the judge, in order that he might ascertain whether secondary evidence of the act was admissible. [Maule J. It would be evidence, not only to the judge [294] for that purpose, but also to the jury, as to the existence, and the subject, of the lost act.] At the time the act in question passed, it appears that public and private acts were kept together in the same bundle (a).

Secondly, the documents put in were properly received as secondary evidence of the contents of the disgavelling act. The copy of the record in *Wiseman v. Cotton* was objected to as being *res inter alios acta*. But it was not offered as a record binding the present parties ; it was put in merely as evidence of the contents of the lost act ; which contents may be looked at without reference to the finding of the jury ; and it was the best evidence that could be given. Suppose the lost act had been a public one. [Maule J. That perhaps would not have been the subject of evidence.] The judges, it is said, would be bound to know its contents (b). But if it was lost, how would they obtain that knowledge ? Might they not obtain it from a copy transcribed in a county history, or in a book preserved in the British Museum ? And there can be [295] no essential difference in this respect between a public and a private act, the parties having no more control over the one than the other. The present case is the same as that where the loss of any other record has occurred. In

(a) It was stated that it appeared from the calendar in question, that the title of the act No. 39 of that year, was, "An act for the abstinence from flesh in Lent;" and of No. 41, "An act for restitution of Sir George Darcy." In the course of the argument Tindal C. J. referred to Ruffhead's Statutes (vol. 2), where the former of these acts is printed as cap. 19, among the public acts of the 2 & 3 Edw. 6 ; and in the table of the titles of the statutes affixed at the commencement of the same volume, the title of the latter act appears as No. 2, among the private acts of the same year, the title of No. 1 being "An act concerning gavelkind in Kent." It may be remarked, that in Ruffhead's Statutes, A.D. 1566 (9 Eliz.), the statute 31 Hen. 8, c. 3 (tit. Customes and Usages, p. 120 a., reprinted in Ruffhead under the title, "An act changing the custom of gavelkind,") is given at length, the object of which is exactly similar to that of the act in question, as set out in *Wiseman v. Cotton*, except that it relates to the manners, &c. of other persons, namely, Thomas Lord Cromwell and thirty-four others.

(b) "Every subject is presumed to know them ; but the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already. 2 Salk. 566, Keb. 2, Jenk. Cent. 280, pl. 5, Hale's Hist. of the Com. Law. 15, 16, Styl. 462, Stra. 446, 3 Read. Stat. Law, 90, 10 Mod. 126." Gilb. Ev. p. 9, 6th ed. It is afterwards added, "In private acts of parliament the printed statute book is not evidence, though reduced into the same volume with the general statutes, but the party ought to have a copy compared with the parliament roll ; for private statutes do not concern the kingdom in general ; and therefore no man is understood to be possessed of them, as they are of those general laws which are set up as the regulation of their own actions, and consequently the private statutes are no intimation of what is already known, but they are the rules and degrees that relate to the private fortune of this or that particular man, which no one else is under any obligation to understand or take notice of, and therefore they ought to be proved with the same punctuality as the copies of all other records, for they are not considered as already lodged in the minds of the people. Citing Tr. per. pais, 232. Quære, for it seems the better opinion, that the copy of private acts, allowed to be evidence, ought to be under the great seal. 10 Mod. 126, Dy. 239, 3 R. S. L. 91."

The learned editor (Mr. Sedgwick) adds in a note, "However, a private act of parliament in print that concerns a whole county, as the act of Bedford Levels, for rebuilding Tiverton, &c., may be given in evidence without comparing it with the record." Citing L. N. P. 225 b.

Gilbert on Evidence (page 18, 6th ed.) it is laid down, "where a record is lost, a copy of it may be read without swearing a true copy; for the record is in the custody of the law, and not of the party; and therefore, if lost, there ought to be no injury arising to the party's private right; and consequently, if it be lost, the copy must be admitted without swearing any examination concerning it, since there is nothing with which the copy can be compared; and therefore it must be presumed true, without examin-[296]-ation (a). But in such cases as these, the instruments must be according to the rules required by the civil law; they must be *vetustate temporis aut judiciaria cognitione, roborata* (citing Carvin. Dig. 292, Mod. 117). And this passage is incorporated in Bacon's Abridgment, tit. Evidence (F.) (vol. ii. p. 611, 5th and 6th editions. Vol. iii. p. 251, 7th ed.), and Bull. N. P. 228. In Style's Prac. Reg. (page 539), it is said, "the judges cannot judge of a record given in evidence, if the record be not *sub pede sigilli*; that is, exemplified under seal. But a jury may find a record, although it be not so, if they have a true copy proved to them, or other matter given in evidence sufficient to induce them to believe that there was such a record. Pasch. 23 Car. B. R. For the judges are to judge only *de existentibus et apparentibus*; but the jury are induced in their consciences by things given in evidence, which are but probable, for the most part; and, accordingly, they give their verdict." And in Finch's Law (page 185), it is laid down, "the jury may, of themselves, find matters of record if they will, although they are not given in evidence." That must mean, although the record itself be not given in evidence. The same rule is laid down in *News v. Lark* (Plowd. 411, 3d except.). In the case of a lost public document, the ordinary rules of evidence are much relaxed. Papers have been allowed to be read in evidence to prove the contents of other documents, without any proof that such documents had been compared with them, or had even ever had existence, provided the papers were connected with the property of the party in whose custody they were found, it being assumed in such a case that it was important to the party to preserve them. In *Bul-[297]-len v. Michel* (2 Price, 399, 4 Dow, 297), which was a trial for tithes, one of the questions as to the admissibility of an old ledger, or chartulary, of the abbey of Glastonbury, turned upon the custody from which the document was produced. It was brought from the muniment room of the Marquess of Bath, who, though not the owner of the particular farm in respect of which the suit was instituted, or of any property in the parish where the farm was situated, was the owner of other estates formerly belonging to the abbey, concerning which there were memoranda contained in the document in question. Gibbs C. J. in giving the judgment of the court below, which was affirmed by the House of Lords, said, "The question is, whether this book appeared, from the facts attending it, to have belonged to the abbey of Glastonbury. We should recollect that such a book as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved, those estates went to the Crown; and the Crown afterwards granted them to different persons: the book, when the abbey was dissolved, would go to the officers of the Crown; and when the Crown portioned out and made over the possessions of the abbey to other persons, the book could go only to one of those grantees; and the only possible way of connecting it with the abbey is, by shewing a connection between the possessor and the Crown, and by raising a probability that the Crown may have handed over the book to the present possessor. Now such a connection was shewn in the present case; for it appeared that the present owner of the book is also the owner of certain lands which formerly belonged to the abbey, and which, on the dissolution of the abbey, passed to the Crown, and from the Crown afterwards passed to the present [298] possessor; and the probability is, that the book attended the lands in their passage from the Crown." That document was admitted only on the ground that the abbot of Glastonbury had an interest to preserve an account of the tithes which had been paid to the vicar. [Cresswell J. The first step in the assumption was, that the custody of the Marquess of Bath was the same as the custody of the monastery.] In the chartulary in that case there was the recital of an instrument of the existence of which there was no evidence but that recital. In *The Earl of Sussex v. Temple* (1 Ld. Raym. 310), an answer in Chancery of a former tenant for life, in which there was an acknowledgment of a deed, was admitted in evidence. [Maule J. One of the

(a) Citing 1 Vent. 257, Style, Pr. Reg. 227, 5 Mod. 117, 1 Salk. 285, Hardres, 323.

defendants in that cause claimed under the tenant for life.] But there were other defendants against whom the evidence was also held to be admissible. [Cresswell J. The report of that case is not much to be depended upon. There seems to have been strange evidence admitted to prove priority. It is stated that "the other defendants, who were purchasers under Anne (the tenant for life), objected that they had been in possession twenty years; . . . and therefore the answer of Anne, in Chancery, shall not be read against them, until the plaintiff prove that they derive their title under Anne. But the plaintiff proving constant reputation in the country, that these lands belonged to Anne, the court permitted the answer of Anne to be read against them also, unless they shewed another title from a stranger" (b). This must mean reputation of some fact as to which reputation was admissible. [299] In *Mathew v. Tompson* (5 Mod. 384), which appears to have arisen out of the same circumstances, the plaintiff proved that the original deed of settlement had been produced before a master in Chancery, in a suit there depending, and a copy of it made, but that it had been gotten away; and he proved, also, that there was a trial at law upon a power of making leases, at which trial that copy was produced, and a special verdict, in which the settlement was set forth in hæc verba, the record of which verdict was then produced in court. And this does not appear to have been admitted on the ground of privity. The learned serjeant cited also *Moore v. The Mayor of Hastings* (17 How. St. Tri. 853), *Olive v. Gwin* (Hardr. 119), and *Hodgeskins v. Tucker* (Dyer, 239 a.). [Maule J. referred to *Slaney v. Wade* (1 Myl. & Cr. 388).]

With regard to the copies found among the muniments belonging to Sir Edward Filmer and Mr. Milner, there was sufficient evidence to warrant the jury in finding that the lands held by them were identified with some held by parties whose names are mentioned in the disgavelling act. If the secondary evidence of the act should be disallowed, the lessors of the plaintiff would be wholly without remedy.

Bompas and Byles Serjts. (with whom were Gurney and Badeley) in support of the rule (June 12th and 13th). If the calendar had not been received, there would clearly have not been sufficient evidence to shew that the act had passed; and that document ought not to have been admitted. It is put on the other side, as though it were like an entry made by a deceased person in the course of his business. But this calendar was made a century after the disgavelling act is supposed to have passed; and it is not shewn by whom, or by what authority, it was made; [300] from what it was copied, or how it was made out. It is impossible to presume that it was made in the course of business.

Assuming, however, that it was proved that the act did pass, and that secondary evidence of its contents might have been given, still the evidence adduced was inadmissible. The finding of the jury in the special verdict in *Wiseman v. Cotton*, cannot be evidence against the present defendant—being altogether *res inter alios acta*. All the cases as to the admissibility of verdicts, are referred to in 1 Stark. Ev., pp. 240 to 260. It is contended, on the other side, that the copy of the act is receivable without the finding of the jury; that is to say, that the verdict may be read, not as a verdict, but as a document containing a copy of the lost act; but without that finding it is not shewn to be a copy of any act. If every thing but the copy of the act were struck out of the record, what remained would not appear to be a copy of the act; and even if it did, it would still remain to be explained how a copy of an act of parliament should be found among the records of the court of King's Bench. Indeed, all that appears from the record in question is, that twelve men said there was an act to the effect there stated. [Maule J. It does not even state so much. The special verdict only finds that in a certain year an act was passed containing "amongst other things" so and so. It does not state the title of the act.] Then as to the copies produced from among the muniments of the Milner and Filmer families, it was not sufficiently shewn that either of them held any disgavelled lands; and it was the same thing, therefore, as if they had been found in the possession of any other gentleman. In *Bullen v. Mitchell* the question was one as to a modus, in which reputation is admissible. The only point in dispute was, as to the net value

(b) Mr. Phillips observes upon *The Earl of Sefton v. Temple*,—"In this case the court went too far in determining that the answer might be read against persons in occupation of property, on proof that it was the reputation of the country, that the lands had belonged to the person making the answer."

of the vicarage at a certain time. But that case does not go the length of deciding [301] that a statement by a third party, is receivable for the purpose of taking away property. The chartulary in that case was evidence against the abbey where it was kept. But this is a question as to the right to property, in which reputation is not admissible. In all the other cases cited the parties against whom the documents were sued were privies. It is said that the lessors of the plaintiff will be without remedy if this evidence of the act is not admitted; but that is not a sufficient reason for altering the law.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This case arose upon a motion for a new trial, in which the defendant objected that evidence had been admitted on the part of the plaintiff, which was inadmissible. The lessors of the plaintiff claimed under a mortgage by Sir Samuel Egerton Brydges made in the year 1820. The defendant appeared and defended for a moiety of the premises, under the will of her husband, Sir John William Head Brydges, the brother of Sir Samuel. And the main question upon the trial was, whether the land for which the ejectment was brought was land which had been disgalvelled by act of parliament in the reign of Edward the Sixth, or whether it still remained gavelkind land: upon the former supposition the lessors of the plaintiff were entitled to the whole, as claiming under the elder brother and heir-at-law of the person last seised; but, if the lands were gavelkind, so that a moiety descended to Sir John William Head Brydges, the defendant was entitled to the verdict, she having claimed, and defended for, such moiety only.

In order to shew that the land was disgalvelled, it was incumbent on the plaintiff to prove the act of parliament which was alleged to have passed in the second and third years of the reign of Edward the Sixth (the [302] same not being a public act), and also to prove that the land in question was included within the operation of that act.

The act in question not being found on the parliament-roll, it became necessary, in the first place, to prove that such an act had ever been really passed by the legislature; and, in the next place, to give secondary evidence of its contents; and it was in respect of the evidence offered in support of those two propositions, that the objections arose, to which alone, on the present occasion, it will be necessary we should advert.

In order to prove that such an act of parliament did really pass, after evidence from the clerk in the parliament office, who had the custody of the records in the House of Lords, that no such act was to be found, a certain calendar was put in, purporting to contain sixty titles of acts passed in the second and third years of the reign of Edward the Sixth, of which that which was numbered 40 purported to be "An act for disgalveling lands in Kent." The calendar, so produced, was made in 1640; and, upon the evidence, it appeared that there were in the office two calendars, one called the long calendar, and the other the short calendar, and that the practice had been, to enter upon the long calendar such acts as were passed, when they had received the royal assent, and not before, with their respective numbers. To the reception of this evidence the defendant's counsel objected; but it was nevertheless received.

The plaintiffs next produced in evidence an examined office copy of a special verdict found in a cause upon a feigned issue between Wiseman and Cotton, Bart., in B. R. Hil. Term, 13 & 14 Car. 2, in which special verdict the jury found, among other things, the act in question so alleged to have been lost. To this evi-[303]-dence there was an objection on the part of the defendant.

The third piece of evidence produced was, the copy of an act of parliament, purporting to be the act in question, found by Mr. Milner, the owner of an estate called the Preston Hall estate, amongst his muniments of title. Against the reception of this evidence, the objection was, that it was not shewn, by sufficient proof, that the lands, so held by Mr. Milner, were any part of the identical lands which had belonged to any of the parties whose names appeared in the act, and whose lands alone were intended to be disgalvelled thereby. And undoubtedly, as to this objection, unless the identity of those lands was made out so as to satisfy the judge who tried the cause that they were lands included in the act, the place in which this document was found, and the custody thereof, would not be the proper place or custody, and the document would be inadmissible in evidence upon that ground.

A third alleged copy of the act was produced from the muniments of Sir Edward Filmer; as to the reception of which an objection was made precisely on the same ground as the last.

As it appears to us that the objection made to the reception of the special verdict, was well founded, and that such evidence was inadmissible, and that, upon the ground of its having been received, the case must go down to another trial, it will be unnecessary to state our opinion upon the other points raised in the course of the argument before us: the more especially as some of the objections, if not the whole, which were raised at the trial, as to the admissibility of the three documents, viz. the calendar and the two copies of the act, produced respectively from the muniments of Mr. Milner and Sir Edward Filmer, may possibly be removed or obviated on the occasion of a second inquiry, or perhaps [304] the documents themselves may not be offered in evidence (a).

But, with respect to the special verdict which was given in evidence, we cannot distinguish this case from any other in which the general rule obtains. The verdict was strictly and properly "*res inter alios acta*," and could not bind the parties to the present suit, by any thing within such verdict found by the former jury.

The finding of the jury in that case is open to the further objection, that it is strictly—and properly—the finding of a matter of fact: it does not profess to give a copy of the act according to its tenor; nor does it state any title of the act, by which alone it could be identified with the lost act numbered 40 in the calendar; but it finds only, as a matter of fact, that at a parliament of King Edward the Sixth, holden, &c., it was enacted, ordained, and established, by the authority of the same parliament, in these words following, to wit, &c. It follows, therefore, that the plaintiff must be taken to give in evidence the finding of the jury in that cause, in order to supply the lost act; and it is not the case of procuring, by some casual means, an authenticated copy of the lost act out of any custody,—as it is argued to be on the part of the plaintiff,—even if such production would be admissible.

As, therefore, it is impossible to say that the verdict found for the plaintiff, did not proceed on the effect which the production of this special verdict had upon the minds of the jury (b), we think the case must go down to a new trial.

Rule absolute.

[305] Hilary term 1844, January 31.

After verdict for the plaintiff in ejectment, upon one demise, and a new trial granted, the court allowed a new demise to be added of the same date as the former demise, the lessors of the plaintiff agreeing that whatever evidence might have been adduced on the part of the defendant under the former, might be given under the new demise.

Sir T. Wilde Serjt., on the 27th of January, obtained a rule nisi, to add a second demise in the declaration, upon an affidavit, which stated that there was some doubt whether or not the legal estate was in the parties who had conveyed to the present lessors of the plaintiff; and that the parties were advised and believed that it was material for them to add a second demise.

Bompas and Clarke Serjts. now shewed cause. There is no instance of such an application having ever been granted. No sufficient reason has been stated why there should be any such deviation from the established practice in the present instance. The plaintiff would be thereby enabled at the trial to abandon the prior demise, and so prevent the defendant from availing herself of admissions by the present lessor of the plaintiff. If the application were granted it would be substituting a new cause of action. A somewhat similar application was refused in *Doe dem. Poole v. Errington* (1 Moo. & Rob. 343, 1 A. & E. 750, 3 N. & M. 646).

The learned serjeant declined to undertake not to set up as a defence, the want of the demise sought to be added, or not to object that the title was outstanding in the parties whom it was wished to introduce as lessors of the plaintiff.

(a) Had the court thought the objection wholly untenable, it would have been unnecessary to throw out any suggestion, either as to the taking of steps for the purpose of obviating these objections, or as to the withdrawal of the evidence.

(b) Vide *De Rützen v. Farr*, 5 N. & M. 617.

Sir T. Wilde and Channell Serjts., in support of the rule. In *Doe dem. Poole v. Errington*, the application was made, at the trial, under the 3 & 4 W. 4, c. 42, s. 23. The present application is to the jurisdiction of the court at common law. Amendments of a more substantial nature are constantly allowed, up to the last mo-[306]-ment of the trial. (They referred to *Billing v. Flight* (6 Taunt. 419), *Storr v. Watson* (2 Scott, 842), *Legge v. Boyd* (6 N. C. 240, 8 Scott, 502).) [Maule J. suggested that the date of the new demise ought not to be anterior to that of the former demise.]

Per curiam. The rule may be made absolute, upon payment of costs, for adding a new demise of the same date as that of the existing demise, the lessors of the plaintiff agreeing that whatever evidence might have been adduced on the part of the defendant under the existing demise if it had stood alone, might be given under the new demise.]

Rule absolute accordingly (e).

[307] BARKER, Clerk, v. BIRCH. June 29, 1843.

Upon an issue directed by the commissioners under the tithe commutation act (6 & 7 W. 4, c. 71,) to try whether a farm was covered by a modus, the occupier of the farm was held to be a competent witness for the defendant, the owner thereof.—The witness upon his examination on the voir dire, stated that his bargain with his landlord was, that if the farm should become titheable, he was not to be affected by it: Held, that this answer removed any supposed objection to the competency of the witness on the score of interest under the 6 & 7 W. 4, c. 71, and the 5 & 6 Vict. c. 54, s. 9.

This was an issue directed by the tithe commissioners, under sect. 46 of the tithe commutation act, 6 & 7 W. 4, c. 71, to try the validity of a modus set up by the defendant, who was described in the declaration as “the lessee, under the provost and college of Eton, of certain lands situate in the parish of Shipdham, in the county of Norfolk, alleged to be commonly called or known by the name of Shipdham Park, or Shipdham Park Lands, with certain allotments of land set out in respect thereof under and by virtue of an act of parliament made and passed in the 47 G. 3 (c. lxvi.), intituled, &c.; “the issue being whether there was a modus of 6s. in respect of the Shipdham Park Lands, and also of the allotments.

At the trial of the issue before Tindal C. J., at the last spring assizes for the county of Norfolk, it appeared that the plaintiff was the rector of Shipdham, and owner of the advowson. On the part of the defendant, among other evidence adduced to establish

(d) The cause was tried again at the spring assizes for the county of Kent, 1845, when an attested copy of the disavelling act was produced from the possession of Messrs. Pemberton and Co., the solicitors to the Commissioners of Woods, Forests and Land Revenues, &c. The jury returned a verdict for the plaintiff; but a bill of exceptions was tendered on the part of the defendant, as to the admissibility of the copy and of some other parts of the evidence adduced in the cause.

(e) “Et totus comitatus, quesitus quo modo tenementa tenta in gavelkinde mutari possunt in liberum feodum, dicunt, quod tantum ex facto et concessione regum (see disavelling charter, 9 Edw. 2, Abbrev. Plac. 238,) et archiepiscoporum Cantuariensium; et similiter, quando, ut escaeta, revertuntur ad dominos feodorum quorum tenementa ad que dominia hujusmodi tenementorum tentorum in gavelkinde pertinent, sunt liberum feodum. Et similiter, quando redduntur in manum hujusmodi dominorum pre nimio onere serviciorum, sine spe ipsa rehabendi. Set dicunt quod si forte dicti domini hujusmodi tenementa retrotradiderint eis qui illa prius reddiderunt, quoquo modo, tenementa illa revertuntur ad pristinam consuetudinem, et fiunt gavelkinde, prout ante redditionem extiterunt. Set bene licet tenentes suos exonerare de serviciis inde debitis, et nihilominus tenementa predicta remanent partibilia per consuetudinem de gavelkinde.” From a special verdict taken in Kent, 26 E. 1, Abbrev. Plac. in Dom. Cap. Westm. 238 a.

In the petition of right to recover the earldom of Cornwall, which had been granted to Piers de Gavaston and Margaret his wife, (formerly wife of Edmund Earl of Cornwall, and, lastly, of Hugh de Audeley) brought by Hugh de Audeley and Margaret his wife, the Lords appear to have taken judicial notice of a private act. T. 12 E. 2, Abbrev. Plac. 335 a. (In that case the Commons joined in the judgment.)

the modus, a witness was called, who stated upon the voire dire that he occupied a farm, being portion of the Shipham Park Lands, as tenant from year to year under the defendant; and in answer to a question by the defendant's counsel, the witness further stated, that when he entered upon the farm the bargain with his landlord was, that if the farm should become titheable, he was not to be affected by it.

It was contended on the part of the plaintiff, that the [308] witness was incompetent, on the ground of interest. On the part of the defendant, the case of *Morris v. The Duke of Norfolk* (not reported), was cited, which was tried at Ipswich, before Alderson B., at the summer assizes for the county of Norfolk in 1841, when his lordship, in a similar case, admitted evidence of the same nature.

The Lord Chief Justice admitted the evidence, and also that of another witness similarly situated. The jury returned a verdict for the defendant.

Sir T. Wilde Serjt. in last Easter term moved for a new trial, on the ground of the improper reception of the evidence in question, and also of the verdict being against evidence. Upon the former point, the learned serjeant contended that the witness was interested, first, with regard to his future liability to the rent-charge which would be awarded by the tithe commissioners under the 6 & 7 W. 4, c. 71;—and, secondly, by reason of his liability to the arrears of tithe under the 5 & 6 Vict. c. 54, s. 9; that the incompetency arising from such interest was not removed by the provisions of the 3 & 4 W. 4, c. 26, which did not apply to a feigned issue (see *Stewart v. Barnes*, 1 Moo. & R. 472, S. C. 1 Stark. Ev. 125); and that it was not affected by the agreement of the defendant to indemnify the witness. He cited *The Earl of Clanricard v. Lady Denton* (1 Gwill. 360), *Anscomb v. Shore* (1 Taunt. 261), *Rhodes v. Ainsworth* (1 B. & A. 87), *Hoyle v. Coupe* (9 M. & W. 450), *Jones v. Carrington* (1 C. & P. 327, 497), and *Whitehouse v. Atkinson* (3 C. & P. 344).

The court having refused a rule nisi upon the latter point, but granted one upon the former,

[309] Byles Serjt. (with whom was Birch), in last Trinity term (a), shewed cause, and

Sir T. Wilde and Channell Serjts. (with whom were Biggs Andrews, and Hugh Hill) were heard in support of the rule.

The arguments are not reported, as they are fully commented upon in the judgment, and as the point decided has become of no practical importance since the passing of Lord Denman's act (b). The following additional authorities were cited in shewing cause against the rule; *Doe d. Foster v. Earl of Derby* (1 A. & E. 783, 3 N. & M. 782), *Collins v. Gwynne* (9 Bingh. 544, 2 Moo. & S. 640), *Smith v. Blackham* (1 Salk. 283), *Carter v. Pearce* (1 T. R. 163), *Davies v. Davies* (Mood. & M. 345), [310] *Novell v. Davies* (5 B. & Ad. 368), *Rex v. Prosser* (4 T. R. 17), *Rex v. Kirdford* (2 East, 559), *Lancum v. Lovell* (9 Bingh. 465, 2 Moo. & Sc. 843), *Goodhille dem. Fowler v. Welford* (1 Dougl. 139), *Snook v. Matlock* (5 A. & E. 239), *Crease v. Barrett* (1 C. M. & R. 919),

(a) May 29th and 30th. Before Tindal C. J., Coltman, Maule and Cresswell JJ.

(b) 6 & 7 Vict. c. 85, s. 1, enacts, "That no person offered as a witness, shall hereafter be excluded by reason of incapacity from crime or interest, from giving evidence, either in person, or by disposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry, arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having, by law or by consent of parties, authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part; or the husband or wife of such persons respectively."

and *Jenkins v. Harvey* (1 Gale, Exch., 23, 1 C. M. & R. 877). In support of the rule, *Wetherell v. Bellwood* (3 Yo. & C. 319), *Girdlestone v. Stanley* (ib. 421), *Taylor v. Cook* (8 Pri. 650), *Armstrong v. Lewis* (2 C. & M. 274, 4 Moo. & Sc. 1), *Oliver v. Latham* (1 Turn. & Phil. 163), 1 Phill. Ev. p. 393 (9th ed.), and 2 *Eagle on Tithes*, p. 431, were relied on. Tindal C. J. referred to *Benson v. Olive* (2 Gwill. 701), and *Travis v. Chaloner* (3 Gwill. 1237).

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court.

The rule for a new trial was granted in this case upon the single point,—whether the occupier of a farm, was a competent witness, on the part of the defendant, the owner of that farm, upon an issue directed by the commissioners under the tithe commutation act, 6 & 7 W. 4, c. 71, to try the question,—whether the farm of which the witness was the occupier, was covered by a modus of 6s. a year.

The objection on the part of the plaintiff was, that the witness had an interest in the event of this suit; first, in respect of his future liability on the rent-charge which would be awarded by the commissioner in lieu of tithes; secondly, in respect of his liability to the arrears of tithes for the last six years, in the event of the issue being found for the plaintiff.

[311] The first objection rests upon the construction of the general tithe commutation act, 6 & 7 W. 4, c. 71; the latter objection on the 5 & 6 Vict. c. 54, s. 9. But we think, upon the best construction we can put upon these acts, that the occupier is not rendered incompetent upon either ground of objection; and, further, that, if such incompetency had existed in ordinary cases, it could be removed by the answer which the witness gave when under examination, as to his own exemption from liability, on the ground of his agreement with his landlord.

It is well established, that, to support an objection to the competency of a witness on the ground of interest in the event of a suit, it must appear to be, not a contingent interest, but a certain, direct interest, in existence at the time of his examination. And we cannot perceive that this witness had any such certain direct interest at that time, on the ground of liability to any future rent-charge that may be imposed by the commissioners in commutation of the tithes. The occupier in this case was holding not under any given term of years, but merely as tenant from year to year, so that he had it in his power to determine his tenancy at any time by a half-year's notice. It is by no means impossible that he may determine it long before the award by the commissioners for the commutation of the tithes of this parish shall be made: indeed, there is no reasonable probability that he should not be able to do so if he thinks fit. The interest, therefore, which he takes in the event of this suit as to liability for future charges, is altogether uncertain and contingent. And, as to any interest in the event of this suit with respect to his liability to by-gone arrears of tithes,—that does not depend upon the statute of William IV.,—by the eighty-ninth section of which it was provided that it shall not affect any right to any tithes which have [312] become due before the commutation,—but on the ninth section of the 5 & 6 Vict. c. 54. This latter section gives power to the commissioners, where there has been an appeal, after the judgment of the court upon such appeal, to make an award founded on the judgment of the court of law to which such appeal has been made, “for the determination of all questions of arrears of tithes claimed in any suit which may be pending in any court of equity; and such award shall have the effect of a verdict of a jury; and shall be received by the court of Chancery, as conclusive evidence of the liability of the lands, and of the amount of such arrears, and of the liability of the parties to the payment of costs in such suit.” But this ninth section does not, as it appears to us, give a general power to the commissioners to make an award as to the arrears in all cases, but in those cases only where such arrears are claimed in a suit in chancery which may be then pending; and whether that means such suit only as shall be pending at the time the appeal is determined,—which seems to us to be the natural meaning of the words, and to be consistent with the similar enactment in the forty-fifth section of the former act,—or whether it means any suit in equity which may be brought at any future time, so as to be pending at the time of the award made, would not seem to make any material difference. Upon the former interpretation of the statute, the answer to the objection to the witness's interest is, that it did not appear that any suit in equity for arrears had been brought and was then pending, and, therefore, that no direct interest in the event of this issue shewn to

exist. Upon the latter interpretation, it is quite uncertain whether any such suit in chancery may ever be brought, so as to be pending at the time the award shall be made; so that the interest of the witness cannot be said, in either case, to be a certain interest existing at the time of the examination, but to be merely speculative and contingent.

[313] But we cannot help thinking that the answer made by the witness when re-examined as to his interest, removes any supposed objection to his competency. After his statement that he was at that time the occupier of the farm, in answer to a question put to him by the defendant's counsel, who had called him as a witness, he stated that his bargain with his landlord was, that, if the farm should become titheable, he was not to be affected by it; and, as no further inquiry was made of him by the counsel who objected to his competency, we must take it, that, if any possible supposition can be made by which he can be exempted from liability in respect of the tithes, we may consider that such mode of exemption has been had recourse to on this occasion. The agreement between the landlord and the witness may have been, that his interest in the farm should cease immediately on the land being made liable to the rent-charge in respect of the full amount of the tithe; or that such sum may have been deposited as would operate as a full and complete indemnity and exemption from liability. Because we think it lies upon the objector, if a *prima facie* answer to the objection be given by the witness, to examine as to the sufficiency of such answer, and, if no such examination takes place, and it is not shewn that the answer is sufficient, it must be taken to have the full weight, in restoring the competency, which it *prima facie* imports to bear. For these reasons, we think the witness was competent, and that the rule for a new trial must be discharged.

Rule discharged.

[314] IN THE HOUSE OF LORDS.

DOE DEM. ISAAC WINTER v. MATTHEW PERRATT AND WILLIAM BURGE. DOE DEM. CATHERINE VINEY, THOMAS VINEY AND THOMAS GREENSLADE v. MATTHEW PERRATT. DOE DEM. JOHN SLADE AND JOHN THOMAS WEBB v. MATTHEW PERRATT. 1843.

[S. C. 9 Cl. & F. 606; 8 E. R. 548 (with note).]

A. devised Whiteacre to B. for life, remainder to C. or his male heir, if any; and if no male heir lawfully begotten by C., then to fall to the first male heir of D's family, paying unto such of the daughters of D. who should be then living 100*l.* each, at the time of taking possession of the estate.—C. died in the lifetime of B., leaving a daughter, who also died in the lifetime of B., leaving a son, E.—Previously to the date of the will D. had died, leaving five daughters; viz. F. with a daughter; G. with two sons, M. and N.; H. with one son, O.; I. with one son, P.; K. with one son, Q.—After the death of A., the daughter of F. had a son, L.; after which F. died, then I., then B.—Held, in Dom. Proc., affirming the judgment in B. R., that a remainder in fee vested in P., dissentiente Lord Cottenham; with whom agreed Tindal C. J. and Patteson J., who were of opinion that the devise in remainder was void for uncertainty, and Williams J., who was of opinion that the remainder vested in M.—Quære whether the expression “first male heir of the branch of D.'s family” is to be considered as having been used in a technical sense or in a popular sense, applicable to an heir apparent and an heir presumptive.—Held by Lord Brougham,—with whom agreed Parke B., Coltman J., and Maule J.,—that the expression is to be considered as having been used in its technical sense; and by Lord Cottenham,—with whom agreed Tindal C. J., Bayley B., Littledale J., Bosanquet J., and Taunton J., and afterwards Tindal C. J., Patteson J., and Williams J., that the expression is to be considered as having been used in its popular sense.—Assuming the remainder to have vested in P., quære at what period it vested.—Held by Lord Brougham,—with whom agreed Parke B., Coltman B., and Maule J.,—that it vested on the death of I., the fourth daughter of D.; Tindal C. J., Patteson J.,

and Williams J. being of opinion that it vested on the death of F., the eldest daughter of D.

Three actions of ejectment were brought to recover the possession of certain lands in the county of Somerset, to which the lessors of the plaintiff respectively claimed to be entitled under the will of Emanuel Chilcott. At the trial the jury found in each cause a special verdict, which stated in substance as follows :—

On the 16th of March 1786, Emanuel Chilcott was seised in his demesne as of fee of the Truckwell estate, being the tenements in the declaration mentioned ; and being so seised, he on, &c. duly made and published his last will and testament in writing, bearing date, &c., and thereby devised as follows :—

“I give unto John Chilcott, my kinsman, living in London, 100l., to be paid in one year after my decease ; also I give unto Anne White, my sister-in-law, 20l. and the income of Burge’s cottage and her living in it, if she thinks proper, during her life ; also I give unto Eleanor White 100l. and half of Truckwell estate during her life ; also I give unto William Burge, my serving man, 5l. All the residue of my goods, chattels, rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments I give, devise, and bequeath unto Elizabeth Chilcott my wife during her life, whom I make my sole executrix ; and I do allow the said Elizabeth Chilcott to give what she thinks proper of her said effects to her sisters Eleanor White and Anne White, during their lives. And after the above lives have expired, that is to say, Elizabeth Chilcott, Eleanor White, and Anne White, all the lands, rights, profits, and hereditaments of Truckwell estate to come to John Chilcott, my kinsman, living in London, or his male heir, if any ; free land not to be sold nor mortgaged on any account whatever, but to remain in the Chilcott’s family for land of inheritance, with two cottages, garden, and orchard in the parish of Brompton Ralph, adjoining to the said Truckwell estate, called by the name of Middle Whitcombe, free land. And if no male heir lawfully begotten by the said John Chilcott, then the above lands to fall to the first male heir of the branch of my [316] uncle Richard Chilcott’s family, who lived at Hanerick farm, yielding and paying unto such of the daughters of the aforesaid Richard Chilcott, which shall then be living, the sum of 100l. each, at the time of the taking possession of the aforesaid estates.”

Emanuel Chilcott, on the 24th of May 1787, died so seised, without revoking or altering his said will, and without issue, leaving the said Elizabeth Chilcott his widow, and the said Anne White and Eleanor White him surviving ; whereupon and whereby the said Eleanor White became and was seised of one moiety of the said tenements called Truckwell estate, with the appurtenances, in her demesne as of freehold for the term of her life, and the said Elizabeth Chilcott became and was seised of the other moiety of the said tenements, with the appurtenances, in her demesne as of freehold for the term of her life. Anne White died on the 9th of April 1791, leaving the said Elizabeth Chilcott and Eleanor White her surviving ; and on the 23d of April 1792, Elizabeth Chilcott duly made and published her last will and testament in writing, bearing date, &c., and signed by her the said Elizabeth Chilcott, and attested and subscribed in her presence by three credible witnesses, and thereby amongst other things devised, and in pursuance of all and every power and powers enabling her in that behalf, gave and devised, all those the said tenements comprised in the said Emanuel Chilcott’s will, over which she had any power of disposition, to her sister Eleanor White and her assigns for and during the term of her life.

On the 25th of December 1795, Elizabeth Chilcott died so seised of the last-mentioned moiety of the said tenements called Truckwell estate, with the appurtenances, without revoking or altering her said will, whereupon and whereby the said Eleanor White became and was seised of the entire of the said tenements, with the ap[317]-purtenances, in her demesne as of freehold for the term of her life, and on the 14th of July 1820 Eleanor White died so seised.

The said John Chilcott (who was the heir of the said Emanuel Chilcott) in the year 1765 married, and afterwards, and in the lifetime of the said Eleanor White, in December 1808, died without ever having had any male heir by him lawfully begotten, and without having levied a fine or suffered a recovery of the said tenements, or any part thereof ; but the said John Chilcott had issue Sarah, his only daughter, and in the year 1789 the said Sarah Chilcott married with Thomas Webb, by whom she had issue John Chilcott Webb her only son, and on the 4th of April 1810 the said Sarah

Webb died ; whereupon and whereby the said John Chilcott Webb became and was heir of the said Emanuel Chilcott. The said John Chilcott Webb, after the death of his mother, to wit, on the 13th of August 1814, by a certain indenture then made between the said John Chilcott Webb and Louisa his wife of the one part, and William Gray, since deceased, of the other part, demised the tenements, called Truckwell estate, to the said William Gray for 1000 years ; and it was by the said indenture declared that a certain fine sur conuzance de droit, come ceo, &c. with proclamations, levied of the said premises by the said John Chilcott Webb and Louisa his wife, should enure to the use of the said William Gray, his executors, administrators, and assigns during the said term of 1000 years, and, subject thereto, to the only proper use and behoof of the said John Chilcott Webb, his heirs and assigns for ever. The said William Gray, on the 21st of October 1815, duly made and published his will, and thereby, without specifically devising the said tenements, or any part thereof, devised and bequeathed all the residue of his real and personal estate to John Slade, his executors, [318] administrators, and assigns, and appointed him sole executor of his said will ; and the said William Gray on the 13th of August 1817, died without altering or revoking the same, and the said John Slade, on the 17th of December 1817, duly proved the said will in the prerogative court of the Archbishop of Canterbury, and took upon himself the execution thereof ; whereupon and whereby the said John Slade, after the death of the said Eleanor White, to wit, on the 20th of July 1820 aforesaid, entered into the tenements, claiming the same, and was possessed thereof as the law required, and being so possessed thereof, he the said John Slade, afterwards, to wit, on the said 1st of December 1820, demised to the plaintiff.

On the 22d of April 1820, the said John Chilcott Webb died intestate, leaving John Staines Webb his only child and heir-at-law ; whereupon and whereby the said John Staines Webb, after the death of the said Eleanor White, to wit, on the 20th of July 1820, entered into the said tenements, claiming the same, and was possessed thereof as the law required, and being so possessed thereof, the said John Staines Webb afterwards, to wit, on the said 1st of December 1820, demised the said premises to the plaintiff, &c.

In the lifetime of the said Emanuel Chilcott, viz. on the 17th of March 1780, the said Richard Chilcott, the uncle of the said Emanuel Chilcott, who lived at Hanrick farm, in the said will of Emanuel Chilcott mentioned, died without ever having had a son, leaving five daughters only, that is to say, Mary, who was born on the 9th of November 1739 ; Joan, who was born on the 1st of January 1741 ; Sarah, who was born on the 4th of December 1744 ; Betty, who was born on the 25th of October 1746 ; and Agnes, who was born on the 13th of February 1749, and which said daughters were all living at the time of the making of the will of the said Ema-[319]-nuel Chilcott, and at the time of his death, and as well the said five daughters respectively hereinafter mentioned, who were born before the making of the said will of the said Emanuel Chilcott, were all well known to him at the time of making his will.

On the 6th of June 1768, the said Mary Chilcott intermarried with George Bishop, by whom she had issue four daughters only, and no other issue, that is to say, Betty, who was born on the 6th of August 1769 ; Ann, born on the 11th of October 1770 ; Mary, born on the 11th of January 1772 ; and Anna, born on the 2d of August 1781. Mary Chilcott, afterwards Bishop, in the lifetime of the said Eleanor White, in the year 1799, died. On the 1st of May 1794, the said Betty Bishop, the eldest daughter of the said Mary Bishop, intermarried with John Durham Perratt, by whom she had issue the defendant Matthew Perratt, her eldest son and heir-at-law, who was born on the 3d of March 1795 ; and which Betty Perratt and Matthew Perratt are still respectively living.

On the 14th of May 1762, the said Joan Chilcott intermarried with Isaac Winter, by whom she had issue two sons, viz. Thomas Chilcott Winter, born on the 18th of February 1763, and Isaac Winter, born on the 15th of July 1770, both of whom were also well known to the testator, and afterwards, and after the death of the said Eleanor White, to wit, on the 8th of November 1820, the said Joan Chilcott, afterwards Winter, died. In the respective lifetimes of the said Eleanor White and the said Joan Chilcott, afterwards Winter, to wit, on the 30th of December 1817, the said Thomas Chilcott Winter died a bachelor and intestate, leaving the said Isaac Winter his brother and heir-at-law him surviving.

On the 3d of April 1769, the said Sarah Chilcott intermarried with Samuel Parsons,

by whom she had issue two sons, viz. James Parsons, born on the 3d of October [320] 1771, and John Parsons, born on the 4th of January, 1773, and afterwards, and in the lifetime of the said Eleanor White, to wit, on the 4th of August 1813, she, the said Sarah Parsons, died; and afterwards, to wit, in 1813, the said James Parsons died intestate, and without issue, leaving John Parsons, his brother and heir-at-law, him surviving.

On the 4th of August 1764, the said Betty Chilcott intermarried with Benjamin Viney, by whom she had issue Thomas Viney, her only son, born on the 5th of March 1765; and the said Betty Viney, afterwards, and in the lifetime of the said Eleanor White, to wit, on the 24th of February 1804, died, leaving the said Thomas Viney, her only son and heir-at-law, her surviving. Thomas Viney afterwards, and in the lifetime of the said Eleanor White, to wit, in 1795, intermarried with Catherine Phelps, by whom he had issue one son, Thomas Viney, who is still living; and the said Thomas Viney, the father, afterwards, on the 15th of July 1819, duly made and published his last will and testament in writing, bearing date, &c., and signed, &c.; and thereby gave and devised all his real estate to the said Catherine Viney, her heirs and assigns. Thomas Viney, the father, afterwards, and before the said time when, &c., to wit, in September 1819, died without revoking or altering his said will, leaving the said Catherine Viney, his widow, and the said Thomas Viney, his only son and heir, him surviving.

On the 11th of November 1770, Agnes Chilcott, the fifth daughter of the said Richard Chilcott, intermarried with John Greenslade, by whom she had issue Thomas Greenslade, her only son, born on the 10th of December 1772; and afterwards, to wit, in 1780, the said John Greenslade died, leaving the said Agnes, his widow, and the said Thomas Greenslade, his son, him surviving, both of whom are still living.

[321] Upon this special verdict, the majority of the court of King's Bench, consisting of Holroyd J. and Littledale J. in Hilary term 1826, were of opinion in favour of the claim of Thomas Viney, the son of Betty, the fourth daughter of Richard Chilcott, who was born on the 5th of March 1765, and whose mother died on the 24th of February 1804; Bayley J. dissenting; that learned judge being of opinion that Isaac Winter, the son of the eldest of the five daughters of Richard Chilcott, who had a son, was entitled (5 B. & C. 48. 7 D. & R. 733).

The judgment of the court, therefore, was given for the plaintiff on the demise of Catherine Viney and others, and for the defendants, in the other ejectments. The record being removed by writ of error to the House of Lords, the following questions were submitted for the opinion of the judges:—

First, whether, under the circumstances disclosed in the special verdict, the remainder to the first male heir of the family of the testator's uncle, Richard Chilcott, was a remainder in fee simple or in fee tail.

Secondly, whether the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living.

Thirdly, at what time did the remainder vest in interest.

Fourthly, in what person did the remainder first vest in interest.

Fifthly, whether the remainder, if once vested in interest in any person, could afterwards open or become divested, so as to admit another person in preference to the person in whom it had so vested.

The case was argued at the bar of the House in the session of 1833, when four of the judges, viz. Tindal C. J., [322] Bayley B., Bosanquet J., and Taunton J. delivered their opinions seriatim, and Littledale J. referred to the opinion already expressed by him in the court below, and to which he still adhered.

Upon the fourth question the four first-mentioned judges differed in opinion, Bayley B. holding that the remainder first vested in interest in Thomas Chilcott Winter, and, upon his death, passed by descent to his brother Isaac; Bosanquet J. and Taunton J. that the remainder first vested in interest in Matthew Perratt, he being the representative of the eldest branch of the uncle Richard's family. Upon the first, second, third, and fifth questions, those judges were unanimously of opinion—1st. That the remainder to the "first male heir" was a remainder in fee-simple. 2dly. That the words "first male heir" were used to denote an heir apparent of a person then living. 3dly. That the remainder vested in interest as soon as there was any person in existence answering to the descriptio personæ contained in the will, that is, on the death of Mary, the eldest daughter of the testator's uncle

Richard, in 1799. 5thly. That the remainder, if once vested, could not afterwards be divested (a).

The case was again argued at the bar of the House on the 10th of August 1841, the judges present being Tindal C. J., Parke B., Patteson J., Williams J., Coltman J., and Maule J., to whom the following questions were propounded:—

1st. Whether the expression “first male heir” was used by the testator to denote a person of whom an ancestor might be living?

2dly. At what time did the remainder vest in interest?

3dly. In what person did the remainder first vest in interest?

[323] There being still a difference of opinion amongst the learned judges, they, on the 10th of May 1842, delivered their judgments *seriatim*, as follows:—

MAULE J. My lords, in answer to your lordships’ first question, I am of opinion that the expression “first male heir” was not used by the testator to denote a person of whom an ancestor might be living. It is a rule of construction, founded in reason and supported by many authorities, that words in a will are to be construed according to their strict and proper acceptation, unless there be something to shew that such a construction is not that intended by the testator. An heir properly and strictly means a person whose ancestor is dead. It is sometimes, when the context necessarily requires it, understood to mean an heir apparent. In the present case there appears to me to be nothing to shew that any other than the strict and proper sense is to be given to the word heir.

In answer to the second and third questions, it appears to me that the “branch of my uncle Richard Chilcott’s family” means that branch of the Chilcotts which consists of my uncle R. Chilcott’s family; the testator having before mentioned another branch of the family, that is, John Chilcott, or his heir male lawfully begotten. Now the family of R. Chilcott consisted of five daughters, and the expression “heir male of the branch,” by itself, might mean either an heir male who was heir of the branch, that is, of R. Chilcott or all his daughters, which would be possible, or of the branch may mean “belonging to the branch;” and between these two senses the latter is determined to be the true one, by the devise of 100l. to each of the daughters who shall be living at the time the said heir male takes. The devise, therefore, in effect, is to the first heir male belonging to that branch, that is, to the first heir male [324] of any of those daughters; and the remainder vested in interest as soon as any of the daughters died leaving an heir male, that is, on the death of Betty Viney in 1804, when Thomas Viney, being her heir, was the first male heir of R. Chilcott’s family.

COLTMAN J. To your lordships’ first question, “Was the expression ‘first male heir’ used by the testator to denote a person of whom an ancestor might be living?” I humbly conceive the answer ought to be that the expression “first male heir” was not used by the testator to denote a person of whom an ancestor might be living. To ascertain in what sense these words were used, they should be considered in connexion with those which follow them. The devise is to the “first male heir of the branch of my uncle Richard Chilcott’s family.”

These words have been considered by some of the learned judges who have on former occasions delivered an opinion on this case, as being equivalent to the expression “first male heir of my uncle Richard;” and if this be the correct sense to be put on the words, it will follow, perhaps, that the words “male heir” were used, not in the strict technical sense of the words, but as designating simply male descendant. But I humbly venture to think that such is not the meaning of the words “first male heir of the branch of my uncle R. Chilcott’s family;” for I cannot imagine that the testator would have used so clumsy a periphrasis to describe the first heir male of his uncle Richard, when, in the preceding devise to John Chilcott of London or his male heir, he uses simple and appropriate terms of description, construing the one devise by the other, it seems to me, that if, by the latter devise, he had meant to designate the first heir male of his uncle Richard, he would have used the same terms as he had used in the former de-[325]-vise; and when I find him studiously selecting other terms, I think the just principles of construction require us to understand that he means something different.

The words have been understood in a different sense by others of the learned judges, and have been considered as equivalent to the words “first male heir of a

(a) See 10 Bingh. 198, 3 M. & Scott, 586.

branch or of any branch of my uncle Richard's family." On this construction of the words the family of the testator's uncle Richard is considered as consisting of five branches, that is to say, each of Richard's daughters with her family are considered as constituting one branch. I humbly venture to doubt the propriety of this construction; for nothing, as it appears to me, can well be more opposed, both in grammar and in sense, than the words "the branch" and the words "a branch of my uncle Richard's family," the former pointing definitely to some distinct branch, the latter, indefinitely, to one out of many. Such violence ought not to be done to the words used if any more natural and appropriate sense can be ascribed to them.

The sense in which I humbly think these words are to be understood will best appear from considering the pedigree of the Chilcott family. The Chilcott family originally consisted of three branches, the family of Emanuel, the father of the testator, constituting one branch, that of John, the father of John of London, constituting the second branch, and the family of Richard Chilcott constituting the third branch; and the expression "first male heir of the branch of R. Chilcott's family" appears to me equivalent to the expression "first male heir of that branch which R. Chilcott's family form of the Chilcott family." The party intended to take under this description must be of the branch of R. Chilcott's family, that is to say, he must be a member of R. Chilcott's family, and he must be first male heir of that branch; in other words, he must be a descendant [326] of R. Chilcott, he must be an heir male, and he must be first heir male.

Now, in determining whether the words "male heir" in this devise are to be understood as denoting a person of whom an ancestor might be living, it is to be borne in mind, that although, at the time when the will was made, there was no member of R. Chilcott's family who was an heir male, in the strict sense of the word, it might well be, that before the will would become operative by the death of the testator there might be several members of the family who would answer that description; for instance, it might well be that two or more of the daughters of R. Chilcott should die before the testator, leaving sons, or that one of the daughters should have left a grandson who might be her heir male, or other cases of like nature might have occurred by which different members of the family might have become male heirs, and these not being remote and merely possible, but probable and proximate contingencies, may reasonably be supposed to have been in the contemplation of the testator in penning his will.

Now, bearing this in mind, and considering it as a settled rule that where technical words are used in a will they are to be considered as used in their proper and technical sense, unless there be some strong ground for inferring the contrary, I cannot, in the present case, see any sufficient reason for inferring that the words "heir male" were used in this will in any other than their proper and technical sense. I therefore think that they were not used to denote a person of whom an ancestor might be living.

To your lordships' second question, "At what time did this remainder first vest in interest?" I answer, that, in my humble opinion, the remainder vested in interest on the death of Betty, the wife of Thomas Viney. The remainder in question would have vested on the death of the testator if there had been at that time any [327] person who answered to the description of "first male heir of the branch of Richard Chilcott's family;" but as there was, at his death, no male heir of the branch of Richard Chilcott's family (in the sense in which I think these terms ought to be understood), the remainder was necessarily contingent until there should be a male heir of that branch. When, by the death of Mrs. Viney, there was a male heir of the branch of Richard Chilcott's family, the remainder would vest in such male heir, if he could be considered as filling the description of first male heir.

This leads me to the consideration of what is one of the main difficulties in the case, namely, in what sense the word "first" was used by the testator. It evidently implies priority of some sort, whether priority in dignity and worthiness of blood (which to a certain extent is recognised even among coparceners (a)); so that the issue of an elder sister should be preferred to the issue of a younger sister; or priority in

(a) As to the eignessee, or enitia pars, of the eldest daughter, see Bracton, 77, Fleta, lib. 2, c. 9; Britt. c. 72; P. 17 E. 2, fo. 543, Co. Litt. 166 b.; *The Bishop of Exeter v. Gully and Others*, 5 Mann. & Ryl. in error, 458.

point of time so that he, who first in point of time became an heir male, should be preferred to one who subsequently became an heir male; or priority in nearness of descent to the original stock, so that the son of a younger daughter should be preferred to a grandson of an elder daughter—may be matter of dispute; and if, at the death of the testator, there had been several members of the family answering the description of heirs male, it might have been very doubtful which of them answered the description of first heir male.

But in the case which actually happened, in whatever sense the word “first” was used by the testator, it seems to me that on the death of Mrs. Viney, her son and heir, being at that time the only heir male in the [328] family, answered the description of “first heir male,” being evidently first in point of time, and, in point of dignity and nearness, first heir male, because only heir male.

It may be urged, in opposition to this mode of viewing the case, that, although on the death of Mrs. Viney her son became heir male, and so, at that time, might be considered as first heir male, in every sense of the word, yet, if the word *first* means first in dignity and worthiness of blood, events subsequent to the death of Mrs. Viney might occur whereby there would be another heir male in the family who would answer more correctly to the description of first heir male; as, for instance, the death of Mrs. Winter or Mrs. Parsons. But to this objection I answer, that it is a fixed rule with respect to contingent remainders, that they are always to vest at the earliest possible moment at which they are capable of vesting (a)¹; and, therefore, if on the death of Mrs. Viney, her son at that time answered the description of first male heir, the remainder will not continue in suspense, because it may turn out that on the happening of a certain contingency there would be a person more fully answering that description. It is like the case where an estate is given to A. for life, with remainder to the right heirs of J. S., if J. S. dies leaving a daughter, and his wife eniente, the remainder, according to the ancient rule of the common law, vested in the daughter, and though a posthumous son of J. S. were afterwards born, the remainder was not thereby divested, but, on the death of A., the daughter was held to be entitled to succeed to the estate; Co. Litt. 95 a. 137 b. And although in the instances of estates settled on children since the case of *Reeve v. Long* (1 Salk. 227) and the statute 10 & 11 W. 3, [329] c. 16, the application of this rule of the common law has been modified in favour of posthumous children, yet I apprehend the principle of the rule is in no wise affected by this relaxation of its application in the particular instance. The rule rests on the necessity there is, as above remarked, that every contingent remainder should vest at the earliest possible period, since if it were allowed to remain in suspense it might continue in suspense until after the determination of the particular estate, and the contingent remainder might thereby be defeated altogether.

On these grounds it seems to me that the remainder in question vested in interest on the death of Mrs. Viney.

To your lordships' third question, “In what person did this remainder first vest in interest?” the answer, in my judgment, ought to be, that it vested in Thomas Viney, for the reasons already stated in reply to your lordships' second question.

WILLIAMS J. My lords, I am of opinion that the expression “first male heir” was used by the testator in the sense suggested by the question first proposed by your lordships; and, in giving this answer, it becomes necessary at once to explain, as well as I am able, the reasons which induce me to give it, which, in truth, involves a consideration of the whole case.

In the first place, it seems to me that the general rule—that the will of the testator should be carried into effect if practicable—has its full bearing upon the present case; because, if any thing can be said to be clear as regards this testator, this, at least, seems to be so, that he did not intend his heir-at-law to take the estate; for if so, he would have made no will at all, in which case he probably knew that the law would have [330] given the estate to such heir (a)²; or if he did make a will, there would not have been the provision in favour “of the branch of Richard Chilcott's family.”

(a)¹ The ground of this rule having ceased by the non-destructibility of contingent remainders, created by 7 & 8 Vict. c. 76, quære whether the rule itself would not fail.

(a)² Before the late statute of wills (7 W. 4, & 1 Vict. c. 26), upon a devise to the heir, he would have taken by descent, and not by purchase; but it seldom happened, where a will was made, that the testator suffered the land tacitly to descend to his

It appears, from the special verdict, that there were three branches of the Chilcott family, as the phrase in the will is ; one, of which the testator is the head as being the son of the elder of the three brothers, Emanuel, John, and Richard ; the second, the branch of John Chilcott, the second brother, to whose son, called "John of London" in the will, the first devise is ; and the third was the branch of R. Chilcott, in which the testator intended the Truckwell estate to go in default of issue male in the second branch.

The words of the will are as follow : After the expiration of three lives "all the lands, &c. of Truckwell estate to come to John Chilcott, my kinsman, living in London, or his male heir ; if any free land, not to be sold nor mortgaged on any account whatsoever, but to remain in the Chilcott's family, for land of inheritance." Then follows, "and if no male heir lawfully begotten by the said John Chilcott, then the lands to fall to the first male heir of the branch of my uncle Richard Chilcott's family, yielding and paying unto such of the daughters of the said R. Chilcott which shall be then living the sum of 100l. each at the time of taking possession of the aforesaid estate ;" and here, before adverting to the second and more important clause in the will, I would observe that in the previous devise to John of London, the word "heir" is by no means certainly used in its technical [331] and proper sense ; for the devise is, not to my kinsman John Chilcott living in London and his heirs male, but "to him or his male heir, if any." I notice this merely for the purpose of shewing the testator's use of the word "heir" in the former clause of the will, as bearing, to a certain extent, upon its use and meaning in the latter ; because, as to the question arising upon Richard's branch of the family, it is immaterial whether John of London took an estate in tail or for life.

The state of the family of R. Chilcott is already before your lordships, and has been noticed. It is only material that I should observe that R. Chilcott left five daughters but no son ; that of these daughters, the eldest, Mary, had a daughter only, whose son, Matthew Perratt, is one of the claimants. The second, Joan, had a son, Thomas Chilcott Winter, older than any son of any other daughter. Sarah, the third, had two sons, whom it is not material to notice. The fourth, Betty, had a son, Thomas Viney, and, what is important in one view of the case, she died before the testator. The fifth, Agnes, also had a son ; and they are both living. And upon this state of the family of R. Chilcott, the question is, whether any of the sons can take under the description of the "first male heirs of the branch of my uncle Richard Chilcott's family," and, if so, which ; in pursuing which inquiry, the most orderly course, as it seems to me, is, to ascertain, if it may be, the intention of the testator, and then to examine whether that can be carried into effect consistently with the known rules of law.

Before, however, I proceed to do this, which is, in effect, to answer the third and most important question proposed by your lordships, it may be convenient to premise who are not entitled to take under the will, about which there is much less difficulty, and, so far as I am aware, no difference of opinion. In the first place, [332] then, I think there is no doubt but that the daughters of R. Chilcott are excluded. They all technically constitute one heir ; but the heir described in the will is one, and a male. Moreover, they do not seem to have been in the contemplation of the testator with a view to any beneficial interest, but to be named merely as the person from some of whom was to be born the male heir, who was to take. For the same reason, that heir, in the singular number, and the first, is mentioned, it seems to me that the heirs male of each of the daughters, as constituting in the aggregate one heir, cannot be included, and also as not being "the first ;" that the grandson of R. Chilcott's eldest daughter (Matthew Perratt), is excluded by the interposition of his mother, which prevents that part of the description from being applicable to him. The claims, therefore, are, in effect, reduced to three ; first, of the heir-at-law, upon the ground that the will has no sufficient certainty of meaning, and those of Thomas Chilcott Winter, and Thomas Viney.

This being so, we come to that question upon which, I am aware, there is so much difference of opinion, that I cannot do otherwise than offer mine to your lordships with much diffidence. That opinion, however, is, that it was the intention of the

heir, without any intimation of his wish that the heir should be benefited. Where the devise was to a member of a class, and not to a specified individual, there seems to have been no motive for inserting a merely nominal devise.

testator that the sons of R. Chilcott's daughters, if more than one, should be preferred in the order of their mother's seniority; and therefore, if Mary, the eldest, had had a son, that he would have been "the first male heir," and that the second daughter, Joan, being the first who had a son, that son (Thomas Chilcott Winter) is entitled to take under that description, and further, that his mother, being alive at the time of the testator's death, is no objection to his so taking, or, in other words, that the will is to be so read as if the expression had been "first male descendant" of R. Chilcott. To this construction, I am [333] aware, is opposed the fact that the state of R. Chilcott's family was well known to the testator (a); and, therefore, it is said, if any particular grandson of R. Chilcott had been preferred, nothing could have been easier than to name him in the will; and it cannot be denied that there is weight in the objection. It will be for your lordships, however, to decide whether it is not, in a great degree, if not entirely, removed by pursuing the intention of the testator, which I assume to have existed, viz., that the son of the eldest daughter, if any, should have the preference; and, if so, the matter might well have been left open by the testator, seeing that up to the time of his death, that chance remained, inasmuch as the age of R. Chilcott's eldest daughter was, I think, about forty-six at the time of that event.

To this construction, also, is opposed an alleged rule of law, that T. C. Winter cannot take, because, at the time of the testator's death, the designation of "male heir" was wholly inapplicable to him; that the word "heir" has a fixed and settled meaning in the law, and that nothing in this case can warrant a more loose or popular interpretation. I am not aware of any other objection in point of law; for suppose each of the daughters of R. Chilcott to have had a son, and, of these, that the son of the second daughter was first born, and further, that all the daughters died in the lifetime of the testator, is it said, in this supposed case, that the son of the second daughter, as being the first born, would take as first male heir? T. C. Winter would have that claim. Or, is it said that the son of the eldest daughter, as being the nearest to her father (for so she was by the admission of most of my learned brothers (b)) would be entitled? T. C. Winter would have that claim also. It seems to be plain, therefore, that [334] the life of his mother at the time of the testator's death, and his not being heir according to the legal maxim, constitute the objection, and the only one, to the construction which I submit to your lordships; and the weight of that objection must depend upon the greater or less degree of clearness with which the intention of the testator appears fairly to warrant that construction. Before, however, I examine it further, I cannot help observing, that—in the case of such a will so inartificially and clumsily composed, that some (if not the majority) of my learned brothers are of opinion that no certain, or even intelligible meaning, can be extracted from it, owing to such rude and perplexed composition, and that for default thereof the claim of the heir-at-law must prevail,—it is a far-fetched and somewhat startling supposition, that the testator must have been conversant with Coke upon Littleton, and the profound maxim—*nemo est hæres viventis*.

Upon this question—the existence of the rule, and the relaxation of it—I must not forget that your lordships are already in possession of the authorities bearing upon it, and of a most minute, and learned, examination of them.

To cite those cases again, and to comment upon them, would be to assume an appearance of research certainly, not real, and to trouble your lordships at much length upon a point which will be found not to be really in dispute. Neither the existence of the rule, generally, nor its relaxation, in certain cases, is denied. This, I think, will be sufficiently apparent, when I remind your lordships of the manner in which Holroyd J. and Littledale J.—who were in favour of using the "term of art" in its technical and strict sense—state the result of the authorities as to the rule and the exception. Holroyd J. is reported thus to have expressed himself—"If it appeared plainly by the will to have [335] been the testator's intention that an heir male apparent should take by the devise, I agree that the rules of law would not prevent the giving of such a construction to the will as to carry that intent into effect." Littledale J. is thus reported:—"All these cases, therefore (cases in favour of my construction), only come to this—that if there be sufficient upon the face of the will to shew that the word is so used that the testator must have meant 'heir apparent,' it shall be so considered; as he so intended it; but they prove nothing more." And

(a) Quære.

(b) Vide ante, 326, n.

this is all, with all possible respect be it spoken, that they are required to prove, consistently with my view of the case. So that it is obvious, from the statement of the question by these most eminent and truly learned judges, that it comes round to this in each case—what was the intention of the testator? because, if that be apparent, ex concessis, the rule will yield to the exception. Instead, therefore, of citing in extenso, I will content myself with referring generally to the authorities which I consider to be amply sufficient for my purpose. They are *James v. Richardson* (Sir T. Raym. 330), *Darbishon v. Beaumont* (1 P. Williams, 229), and especially *Goodright d. Brooking v. White* (2 W. Bla. 1010), in which De Grey C. J. seems to have established the exception which Holroyd J. and Littledale J. admitted.

In order, however, that the relaxation of terms of art, or of the strict legal sense of a word, into popular meaning, may not appear to be a modern doctrine, I take leave to cite to your lordships the case of *Hill v. Grange* (Plowd. 170). That was an action of trespass for breaking and entering a house and certain closes of land: Plea, that the said house and closes were “one messuage and 100 acres of land to the same appertaining,” stating a lease thereof to the defendant, and a justification [336]-tion, not material to my purpose. Much argument took place upon the effect of this allegation, “land to the said messuage appertaining,” which all the judges agree was (in the true and legal sense of the word) equivalent to “to the said messuage appurtenant.” After an extraordinary profusion of learning upon all points in any degree connected with that in judgment, as the manner of those times was, the report states, that all the judges agreed that the averment or pleading (in which the strict legal meaning must prevail) “that the land has always been appurtenant to the said messuage” is not good, and that the land may not be “appurtenant” to a messuage, in the true and proper definition of an appurtenance. It is added, however, that the judges—except one who did not speak upon that point—when they came to consider the language of the lease, agreed that when “appertaining” is used with the other words, it cannot have its proper (that is, its strictly legal) signification, as it is said before (that is, as in pleading it must be understood); and therefore that it shall have such meaning as was intended between the parties, or else it would be void, which it must not be by any means; for it is commonly used in the sense of “occupied with,” or “lying to;” and forasmuch as it is commonly used in that sense, it is the office of the judges to take and expound the words which common people use to express their meaning, according to their meaning; and therefore it shall be taken here, not according to the definition of it (that is, its true legal meaning), because that does not stand with the matter, but in such sense as the parties intended it. And many other cases were put (as the report adds) where the word shall be taken out of the natural (that is, in conformity to the context, the legal) meaning, but according to that of the party; and the judgment was accordingly.

Upon the whole, it seems to me, that the intention [337] of the testator was in favour of T. C. Winter; and that there is no rule of law preventing that intention from being carried into effect; and that therefore Isaac, his heir, is entitled to take under his will.

These observations furnish my answer to the first and third questions proposed by your lordships. As to the second, it follows, from my view of the whole case, that the remainder first vested in interest in T. C. Winter, upon the death of the eldest daughter Mary without issue male; because, until that event happened, it was contingent whether he would become entitled or not.

PATTERSON J. In answer to your lordship's first question, I am of opinion that the expression “first male heir” was used by the testator to denote a person of whom an ancestor might be living. If the expression had been used with reference to any particular individual by name, as if, for instance, the words had been “the first male heir of Mary Bishop,” I should have had much difficulty in coming to the conclusion; because the authorities shew that the rule “*nemo est hæres viventis*” would apply; and it is clear that if an estate be left to A. for life, with remainder to the heir of J. S., and A. die in the lifetime of J. S., the remainder is void, there being no person who, at the death of A., answers the description of the heir of J. S.; though no one can doubt that such was not the intention of the testator. Here, however, the expression is used with reference, not to any particular individual by name, but to “the branch of my uncle Richard Chilcott's family.” R. Chilcott was dead, and had left

five daughters, and no son. There were, therefore, five branches of R. Chilcott's family; and if the words be taken in their literal sense, it is quite uncertain which of those five branches is meant by "the branch of my uncle R. Chilcott's family." [338] To avoid this uncertainty, it is argued that the words "the branch of my uncle R. Chilcott's family" are to be read as if they had been "my uncle R. Chilcott's branch of the family," words of very different import; and I know not by what rule of construction I am at liberty so to read them. But, assuming that I am at liberty so to read them (as all the judges who have delivered opinions in this case do assume), then the words will stand "the first male heir of my uncle R. Chilcott's branch of the family." Still those are not technical words: they have no certain legal sense according to any authority which I can find. The word "family" in a devise, has, indeed, received a construction in several cases; *Chapman's case* (Dyer, 333 b.); *Wright v. Atkyns* (17 Vesey, 255); *Doe v. Smith* (5 Maule & Selw. 126); in all of which the word "family" in devises of remainder to the "family of J. S." was held to mean the heir of J. S. So here, it appears to me, that if the word "heir" must be taken in its strict legal sense, the words would mean "the first male heir of my uncle R. Chilcott." Now this is clearly not the sense in which the testator used the words; for he evidently meant to denote some single individual by the words "first male heir," yet no single male individual could be heir of Richard Chilcott until all the five daughters were dead; nor then, unless four out of the five daughters had died without issue, or, at all events, unless the issue of four out of the five had failed; all which is quite inconsistent with the direction that the first male heir, on taking possession, should pay to each of the daughters of R. Chilcott who should then be living, 100l. No one could be sole heir of R. Chilcott so long as any one of those daughters was living. The words, therefore, do not mean the first male heir of R. [339] Chilcott; they must denote some male descendant of R. Chilcott who yet was not his heir. Whose heir then was it intended to denote? Not, the heir of any particular individual, but of R. Chilcott's branch of the family. The heir of the whole of that branch of the family would be the same as the heir of R. Chilcott himself, whom I have already shewn not to be the person meant. If then the word "heir" is to be taken strictly, it must mean the son of one of the daughters who should be dead; and yet he would only be heir of his mother, not heir of the branch of the family. Again, if all the daughters survived the tenant for life, there would, on the determination of the particular estate, be no person answering the description of "male heir" by reason of the rule "*nemo est hæres viventis*;" and not only must the devise become void, but the daughters must be deprived of the 100l. each which is given them; whereas it is quite plain that the testator intended that each of them who should be living at the death of the tenant for life should have 100l.

For these reasons, looking at the will and at the state of the family, it appears to me that the testator meant by the words "first male heir" to denote the first male descendant of R. Chilcott, without regard to whether his ancestor was living or not. It is said that if such was the testator's intention, it is strange that he should not have pointed out, by name, the person whom he intended. This observation may be very just; but it may be answered that though four of the daughters had each a son, the eldest had not, but only daughters, nor had she a grandson; and yet she might have had a son or grandson born afterwards; and the testator's intention may have been such, that a son or grandson so born should come within it (though, as I shall state afterwards, I cannot clearly discover that it was), and the testator may, for that or some other reason, have purposely [340] omitted to name the individual. Probably, as it seems to me, the testator meant to describe some person who should be living at the death of the tenant for life, some one who should then be "first male heir," which must, of necessity, be a matter of uncertainty at the time of making the will.

The authorities upon the question, as to when and under what circumstances the word "heir" may, in a will, be taken in a sense different from its strict legal meaning, have been so thoroughly sifted and examined in the opinions which have been pronounced in this case in the court of Queen's Bench and in your lordships' House, that I cannot hope to throw any further light on the subject by a detailed examination of them. They appear to me to establish this proposition, that, *primâ facie*, the word "heir" is to be taken in its strict legal sense; but that if there be a plain demonstration in the will that the testator uses it in a different sense, such different sense may be assigned to it. What amounts to that plain demonstration, must, in each case, depend

on the language used, and the circumstances under which it is used, and is not a question to be determined by reference to reported cases, but by a careful consideration of that language and those circumstances in the particular case under discussion.

In answer to your lordships' second question, I am of opinion that the remainder vested, if at all, at the death of Mary Bishop, in 1779. So long as she lived, the law contemplates that she might have a son, who might possibly have answered the description in the will; but upon her death, as she left a grandson then living, and as each of the other daughters had then a son, the right of the person entitled under the description in the will could not be altered by any subsequent events, and therefore the remainder must vest; it being [341] an admitted rule that remainders shall vest as soon as possible (a)¹.

The third question put by your lordships is, in my judgment, very difficult to answer; and I must confess, that, after fully considering all the very plausible arguments which have been adduced in favour of the different claimants, I cannot satisfy myself that any of them are sound; nor can I discover any rule of construction which enables me to form more than a probable conjecture as to the meaning of the testator's words. I apprehend that probable conjecture is not a safe or sufficient reason for fixing a meaning to the words; and I am therefore obliged to say, that, in my opinion, this part of the will ought to be held void for uncertainty. The most strict and technical argument appears to me to be that which is urged in favour of Thomas, or rather of Catherine, Viney; but then it is grounded on the supposition that the words "first male heir" mean a person of whom no ancestor, is living; and I cannot bring my mind to the conclusion that such is the true meaning of those words.

If the Vineys be excluded, then the question is between Matthew Perratt and Isaac Winter, and will depend on the meaning of the word "first" prefixed to the words "male heir." Taken in the sense of "male descendant," whether it means the male descendant of the eldest daughter, she being the first in birth of the family of Richard Chilcott, and, according to some authorities, the more worthy; or the male descendant who was first born in order of time, from whichever daughter he might descend; or the male descendant who traces through the fewest females, and so is, in some sense, the first of the generation after R. Chilcott's daughter, that is, the son of the eldest of the daughters who had a son, [342] viz. Isaac Winter, and who would also be first as compared with Matthew Perratt; and being less remote from R. Chilcott. Any one of these interpretations of the word "first" would, as I apprehend, be consistent with decided authorities; and yet there is no authority which makes any one of them preferable to the other, as a matter of law; neither is there any thing in the will which at all leads my mind to any opinion as to the interpretation which the testator himself would have adopted if the question could have been asked him. As, therefore, I am in complete uncertainty as to the testator's actual meaning, and as I have no rule of law to guide me, no technical sense which I am bound to affix to the word "first," it appears to me that the well-known rule must prevail, viz. that an heir shall not be disinherited except by express words (a)², and that this part of the will, being uncertain, is void and inoperative.

PARKE B. My lords, my answer to the first question proposed by your lordships is, that, in my humble opinion, the expression "first male heir" was not used by the testator to denote a person of whom an ancestor might be living. It is a rule in the judicial exposition of wills, that technical words, or words of known legal import, are to be considered as having been used in their technical sense, or, according to their strict acceptation, unless the context contain a plain indication to the contrary. Such is the rule laid down by Eyre C. J. in *Buck v. Nurton* (1 B. & P. 57), by Lord Alvanley M. R. in *Thellusson v. Woodford* (4 Vesey, 329) and in *Poole v. Poole* (3 B. & P. 620), citing *Goodright v. Pulleyn* (2 Ld. Raym. 1427); and, lastly, by Lord Redesdale, in *Jesson v. Wright* (2 Bligh, 1), and other authorities. [343] That this rule is well established, admits of no doubt: and it is a sound and salutary principle of construction, —which affords the best chance of obtaining a reasonable degree of certainty in the exposition of testamentary papers,—to abide steadily by general rules, and not to indulge in conjectures of the supposed intent of the testator. Upon this subject I

(a)¹ Vide ante, 328, n.

(a)² As to the foundation of this rule, and the mode in which, if received, it is to be understood, see 4 Mann. & Ryl. 71 (d).

cannot forbear referring to a passage in Mr. Fearne's work, page 136, in which this doctrine is ably enforced: "Certain established maxims as to the legal import and effect of technical expressions will render the decisions of titles to property as little dependent, as the nature of things will admit, upon the occasional opinion, humour, ingenuity, or caprice of the judge, and are therefore most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained; and, under them, a permanent peaceful enjoyment may be expected" (a).

Adopting, then, this rule of construction, the word "heir," in its strict legal acceptation, cannot be applicable to any one whose ancestor is living: "Nemo est hæres viventis (b)". That word must, therefore, be read [344] in the will in question with its appropriate meaning, unless the context contain a plain indication to the contrary. No one can take "by a devise to an heir, who is not an heir indeed, without demonstration plain," to use the language of a marginal note in Hobart (Hob. 33), sanctioned by Bridgman C. J. (Bridgman, 413) and Eyre C. J. in the case referred to. It seems to me that there is nothing in the context of this will which amounts to "demonstration plain," or any thing like a plain indication, or indeed any indication, that the testator meant to use the word heir in any other than its primary acceptation. There is no doubt that the word "heir" is capable of being applied to one whose ancestor is living; and there are cases where the context has been, in the opinion of the court, sufficiently clear to call upon it to construe the word in its improper or secondary acceptation; such as the case of *Darbyson dem. Long v. Beaumont* (1 Peere Williams, 229, 3 Brown's C. C. 60) and *Goodright dem. Brookings v. White* (2 W. Bla. 1010). Whether, in all these cases, the circumstances relied upon amounted to a clear indication of the intent of the testator to use the word "heir" in other than its strict sense, so as to satisfy the rule laid down in the cases above referred to, and now established, it is not necessary to inquire. In the present case no similar circumstances exist; and it appears [345] to me to be a mere conjecture, and that upon a slight foundation, that the testator intended to make any but a very heir the object of his bounty.

Assuming, then, that the testator did not mean by the word "heir" an "heir apparent," I proceed to the consideration of the second and third questions proposed by your lordships, which can be most conveniently taken together.

What was intended by the expression "first male heir of the branch of my uncle R. Chilcott's family?" That it must be some one who fills the character of heir to some deceased member of the family, is, for the reason before given, quite clear; that he must be a male heir is also clear; but what is meant by the term "first," or by "the branch of my uncle Richard's family," is by no means equally so. The latter expression is inaccurate, and must be understood to mean the first male heir of that branch of our family which consists of my uncle R. Chilcott's family, or, in other

(a) As to the supposed difference of construction in deeds and wills, see note at the end of this case.

(b) Strictly speaking, perhaps no one is an heir except a person who has succeeded to some property, or to some liability, of an ancestor. The word heir implies "descent," as much as descent implies an heir,—descent actual, where the ancestor dies seised or dies really bound; descent potential, where the quasi ancestor is alive and capable of acquiring descendible property, or of incurring descendible liability. On the death of a party where there is no descendible property and no descendible liability, an actual descent has not occurred, and the previous potential descent is destroyed, or, at least, suspended. In such a case the next of blood, as expectant heir, would seem to answer the description of heir, as little in strict law, and less in common acceptation, after the death of the quasi ancestor, than he did in his lifetime, when the non-existence of property or liability which might descend, was not ascertained. Where an estate stands limited to A. for life, remainder to the heir of B. in fee, and B. has an only, or eldest, son C., his heir apparent, if A. dies, living B., the remainder fails, and is destroyed, it being at the time of the death of A. uncertain whether C. will survive B., and thereby become the party who is to succeed to the real estate and the real liabilities of B. If B. has only a daughter D. or a nephew E., who is heir presumptive, the uncertainty is increased by the possibility of B. having a son. But if B. die living A., the remainder will vest in C., D. or E., not because he or she is, in fact, the heir of B., but as being the only party who can be so designated.

words, the "first male heir of my uncle Richard's branch of our family." What is meant by the term "heir of my uncle Richard's branch," and by the term "first"? That he must be one individual, and not all who collectively answer the description of heir, is very clear; but must he be that person who, being a "male," is the true heir of some deceased member of that branch of the family, or must he be the true heir of Richard the uncle? That the latter was not intended, may be collected from the context. There could be no single true male heir of Richard until all the stocks of the daughters but one were extinct; which is a very remote contingency; yet the testator contemplated an heir who might have to pay to more than one of the daughters of Richard the sum of 100l.

It follows, therefore, that the heir intended by the testator, was the heir of some other deceased member of [346] that branch of the family. Which of these will answer the description of "first"? It seems to me that when the word "heir" is determined to be not "heir apparent" but very heir, there is little or no difficulty in deciding on the meaning of this term, whatever there might be if the word "heir" were to be construed as heir apparent. The ordinary meaning of the word "first," when applied to a person who, at some future period, should fill the character of very heir, is, I think, the first in order of time who does so; and the language of a will ought to be read in its ordinary sense, unless the context, or the facts to which the will is to be applied, require a different construction. If the very heir of the first or eldest of the daughters had been intended, the term "first" would have been applied to the daughters, not to the heir. My humble opinion, therefore, is, that the first male descendant of the daughters who filled the character of very heir, to any of them, was entitled under this devise, and, consequently, to the second of your lordships' questions, I answer, that the remainder vested in interest, on the death of Betty Viney (the fourth daughter of Richard), that is, on the 24th of February 1804. And to the third, I answer, that it vested in Thomas Viney, her son, who, on her death, became her very heir, and was the first of the descendants of the uncle Richard, who was the heir-at-law, in the proper legal sense of that word.

TINDAL C. J. My lords, having had the honour of stating to your lordships, upon a former occasion, the opinion which I had formed on the several questions now submitted to H. M.'s judges, and finding no reason to vary from the opinion which I then formed, I hope I shall stand excused, if I simply refer to the answers before given by me to the first and second questions, confining myself, at present, to the discussion of the [347] last, which is the most important question, in the determination of this case.

My lords, the consideration of the last question involves in it the construction of the will of Emanuel Chilcott; and, in effect, calls upon us to state who it was the testator intended should take in remainder by the description contained in his will "the first male heir of the branch of his uncle R. Chilcott's family."

The first inquiry would seem to be, whether any person could fill out and answer the description contained in the will "first male heir of the branch of his uncle's family!" And if the word "first" had not been found in the will, and the devise had been simply to the "male heir of the branch of his uncle Richard's family, it is possible, though in the state of the family at the time the will was made, in the highest degree improbable, that upon certain events taking place, the description contained in the will might have been satisfied; for, if before the time when the remainder must vest by law, all the daughters of Richard had died without any of them leaving issue except one, and that one, leaving a son, or a male descendant, such son or male heir might be considered "the male heir of the branch of his uncle Richard's family" within a certain latitude of expression, such persons being, at the same time, the direct heir male of one of the daughters of Richard, and the heir of the other daughters, and thus uniting in himself the character of heir male to the several coparceners, and, in some sense, that of heir male of his uncle Richard's branch of the Chilcott family," which is probably what the testator intended by the expression "the branch of his uncle's family."

But neither did such an event ever happen, nor, at the time of making the will, was such a state of the family within the reach of probability; for, at that time, of the five daughters of Richard, Mary, the eldest, had [348] four daughters; Joan, the second, who had married Winter, had two sons; Sarah, the third, who had married Parsons, had two sons; Betty, the fourth, who had married Viney, had one son; and, lastly, Agnes, the youngest daughter, who had married Greenslade, had also a son.

But the will further contains within it the word "first," in addition to the description before adverted to; the devisee is to be, not only "the male heir of the branch of his uncle Richard's family," but "the first male heir" of that branch—words that import in themselves a discrimination or selection of some one out of several of the same description or class; whilst, at the same time, the will shews the express intention of the testator that some, at least, of the five daughters of Richard, if not all of them, might be alive at the time when this first male heir should take; for the heir who takes is charged with the payment "unto such of the daughters of the said R. Chilcott who should be then living" 100l. each.

In the case of such words of devise, and of a family the several members whereof were within the testator's knowledge (a)¹, I cannot bring myself to think, that by the expression "first male heir of the branch of my uncle Richard's family," the testator could possibly mean "heir" in the strict legal sense required by the maxim "*nemo est hæres viventis*," that is to say, that in order to take the remainder he intended the first male heir must be a person who had become very heir by the death of his ancestor before the remainder was to vest; but I think he had in his mind some general and popular notion of "a male descendant" of the branch of his uncle Richard's family, and nothing more. And [349] the present case, as it seems to me, falls rather within those in which Lord Hobart, in the case of *Counden v. Clerke* (Hob. 32), states there is "declaration plain" that the testator intended the word heir should not be confined to its strict legal meaning, but should be taken in the more popular sense of heir apparent or presumptive; for the testator knew that his uncle was then dead (b) without leaving a son. He knew, therefore, that there could be no male heir of Richard, strictly and properly so called. He knew, also, that whoever took as male heir must be a male descendant of one of the five daughters of Richard; and he must, as I understand the will, have meant such male descendant to take, whether his mother was dead or living, because the will provides that such of the daughters as were living at the time of the vesting of the remainder, were, without any restriction, to receive payment of their several legacies from the devisee; so that, consistently with this will, the heir might be called upon to pay his mother, that is, his ancestor, who was then living. Again, the testator never could have intended that if all the daughters were living at the time the remainder ought to vest, such remainder should fail, and, with it, all the legacies fall to the ground; and yet, if the daughters had all been alive, such would have been the necessary consequence if it be held that no one can take who is not an actual heir.

I am therefore satisfied, as I have already stated, that the testator used the phrase male heir, not in its strict legal sense, but in its popular acceptation, as "heir male apparent," or "male descendant," and that the great difficulty of construction arises from the intro-[350]duction of the word "first" into the devise, so as to make it necessary to determine who is the "first male heir," or "first male descendant" of the branch within the testator's meaning.

My lords, I agree entirely in the position, that where the deviser uses a legal technical term it must be construed strictly, unless a plain intent to the contrary appears on the will itself. But I cannot consider the expression "male heir of the branch of a family" as any legal expression, or word of act, the law neither acknowledging such phrase nor knowing or defining who the male heir of a branch of a family is, though it both knows and defines who is the heir male of an ancestor. I cannot therefore feel the weight of the argument that the expression "male heir" must be construed strictly in this case; for that is to take part only of the testator's expression in his will, not the whole of it, and to give a strict interpretation to part, omitting altogether the rest (a)².

It appearing, therefore, to me that the will is to be interpreted as if the remainder had been limited to the first male descendant of the testator's "uncle's branch of the

(a)¹ The knowledge found by the verdict goes no further than to the fact of the existence of the five daughters.

(b) The testator, knowing the five daughters of R. Chilcott, would probably know that their father was dead. Consistently, however, with the finding, the testator may have believed R. Chilcott to be living.

(a)² This important view of the case is not noticed by the learned judges who supported the decision of the court below.

family," and being unable to determine, from the words of the will, to which claimant the word "first" ought to be applied, the conclusion at which I arrive is, that the will is void for uncertainty, and that the heir ought to take.

My lords, I readily agree that to hold a devise to be void for uncertainty, is the last resource to which any court should be driven in the interpretation of a will; but that cases must, and do sometimes, arise, in which it is necessary to come to that conclusion, must also be admitted. Hobart C. J. in his judgment in *Cownden v. Clerke*, already referred to, says, "We must pass be-[351]-tween two main grounds, so as we offend neither; one, that the devise must be taken according to the intention of the party devisor, the other that such intent must be so expressed in the will written, that it may be certain to the court, and not against law."

What certainty, or ground of certainty, can the court see in the present will to guide them to the meaning of the term "first male heir?" Does the testator mean "first" according to the dignity of descent, as coming from the elder and worthier branch? Then Matthew Perratt is the first male heir, as was the opinion of Taunton J. and of Bosanquet J. when called upon by your lordships, in this House. Or, is it to be the first-born in order of time? Then, the claim of Isaac Winter is to be preferred; as was the continuing opinion of Bayley J. both in giving his judgment upon the original argument in B. R., and also afterwards, when he stated his opinion in your lordships' House. Or, is it to be interpreted the first who is actual heir male by the death of his mother, that is, the son of such one of the five daughters of Richard as dies first. Then is Thomas Viney to be considered as such heir male, according to the opinion of Littledale J. and Holroyd J.; upon the argument of this case in B. R. Littledale J. still retaining that opinion, when he was called upon to declare it in this House.

My lords, the opinions of those eminent judges are fortified and supported by such strong argument in favour of each respective claimant, as to leave the mind in complete doubt and hesitation which way the decision should preponderate; and I am not ashamed to say that I am unable to attain that certainty as to the testator's intention, which will justify me in offering an opinion to your lordships which of the claims is entitled to the preference.

Under these circumstances, I think the testator has not done enough to intercept the descent to the heir-at-[352]-law, by describing, in terms that are clear and intelligible, who it is he means should take as the hæres factus or devisee. In many cases the courts have held that where the devise is left absolutely uncertain, the devise must fail. I will instance a few only. A devise to the two best men of the guild or fraternity of the white towers: the devise is void, because there being no such fraternity by charter or prescription, the court cannot decide who the two best men are; they are not persons known, and there is no certain intentment to be collected from the words of such a devise. Fitzh. Abr. tit. Devise, 7 (citing M. 45 E. 3, fo. 3. Vide post, 359). A devise to one of the sons of J. S., he having several sons, the devise is void for uncertainty, and cannot be made good, Sir T. Raym. 82 (*Bale v. Amherst*), or a devise to his son John, he having two sons of that name, and no direct proof which was meant (5 Co. Rep. 68 b.); and this case appears to me to fall within the doctrine laid down by Rolle C. J. in *Beal v. Wyman* (Style Rep. 240), where the testator devised one half of his lands to his wife, and, after her death, all his lands to the heirs male of any of his sons or next of kin. The Chief Justice says, "The intention of the testator here, is *cœca et sicca*, and senseless, and cannot be known; and we ought not to frame a sense upon the words of a will where we cannot find out the testator's meaning;" and, lastly, in the late case of *Doe v. Joinville* (e),

(e) In *Doe v. Joinville* the devise as to one moiety was "to my wife's family;" and as the wife never had any children, and there was nothing to indicate which of her relations were intended to take, the devise of this moiety was held to be void for uncertainty. The other moiety was devised "unto my brother and sister (or sisters) family, equally to be divided between them, share and share alike." The testator, at the time of making his will and at his death, had a brother with children, a sister with children, and nephews and nieces, the issue of a deceased sister.

Notwithstanding the use of the word "family" instead of "families," it is conceived that the words used were equivalent to "the family of my brother and the families of each of my sisters." If the testator had meant that the brother should take, and not

the court of King's Bench held the devise to be void for uncertainty, where the testator had devised a remainder "to his brother and sister's family," one of his sisters being dead, leaving children, so that it could not be collected who were meant; and, therefore, in the present case, because I cannot satisfy myself from the words of the will, who it was the testator meant by the "first male heir of the branch of his uncle Richard's family." I do, in answer to the third question proposed by your lordships, state my humble opinion to be, that the devise is void for uncertainty, and that the heir-at-law ought to take.

[354] LORD BROUGHAM. My lords, in this case I shall not trouble your lordships with reading the writ, upon which the questions have arisen, because that has been so frequently before your lordships; and, indeed, parts of the will will be immediately referred to so necessarily that it is not needful I should trouble you with reading it before entering upon the case.

The first difficulty which arises in construing this will, is, upon the words "the branch of my uncle R. Chilcott's family who lived at Hancrick farm;" and, if this clause had stood alone, the difficulty might have been greater than I think it is, of construing those words. But the testator had before given the lands and houses in question, after the determination of the prior estates for life, which he had created in remainder, to his "kinsman John Chilcott living in London, or his male heir," and for default of such issue, over; which, whatever construction we may put upon the devise as to the estate given, clearly indicates his having in contemplation John Chilcott, his cousin, and the part or branch to which he belonged of the family. Then, he refers to that family by the name of the "Chilcott family" in directing that the freehold land thus given to John Chilcott shall not be sold or mortgaged, but remain in the family. Immediately after this he provides for the case of John Chilcott having no "male heir," he John Chilcott having a daughter then living, and, in that event, gives the remainder to "the first male heir of the branch of his uncle Richard's family."

It appears thus, sufficiently plain, that he had in view the Chilcott family, as divided into three branches: first, his own, the eldest, the extinction of which he assumes, only giving life estates to those connected with it by affinity; secondly, the branch of his eldest uncle, the next brother of his father; and to them he gives the estate, whether in remainder to his male heir as a pur-[355]-chaser, or not, may be made a question, which, for our present purpose, is unnecessary to be considered; and, lastly, the third branch of the family, that issuing from Richard his father's youngest brother; and to this third branch he gives the remainder expectant upon the failure of male heirs of the second.

The words considered to be inaccurate, and supposed to cast doubt upon the meaning, are these, "the branch of R. Chilcott's family." But I can hardly so regard

the brother's family, he would have said, "unto my brother and unto my sister's family," or "families." The learned judges, however, appear to have thought, that in order to avoid the imaginary ambiguity of the expression, "my brother and sister's family," the testator ought to have violated the propriety of the English idiom, and to have said in latinized English, "my brother's and sister's family." This view of the case appears to have originated in the modern practice of treating the suffix "s" as the sign of the genitive case. If it be a genitive at all, it is a genitive not of a substantive, but the genitive of the whole predicate to which the subject following the "s" is affirmed to belong. Thus, we say, "the king's men," because "the king" is the sole predicate to which "men" are said to belong; and we do not say "the king's of England men," but "the king of England's men," because it is not the king, but the king of England, that is the predicate; and it is plain that England's is not the genitive of England; first, because the effect of a genitive case is given to England by the word "of"; and, secondly, because it is not meant to be affirmed that the men belong to England; thirdly, because if the "s" be read as modifying the word England only, we produce a totally different meaning. So read, the sentence would be equivalent to "the king of the men of England." In this will of Hayter, the predicate to which the term "family" properly attaches, is "not sister" or "sisters," but "brother and sister," or "brother and sisters." If Hayter had written according to the old mode, "my brother and sisters—his children," there would perhaps have been no dispute, the unelided "his" thus used, applying to predicates of both numbers and of all genders.

them; for he was clearly dealing with his third branch as contradistinguished from the second, that of John, and he terms R. Chilcott's family this third branch. The Chilcott family is considered as the whole, and to consist of three branches; one branch is his own, a second is John Chilcott's, the third branch consists, not as in his own and John Chilcott's case, but of a numerous body, namely R. Chilcott's family; and he describes this third branch, accordingly, as "R. Chilcott's family" as if he had said "that branch of the Chilcott family which consists of R. Chilcott's family, and not my father's family, or my uncle John's family." I am yet to learn that a particular family may not, correctly enough, be considered as a branch of a whole family, or that we may not say, accurately enough—certainly intelligibly enough—the branch of the Bourbons or Bourbon family, consisting of the Orleans family, or the Carlisle family, a branch of the Howards or Howard family.

"Male heir of the branch" has, in the course of the argument, been spoken of as presenting some definite legal idea; and, if the reading I have given of the words, "branch of R. Chilcott's family," be not the true one, some such meaning must be resorted to. But these words do not seem to possess any intelligible sense in law. "Heir of the body," or "heir male of the body," or, "heir of line," or "heir general," all these [356] are expressions of a known and received sense. "Heir or male heir of the branch" has none, and therefore it must be taken in the sense given by the context, and consistent with the scope of the will.

The word family is certainly not to be taken as technical. It has in different cases received a technical construction; but that was where it necessarily must be taken out of its meaning, as in *Doe dem. Chattaway v. Smith* (5 M. & S. 126), where a remainder to the family of A. B. was held to be a remainder to the heir of A. B., and other similar cases. But there is this difference between such devises and devises to the heir male, or to the issue male, or to the first and other sons—that all of these must be taken in their technical sense, unless a plain intention appear from the context, that they should be taken in their popular sense; whereas it is the reverse with a term like "family," which only receives a technical sense when the context appears to exclude the popular use of the word.

In the present case, "heir male of the family of R. Chilcott" cannot be taken to mean heir male of R. Chilcott, because, until all the five daughters, save one, were extinct, without issue, no person could come in esse answering the description; and then this would be wholly inconsistent with the gift of 100l. to each of R. Chilcott's daughters, with the payment of which the devisee in remainder is charged immediately upon the estate vesting in possession. Indeed, if it were heir male of R. Chilcott it must be heir male of the body of R. Chilcott by the doctrine laid down in *Lord Ossulston's case* (3 Salk. 336), and in Co. Litt. 27 a., and other books; and the testator could not possibly intend that, because at the date of the will, he knew (c) that R. Chilcott had been long dead, leaving only five daughters.

[357] The same consideration makes it equally impossible to read the devise as of a remainder to one, in the strict technical sense of "heir," any more than of male heir, which it could not be, because that strictly means one claiming altogether through males, and R. Chilcott had predeceased the date of making the will, leaving only daughters. But so, neither could "heir" signify the true heir of R. Chilcott, or of the branch, or the family, meaning the heir of the whole or the heir of R. Chilcott, because the coparceners, or their heirs, taken together, were, in law, that heir, and the clause plainly imports that one, and not many, was to take the remainder; and, for the reason already assigned, the taking could not be postponed until after the male heir of one should fail, both because such postponement is against the rules of construction with respect to remainders, and because the gift to surviving daughters supposes the remainder to vest in possession while some of the daughters are themselves living.

We may, therefore, conclude first, that some individual of R. Chilcott's branch of the family is intended; secondly, that one individual is intended to the exclusion of the co-parceners and their heirs; and, thirdly, that this individual is not the male heir of R. Chilcott.

The question now comes to be, and the question in which nearly all the difficulty lies, who this person is? Who is the first male heir of R. Chilcott's family?

We may, in the outset, observe, that there are certain principles fit to be kept in

(c) Vide tamen, supra, 348, n., 349, n.

view when we are called upon to construe a will which raises such doubts as the present has raised. One is, and the most material, that the leaning should be towards taking technical words in their technical sense, and only suffering ourselves to adopt another meaning when there can be no reasonable doubt, from the context, that in such sense the testator used them, and that he could not have used them in [358] their known or legal sense. This rule is founded upon a consideration of the risk that we run—in allowing a scope for conjecture and fancy—of making a will for him, which neither he himself made nor the law recognised; and, if it be said that by adhering to the technical sense we shall sometimes run the risk of giving a construction which the testator did not intend, the answer is, that this risk is common to both courses, and we avoid that other, and perhaps greater, evil, of introducing uncertainty into the foundation upon which titles rest.

The authorities are numerous which confirm this doctrine; and the cases are numerous and familiar, in which it has been acted on; the rule being, that the technical meaning of technical expressions shall only bend to a manifest intention, clearly shewn, of using them in a popular sense.

The arguments of Lord Eldon and Lord Redesdale need only be cited, when deciding a case, which excited much interest in the profession, that of *Jesson v. Wright* (2 Bligh, 1), where the decision of the court of King's Bench was reversed, and a devise to A. for life, remainder to the heirs of his body, in such shares as he should appoint, and for want of such appointment to the heirs of his body as tenants in common, was held to give an estate-tail to A., the contrary doctrine in *Doe dem. Strong v. Goff* (11 East, 668) being also over-ruled. Lord Redesdale observed, that it is not an accurate expression of the rule to say "the general intent shall overrule the particular, but the rule," said his lordship, "is, that technical words shall have their legal effect unless, from subsequent words, it is very clear that the testator meant otherwise." But the same doctrine had repeatedly been laid down in the courts below, and was never more [359] strongly enforced than by Lord Alvanley in *Poole v. Poole* (3 B. & P. 620), where it was, in vain, sought—by insufficient reference to other parts of the will, as indicating intention,—to make heirs of the body, words of purchase. "Words are to be taken in their ordinary sense as words of limitation, unless the testator has demonstrated an intention to put a different sense upon them" (b)¹. He afterwards says, "My brothers agree with me in thinking that this rule must be rigidly observed," meaning the technical rule.

Secondly, another principle is equally clear. We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and, where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favour of one view rather than another, before we reject the whole. It is true the heir-at-law shall only be disinherited by clear intention (c); but if there be ever so little reason in favour of one construction of a devise rather than any other, we are, at least, sure that this is nearer the intention of the testator than that the whole should be void and the heir let in.

The cases where courts have refused to give a devise any effect, on the ground of uncertainty, are those where it was quite impossible to say what was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested, and seemed equally entitled to the preference. Thus, in the case (d) of a devise to "one of J. S.'s daughters," he [360] having several daughters, or a devise to "my son John" (a), where he had two of that name. In neither case was there any thing supposed to indicate which son or daughter was intended. When Lord Coke puts the case of a devise to A. for life, remainder to the next heir male of B. in tail, B. having two daughters, and each of them a son, and both B. and the daughters being dead, he gives three opinions. The one, that the devise is void for uncertainty (b)², seems plainly to be the opinion he himself least leans to. And the decision in *Periman v. Pierce or Biford* (Palmer, 11, 303) would seem to shew that

(b)¹ See the distinction taken by Newton C. J., *infra*, 380 (b).

(c) As to the force or value of this maxim, see 4 Mann. & Ryl. 71 (d).

(d) *Bate v. Amherst*, Sir T. Raym. 82,

(a) *Lord Cheney's case*, 5 Co. Rep. 68 b.

(b)² Co. Litt. 25 b.

"next heir male of B." would have been held to mean the son of the eldest daughter, as next in consanguinity to B. At any rate, the devise in that case seems much more uncertain than that in the present, and yet the court seized on any circumstance, rather than be driven to regard the whole as void; for the limitation of an estate to two of the four daughters, the second and third, was the ground relied on besides the word "next"; and this ground only excluded those two daughters and not the fourth.

The case of *Counden v. Clerke* (Hob. 29), was that of a devise to the right heirs of the testator's "name and posterity, part and part alike," which was plainly not only uncertain, but self-repugnant; so a devise to the best men of the white-towers in the Year Book, 49 Ed. 3 (e), or to twenty of the poorest of the tes-[361]-tator's kindred, which was *Webb's case*, in 1 Rolle's Abridgment (a).

In *Doe v. Joinville* (b), the remainder being given by the testator one moiety of his wife's family, and the other to his brother and sisters' family (not brother's and sisters' family), the testator having one brother with children, one sister with children, and having had a deceased sister who had left a family, and there being no means, afforded by the will, of ascertaining which sister was meant, or what relations of his wife, or whether it was the brother or his family (b), who were to share with one or more of the sisters' families, the court, of necessity, held this void for uncertainty; but, even in that case, (and it shews how slow the most celebrated, and justly celebrated, judges are to come to that conclusion, even in such a case as that) even in that case, Lord Kenyon, before whom it was argued, though the decision was after his death, had been so unwilling to adopt this conclusion, that, in order to escape from it, he had propounded a theory in which the other judges did not concur.

On this head, it may further be observed, that the difficulty of arriving at a conclusion, even the grave doubt which may hang round it, certainly the diversity and the conflict of opinions respecting it, and the circumstance of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility; the doubt so great, that there is not even an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of [362] preferring one solution to all the rest. The books are full of cases where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty; and on any one of these grounds which have been held sufficient to shew uncertainty in the few cases, and they are very few, where this has been allowed to defeat a devise, it does not appear possible to defeat the devise now under consideration.

Lastly, it seems not at all consistent with principle, that, in order to put a construction upon words, we should take some of them in a technical, and others in a popular, sense; and even the same words in a popular sense to a certain extent, and a technical for the residue, that is, only to take them so far out of their technical sense as we are compelled by the circumstances and the context.

This principle, of getting as near the technical sense as we can, is strongly illustrated by what Littleton in s. 352 says of performance *cy pres* of conditions, which are to do some act known in the law,—as to re-enfeoff the feoffor and his wife, habendum to them and the heirs of their bodies, remainder to the right heirs of the feoffor; and the husband dies. Here, the feoffment must be made as near to the technical import of those words as may be. Therefore, a life estate without impeachment of waste, must be given to the wife, with remainder to the heirs of the body of the husband by her, remainder to his right heir; which is not giving her an estate tail, as she would have had if her husband had been alive, but as near it as possible.

We are now to apply these principles, every thing of course depending upon the

(e) In *Ralph Jordan's case*, M. 49 E. 3, fo. 3, pl. 7, the only question discussed was, whether—on a devise to Agatha Lawe for life, on condition to find a priest to sing for the souls of Ralph Jordan and his ancestors, remainder to two of the best men of the guild or fraternity of white-towers in London, for ever, on the same condition, such remainder was not void for want of capacity in the unincorporated guild to take.

(a) Quære this case.

(b) Vide *supra*, 352, n.

particular words and circumstances of each case; and the two questions which must be disposed of are, first, whether the words "male heir" are used in a strict and technical, or in a popular [363] sense? And, secondly, on what event, and to whom, the words "first-male heir of R. Chilcott's branch of the family" give the remainder?—when that remainder vests? And in what person?

First. That "heir" may, in peculiar circumstances, mean "heir apparent," or even "heir presumptive," cannot be denied; but, according to the principles already stated, the proof of this is upon those who would divert or pervert the words from their known legal acceptation, and assume a testator to have treated as an heir one, who his ancestor being still in esse, could not, in any legal propriety of speech, be said to have become an heir; the maxim "*Nemo est hæres viventis*" being the known general rule. Sometimes, no doubt, the expression is so used as to take it clearly out of the rule: thus "heir apparent" at once shews what is meant. So, the statute of treasons, 25 Ed. 3, st. 5, c. 2, mentions the king's "son and heir" as contradistinguished from the king himself. But so, too, the context may shew, in a devise, that the person intended to take is, not very heir, but he who would be heir on the death of his ancestor, and that "heir" is a word of designation or description; as, for example, when he is plainly intended to take during the ancestor's life. Thus, though a devise to A. for life, remainder to the right heir of B. is contingent during the life of B. and is defeated by B.'s not dying during the subsistence of the particular estate, yet, if it were to A. for life remainder to the heirs of the body of B. so long as B. shall live, an estate *pur auter vie* being given, and the ancestor being *cestui que vie*, the rule of law would plainly be excluded. But we may safely assert, that whenever the popular sense of descendant has been given to the word "heir," this has been done on a manifest indication of the testator's meaning, or what Hobart (in *Cowden v. Clerke*) calls "demonstration [364] plain" (a) in a note mentioned with approval by Bridgman C. J. in *Collingwood v. Pace* (Bridgm. 413), an indication which made it almost as impossible to use the words in their technical sense, as if the testator had himself declared that he used them in the popular sense.

Thus, in *Burchett v. Durdant* (2 Ventr. 311) the question arose, whether a devise to "the heirs of the body of A. now living," was a vested or a contingent remainder; and it was held to be vested, because the words "now living" were clearly referred, not to A., but to the heirs of the body; and it was also from the other parts of the will clear that the testator knew of A. being in esse also (d). Therefore, it was held, that this gave the remainder to the heirs during his life as much as if the devise had been "to the heir apparent of A." in terms. Nevertheless, it was not without great struggle, and conflict of opinion, that this decision was come to; for, in *James v. Richardson* (1 Ventr. 334) on the same devise, the court of King's Bench having held that the remainder vested, the Exchequer Chamber reversed their decision with only one dissentient voice; and one judge in the court of King's Bench also had held the remainder contingent. The judgment of the Exchequer Chamber was indeed reversed in the House of Lords. It was in deference to this decision of the Lords, that *Burchett v. Durdant*, to which I have just referred, was decided; and even then Atkyns C. B. and Powell J. retained their opinion, that the remainder was contingent.

So, in *Darbishon dem. Long v. Beaumont* (1 P. Williams, 229), a remainder [365] being devised to the heirs male of the body of Elizabeth Long, and notice taken that she had three sons, and the heir-at-law being clearly excluded by an annuity given to him, the House of Lords again held, against the opinion of the chief justice, and the chief baron, and other judges, that the heir apparent took. But this was so held upon the intention appearing from the reference made to the sons of Elizabeth Long, and to herself at the same time, as well as upon the exclusion of the heir-at-law.

In like manner, the case of *Goodright dem. Brooking v. White* (2 W. Bla. 1010), though it goes further than any other case, yet was rested upon the plain indication of intention. The testator gave annuities to three of his daughters for their several lives, and he then gave an annuity to his daughter Margaret and his son Richard Brooking for his own and their joint lives. Blackstone J., who reports the case,

(a) Hob. 33. The marginal note here referred to, is, "No man shall shew me a case in law where, by purchase by devise to an heir, any may take, that is not heir indeed without declaration (not demonstration) plain."

(d) The latter circumstance appears rather to militate against this construction.

considered this change in the tenure of the annuity from that of the annuities to the other daughters, as a plain indication that the testator contemplated Margaret surviving Richard Brooking, and that therefore "heir" must be read "issue," in order to let her son take during her life. The devise was to Richard Brooking and the heirs of Margaret: habendum, to the heirs male of Richard lawfully begotten and heirs of Margaret, jointly and equally, and for want of heirs male of Richard Brooking at his decease, then to the heirs and assigns of Margaret, lawfully begotten of her body. It cannot, therefore, be said that any new law was introduced by this case; and, indeed, the chief justice founds himself upon the former cases, in holding that Margaret's heir apparent was indicated to be intended by the testator.

It must, however, be admitted, that in both the latter [366] cases (a) feeble indications of intention were allowed to satisfy the court than had been held requisite in other instances; and, as regards this diversity, those two cases are less reconcilable with the general current of decision than might have been wished. Nevertheless, in all of them, the courts have professed to require a plain and undeniable intention before they can bend the words from their technical import.

That nothing but such plain indication can suffice to give this sense to the words, we have not only the authority of Hobart C. J. and Bridgman C. J. which I have already cited (*supra*, 365), but the decision in *Challoner v. Bowyer* (2 Leon. 70), a case always regarded as of great weight, and never professed to be at all broken in upon by the subsequent decisions. It was an assise of novel disseisin, in which the tenant claimed as heir-at-law, and the demandant, under a devise to the younger of two sons in tail remainder to the heirs of the body of the elder, and if he die without such issue, then to two daughters, in fee. The younger son died leaving the elder living; his son was tenant, and he contended that though by grant he could not take, living his father, yet by devise he might, in order to favour the intention of the testator. But the court appears strongly, and unanimously, to have reprobated this distinction. It held, that clearly the tenant could not so take; whereupon he offered evidence to shew, by parol declaration of the testator, that he never meant his daughters to take as long as his eldest son had issue. But the court, says the book, "utterly rejected this evidence," and gave judgment for the demandant, upon the strict legal meaning of the devise, holding to the maxim "nemo est hæres viventis."

[367] So, in *Davis v. Speed* (4 Mod. 153), where the whole question turned on the want of a particular estate to support a contingent use, (the first gift being to the heirs of William Horn, begotten, or to be begotten,) upon Ann his wife, it was held, that neither in a deed, nor in a will, could any such estate be raised by implication as was here wanted, to support the remainder; and the decision was affirmed in the House of Lords.

But to shew an intention of the testator in the present case, there is absolutely nothing, except a suggestion of consequences which may, or may not ever, have occurred to himself. The learned judges, six in number, who held that he used the words in their popular sense, as meaning heir apparent (b), do not, by any means, ground this opinion upon the same circumstances. The Lord Chief Justice gives as his reason, what would be quite sufficient, and would bring the case within the authorities of *James v. Richardson* and *Burchett v. Durdant*, if it existed in the facts. His lordship, both in the former and the more recent argument, but more particularly in the former (and to his reasons on that former occasion he expressly refers upon this point in his latter argument), mainly relies upon the supposed circumstances of the will, shewing "that the testator contemplated the possibility of the mother being alive when the son took as heir of the uncle." This, his lordship says (10 Bingh. 235, 3 Moore & Scott, 624), brings the case within the principle established in *Darbishon v. Beaumont* and the other cases.

Now, I have, in vain, endeavoured to find any proof that the testator had any such fact in his contemplation, as the mother surviving the son, who should take; his lordship can only shew this by referring to the obligation imposed on the heir of paying to the daughters of [368] R. Chilcott, which shall be then living, the sum of 100l. each, at the time of the taking possession of the aforesaid estates. Now, how does this shew that the heir's mother was to be one of these daughters. It plainly requires him to pay each of the surviving daughters. But his mother might be dead

(a) *Darbishon v. Beaumont*, and *Goodright v. White*.

(b) *Quære*.

before he could take, and yet the direction would apply ; and he would comply with it, by paying such as survived his mother.

It is admitted, on all hands, that a devise to A. for life, remainder to the right heir of B., cannot vest unless B. predeceases A. But a devise to A. for life, remainder to the right heir of B. now living, vests the remainder in B.'s heir apparent or presumptive. So, a devise to A. for life remainder to the right heir of B., he paying to B. an annuity upon coming into possession, would clearly vest the remainder in B.'s heir apparent. But the present is nothing like that case. It is a remainder to the heir of B., he paying so much to his surviving aunts on taking possession, or a remainder to the heir of one of five sisters, he paying such of the others as may be alive when he takes possession, that is, he paying such of his aunts as may survive his mother. The person intended being unknown, and the question being, whether that person can be one whose mother is living, we clearly are not entitled to assume that the testator conceived the person's mother, whoever he might be, to survive the party in possession, because this is assuming one of several possible things, and assuming it, for the purpose of ascertaining who the person intended is, which is the thing in dispute ; consequently it is assuming the matter in question, or, what is the same thing, assuming gratuitously that which decides the question.

The test, by which to try the argument, is this. Suppose the testator had intended to designate the very line and the very individual, upon whom the strict [369] technical construction, as I conceive, makes the gift fall. Nay, suppose he had said in terms, "Let whichever daughter first dies leaving a male heir, be the stirps of the line in which this remainder shall descend," might he not still have added the obligation on that male heir, to pay 100l. to each surviving daughter, upon the estate's vesting in possession ? Unquestionably he might have done so, and in the very words which he has used. Therefore, those words, of undisputed meaning, do not at all indicate an intention inconsistent with the technical construction of the words of which the sense is disputed. But the same test applied to the other constructions, which have been set aside upon the inference drawn from the gift of 100l., will be found conclusive as to those other constructions. For example, had he intended all the daughters, or their descendants, to make up one heir, and that the remainder should fall upon the one male heir of R. Chilcott, through the coparceners, the direction that this male heir should pay 100l. to the surviving daughters would have been absurd, as they must, by the supposition, have been all dead.

I ought to add that two of the learned judges, Taunton J., and Bosanquet J., in a single sentence, each in passing, and, among many other reasons, advert to that view of the case, as it seems to me, from an oversight on the part of those learned judges ; but they do not rely upon it. It is not the ground of their argument ; it is only one of several circumstances to which each of those two learned judges adverts, as forming, altogether, the ground of their argument ; but the Chief Justice mainly relies upon it. The ground upon which, mainly, four of the other learned judges reject the technical sense, exists in the case ; but it does not appear to me sufficient to support their conclusion ; and the fifth,—Williams J.,—in his very able argument, does not specify the particular reasons which have led him to the same con-[370]clusion, but merely gives his opinion upon the particular case, after laying down the principles with great clearness, and in a manner not to be questioned. The other four learned judges, Taunton J., Bosanquet J., Patteson J., and Bayley B. (subject to the observation I have made respecting the first two of those learned judges), in their learned and luminous judgments, rest their preference of the popular to the technical sense mainly upon the consideration that, if the strict legal sense were adopted, the whole devise might fail, including the gift to the daughters ; because it was possible that the whole of the five daughters of R. Chilcott might survive the determination of the prior life estates given to his widow and her sisters.

The possibility was not a very proximate one. It was more likely that some one of the five should predecease. Three of them died before the life estates determined, and each left a male heir at her decease. But it certainly might have been otherwise ; and all might have survived the widow and her two sisters ; and, in that case, no doubt, the heir-at-law must have taken ; because there would have been no heir male of three living daughters to take under the devise, construed, as we have construed it, by the strict rules of law, and the contingent use would have been destroyed.

But the same thing might have happened, and the same failure of the devise, upon

the other construction, if the sons had died leaving only daughters or heirs female of the five sisters at the determination of the life estates. Such things are always possible; and, in hardly any instance, does the framing of a will provide against the possibility of their happening. The existence of such a risk is never to be taken as a proof of a testator's meaning, as a "demonstration plain" that he uses known legal phrases in an unusual and intellectual sense, unless the risk be imminent, and the event one [371] which he must be presumed to have been aware of, to have had before his eyes, and to have meant to avoid, and yet to have taken no precautions to avoid, except the use of the words in question.

If we can be sure that he foresaw the event, that he was minded it should not happen, and that he used the words notwithstanding, then an inference certainly arises that he used them in such a sense as precluded the danger. But if it be only a possibility which we can speculate upon and imagine, while he may very possibly never have thought of it, no inference can arise which it would be safe to rely upon in construing his words. It constantly happens, that cases occur never contemplated; and nothing can be more common than to see the legal construction of a devise defeat what must have been the intention of the testator.

It appears, therefore, impossible to depart from the known and fixed rule of law, in this case, upon any of the grounds suggested; and we are then left to inquire, within the scope of that rule, who the first male heir of R. Chilcott's branch shall be; that is, which of the heirs male of the daughters, taking (a) on the decease of their ancestors, became entitled in July 1820, when the life estates given by the will were determined.

This brings us to the second, and the only, remaining point in the case. Taking into consideration what was before shewn respecting the meaning to be fixed upon the words "branch of R. Chilcott's family," and keeping in mind that the testator had disposed of the other and elder branch by giving an estate to the male heir of John Chilcott, and for want of such male heir, then over to R. Chilcott's branch, it appears that, upon the supposition shewn to be necessary of "heir" meaning heir [372] in the legal sense, the remainder over is devised to the person in R. Chilcott's branch who first shall answer the description by becoming a male heir.

There were five daughters living, to the testator's knowledge, of whom four had sons; but the eldest having only daughters, and it being possible a male might be born to her, though it was in all likelihood out of the testator's contemplation, as she had attained the age of forty-seven or forty-eight; but it being certainly possible that her daughters might have sons, as actually did happen before the determination of the life estates, he directs that whoever, from any of the five daughters, first answers the description of heir male, shall be entitled, as what he calls the heir male of R. Chilcott's branch. The words plainly bear this construction; they indeed seem not to bear any other without doing violence to their obvious meaning; and when we find a sense in which they can, consistently with the rest of the will, be taken, and that sense is, not only contrary to no rule of the law, but more accords with its known rules and principles than any other sense which can be put upon them, surely we are not authorised to reject it.

This construction, indeed, the construction put upon "male heir" of itself, excludes the lines of three of the daughters, and this construction excludes a fourth. The issue of Agnes, who was still living when the ejectments were brought, are of course excluded. The Winters are also excluded, because Joan, their mother, survived the last tenant for life, Eleanor White, by some months. Joseph Parsons answered the description of a male heir at Eleanor White's death, because his mother, Sarah, died in 1813; but he cannot be considered as coming under the description of first male heir on any construction that can be imposed upon the phrase; for he neither was the male heir of the eldest daughter nor the person [373] who first by the death of his mother came within the description of heir. The construction excludes, lastly, the Perratts; because Betty Perratt, daughter of R. Chilcott's eldest daughter, Mary Bishop, was living when the ejectments were brought, and consequently the defendant Matthew Perratt did not come within the description of kin. Thus the line of Betty Viney remains to take. She died in 1804, leaving a son, Thomas; consequently, that son

(a) As to the distinction between the heir, taking by limitation, and the quasi heir, taking by purchase, vide *infra*, 380 (b).

was then male heir, and he was the first of R. Chilcott's family, the first of the branch of the Chilcott family, who became male heir. He devised to his wife Catherine, one of the lessors of the plaintiff in the second ejectment; and some question having been made whether the words gave a remainder in fee or in tail, it is necessary to dispose of this, in order to remove any doubt as to the validity of the devise under which she claims; but I own I can see no doubt whatever on this part of the case; nor, indeed, do I find any expressed by the learned judges. It is not denied that an estate may be given to A. for life, and the heirs of the body of his ancestor B., so as to execute an estate tail in whatever person comes within that description of being heir of B., and, consequently, that of A. himself comes within it, the estate tail shall be executed in him; as if the gift be to the first son of B., and the heirs of his body; and such was the principle in *Mandeville's case* (Co. Litt. 26 b. and 20 b.) and in *Southcot v. Stowell* (1 Mod. 237). But in all such instances there are apt words expressly to create an estate tail by plain limitation; and to raise an estate tail from such words as "first heir," and, still more, from the words "the first heir," is quite impossible. It is clear, then, that the person, whoever he may be, taking under this devise, takes an estate in fee; [374] and therefore Thomas Viney could well devise to his wife Catherine.

The remainder having once vested in the son of the fourth daughter, it cannot divest by any subsequent event. This is not one of the cases in which a remainder may open, to let in interests accruing since the vester: as where a contingent limitation is to the use of several, incapable of taking at one and the same time, it will vest in the first who becomes capable, and then open so as to let in the others for their proportions. But, here, the remainder being contingent till the death of Betty Viney, it vested, upon her death, in her son, who took as a purchaser; and the rule is, as was laid down in *Southcot v. Stowell* (1 Mod. 226), "that a remainder being once well vested in a purchaser, the estate shall afterwards run in course of descent."

That the construction put upon this devise is free from all doubt, nay that there may not be considerable objections urged against it, can in no wise be affirmed. The case is confessedly one of extraordinary difficulty; but the meaning given to the words appears to come within the principles already stated, and to be less exposed to grave objections than any of the other constructions which have been proposed.

Thus, if it be said that, after all, the son of the fourth daughter is not so much first heir of the branch as the son of the eldest, the answer is, first, that the latter is not heir, unless we violate a known rule of law; and, secondly, that neither is he heir of the branch; for no one can answer that description, except an heir made up of all the coparceners.

Again, if it be said that neither, therefore, is the son of the fourth daughter such heir, the answer is, that such heir, strictly so called, being plainly excluded by [375] the words of the devise, we come as near the strict legal sense as the will allows, by taking one who is both an heir, and, in a plain sense, the first heir, though he be not that one heir which all the coparceners together make up.

Again, if it be said that the son of the youngest daughter only is the male heir of the branch, meaning by that, the male heir in the branch at the time of his mother's death, and that afterwards, an elder sister dying, her son would have better answered the description—the answer is, that there is no good ground for holding the son of the elder preferable to the son of the younger daughter as male heir of the branch, because the law regards the daughters equally (a), and the remainder being once vested in the heir male, by the death of the fourth daughter, it cannot be divested by any subsequent event.

Further, it is said, that the testator more probably intended the male heir of the eldest daughter to take. The answer is, first, that this opens the whole question, upon the legal import of the words he used; but, next, that if we are to go in quest of probable intention we see he most probably intended a male heir (or rather, if his attention had been called to it, would have intended a male heir,) of none of the five daughters of R. Chilcott to take, but rather a male heir of John Chilcott the elder branch; and yet, he is held clearly, on all hands, to have used words which preclude

(a) Except where the property descended is clothed with a public trust, as in the case of the descent of the crown or of an advowson. As to the *enitia pars*, vide Litt. a. 245, *supra*, 327.

any such effect being given to his most probable intention. And, lastly, it is certain that he might have distinguished the eldest daughter and her issue, had such been his clear intention; but he did not.

In construing the words "the first male heir," &c., [376] I have proceeded upon the ground of "male heir" being taken as near the technical sense as is possible, consistently with the words of the will. If, instead of this sense we take the term to mean descendant, or heir apparent, much greater doubt arises as to the person intended by "the first," so much doubt, that I should, in this case, even lean more towards the opinion of those who hold the meaning to be uncertain. But this consequence of giving a popular sense to the word "heir," the consequence, that we should be driven to hold the devise void for uncertainty, only adds new force to the reasons in favour of abiding by its legal acceptance.

Nor is it easy, in construing the devise over, to leave out of our consideration the reasons given by Holroyd J., in his most able and learned argument, for holding that the testator used the language in the first gift,—that to John Chilcott,—in nearly the same sense (or, at least, that he must be taken to have used it in the same sense,) which we are affixing to the terms employed in the devise over to R. Chilcott's family.

If your lordships shall, as I humbly venture to recommend, adopt this construction, and agree with the court of King's Bench, you will differ from the two learned judges who consider that the grandson of the eldest daughter should take, as nearest in blood (but there is no indication to whom (*a*) nearest), with the two learned judges, who hold that the second daughter's son should take as first in order of birth, and with the other [377] two, who hold the whole devise void for uncertainty. You will agree with the five learned judges, who, rejecting the popular sense of the words, construe them technically, and give the remainder to the first person who answers, or comes as near as may be to answering, the legal description of the will.

In any case, not before you for review, which should have had the authority of such names as are to be found supporting any one of the doctrines mooted in this argument, that authority would have been high and commanding. When we are called upon to determine whether or not those most learned and able persons have in the courts below arrived at a right conclusion on a question confessedly difficult, we are not at liberty to acknowledge the sway of their authority; yet it may be some satisfaction to your lordships when driven to the necessity of choosing between their conflicting opinions, that you have taken the same view with such men as Holroyd and Littledale, among the greatest lights that have ever shone in our profession.

LORD COTTENHAM. My lords, the judgment under consideration is in favour of the title of Thomas Viney, the son of the third daughter of R. Chilcott, the testator's uncle.

The first question is, whether this judgment should be reversed. Until this is determined, it would be useless to consider which of the other male descendants of the daughters of R. Chilcott ought to be preferred, as best answering the description of "first male heir of the branch of my uncle R. Chilcott's family."

Thomas Viney, if the ground upon which he has been preferred by the court of King's Bench, cannot be maintained, cannot upon any other sustain any competition with the male descendants of the elder sisters, Mary or Joan; for he was neither first in birth, nor proximus [378] gradu; but he was first of the male descendants of Richard's daughters, who, by the death of his mother, became her heir in the sense implied in the maxim—"nemo est hæres viventis." The sole question, therefore, is, whether this maxim applies to the present case, so as to give to Thomas Viney a title above the other claimants. In the court of King's Bench in 1826, two judges, Littledale J. and Holroyd J., were in favour of his claim, and one, Bayley J., against it. In this House, in 1833, four judges, Taunton J., Bosanquet J., Bayley J., and Tindal C. J., were against it; and one, Littledale J., was in its favour; and, upon the

(a) Assuming that the testator contemplated any distinction as to nearness of blood, he would appear to have contemplated a priority between daughters, similar to that which exists between sons. Taking Matthew Perratt, the grandson of Mary Chilcott, afterwards Bishop, to be the grandson of an eldest son, instead of the grandson of an eldest daughter, he would be, as between him and his cousins, the nearest in blood to R. Chilcott, and to the branch of R. Chilcott's family.

reargument in 1842, three, Coltman J., Maule J., and Parke B., were in its favour, and three, Williams J., Patteson J., and Tindal C. J., were against it.

The result of all the opinions delivered is, that six, Bayley J., Williams J., Taunton J., Bosanquet J., Tindal C. J., and Littledale J., Holroyd J., Coltman J., Maule J., and Parke B., are in favour of it. It is impossible that authority can be more equally divided; the majority, however, is against the title of Thomas Viney.

The difficulty of the case, evidenced by this great equality amongst the judges, seems to demand the utmost caution and deliberation on the part of this House. After the most careful consideration of the grounds upon which these several opinions are founded, I have come to the same conclusion as the majority of the judges.

It is a proposition common to all the claims except those of the heir-at-law, that the party to take under the description of "first male heir of the branch of my uncle Richard's family," must be some person who could not answer the legal definition of "heir." The testator knew (a)¹ that his uncle Richard had left only daughters; from some of them, therefore, the party to [379] take must be descended. But any such party must claim through some one of those daughters; and, as the five daughters of Richard constituted but one heir, and as they were all married, and had children, the testator could not have contemplated (a)² the entire heirship of his uncle Richard's branch of the family, being vested in any one descendant of his daughters.

If, therefore, any of the descendants are to take, as none of them can answer the description, if construed in the strict legal sense, the terms used must be construed in a popular sense; and, if so, the question is, what is the ordinary and popular sense of "first male heir of a family, or of a branch of a family?"

The familiar expressions "heir to the throne," "heir to a title or estate," "heir apparent," "heir presumptive" (b)¹, prove that the existence of a parent is quite consistent with the popular idea of heirship in the child. In all such cases the maxim, *nemo est hæres viventis* has no place, nor can it in any in which the person speaking knows of the existence of the parent, and intends that the devise to the child should take effect during the life of the parent. In this case the testator, by his will (c), proved that he knew of the existence of the parent; and I think it appears clear that he intended the devise to take effect during the life of the parent.

This rule is supported, as well by authority as by common sense. In *Darbisham v. Beaumont* (1 P. Williams, 229. 3 Brown, Parl. Ca. 2d edit. 60) a devise, in remainder, to the heir male of the body of E. L., was held to vest in her eldest son, the will shewing that the testator knew that E. L. was living, and had a son.

[380] In *Goodright dem. Brooking v. White* (2 W. Bla. 1010) a devise to the heir of testator's daughter, to whom he gave a term and an annuity, was held good for the daughter's son: because the will proved that the testator knew that the mother was living.

In *Farington v. Darrel*, 9 Hen. 6, 23, and 11 Hen. 6, 12, the devise after an estate was to the testator's next heir male. The contest was between the testator's granddaughter, who was heir, and her son; and no objection was made to his claim because his mother was living (b)². It is admitted that the rule *nemo est hæres viventis* is

(a)¹ Quære; et vide infra, 382, n.

(a)² Quære, as to his knowledge of these facts, vide ante, 348, n., 349, n.

(b)¹ The latter term is of modern introduction. Both classes of expectant heirs are called by Lord Coke heirs apparent. In ordinary language, all expectant heirs are called "heirs," generally, except in the case of the crown.

(c) It is found as an extrinsic fact, by the special verdict.

(b)² In *Farington v. Darrel*, T. 9 H. 6, fo. 23, pl. 19, and M. 11 H. 6, fo. 12, pl. 28, one Reynold devised a house in London to Sibil, his wife, for life, remainder to John, his son, and the heirs male of his body, remainder to the next heir male of the testator and the heirs male of his body. John died without issue, in the lifetime of Sibil. After the death of Sibil, P. G. and Joan, his wife, entered in right of Joan,—who, as daughter of a daughter of the testator, claimed the house as his heir,—and conveyed to Farington in fee. Giles, the son of Joan, entered upon Farington, claiming under the last limitation in the will, as the next heir male of the testator, and enfeoffed Darrel (probably for life). Farington entered upon Darrel, and Darrel re-entered upon Farington. In that case it was said by Newton C. J. that "the reason why the son of the daughter of a donee in tail male would not take by descent, was that

not inflexible, and that an heir apparent [381] may take under the description of "heir," if such appear to be the sense in which the testator used the term.

It has been said that these cases depart from the old rule of law ; but the observation is founded upon the supposition that the wills in these cases did not afford sufficient evidence or demonstration (a)¹ that the testator used the expression in any other than the legal and technical sense. It is not disputed that the heir apparent may take under the term "heir" if the intention be sufficiently clear, or that the child of a living parent may take under the description of "heir," the heirship being derived through such parent. It would appear that the question to be asked would be, "Did the testator use the word 'heir' in the strict legal sense, or in any other sense?" and that if the answer should be, that he used the term not in the legal and technical, but in some popular sense, that the rule so adopted should be followed out. It does not seem reasonable to adopt the strict legal sense as to part, and the popular sense as to another part of the description, and that this need not and ought not to be done if contrary to the apparent intention of the testator, and leading to consequences inconsistent with his declared object, the cases before mentioned and the other authorities referred to by the learned judges clearly establish.

The cases above referred to, and the observations connected with them, would apply to this case if the testator had described the parties to take as heirs of their respective matters ; but that it appears to me to introduce a difficulty which does not belong to the case. The heir of which the testator was in search was an heir to the family or branch of his uncle Richard. He must, indeed, have known that such heirship could only [382] be derived through some one of the daughters of Richard, but to these daughters he, in the devise of his land, had no regard ; they are not named in the description of the devise.

The judges who have thought that the maxim "nemo est hæres viventis" applies, seem to have considered the devise as if it had been to "such person of the branch of my uncle Richard's family who shall be an heir male ;" making the being an heir male to somebody (a)² a necessary qualification ; but the expression is, "the heir male of a branch or family," and not of any particular individual. I can see no reason for departing from the obvious meaning of the words, and for the purpose of introducing a qualification which would be foreign to the apparent intention of the testator, and which might exclude those from whom he must have intended that the devise should operate.

If, then, the terms used are capable of describing the child of a living parent, the question is, what appears to have been the testator's intention? He knew that his uncle Richard had five daughters, and that three or four of those daughters had sons (b) ; but that the eldest daughter Mary had only daughters (b). Had he intended, at all events, to prefer any of the living grandsons of his uncle Richard, he would, of course, have done so in terms. But it is evident that he had some intention of preference, to depend upon some future event, and which he describes by the words "first

he must convey to himself by descent lineal, and lands limited to the heirs male cannot descend to a daughter. But in this case at the bar, Giles claims by way of remainder, which is as a purchaser ; for he is the first person to whom the remainder comes, and he is the heir male by force of the gift, notwithstanding that his mother is alive. As where a gift is made to a man and the heirs females of his body, and he dies leaving a son and a daughter, the daughter will take, because, although not heir, she is heir female."

The questions discussed in *Farington v. Darrel* were, first, whether it could be collected from the pleadings, that Giles was born before the death of Sibil ; and, secondly, whether, supposing him to have been born afterwards, the remainder, being created in a customary devise by will, would fail absolutely for want of a person qualified to take on the determination of the life estate, as it would have done if the remainder had been created by deed.

(a)¹ Vide supra, 364.

(a)² In this view of the case, as no descent, no inheriting of any thing, is required, why would not the death of John Denham Perratt, who, consistently with the finding, may have died before Betty Viney, be sufficient to make Matthew Perratt the first male heir, viz. male heir to his father?

(b) This knowledge is not found by the special verdict, vide supra, 315, &c.

male heir of the branch of my uncle R. Chilcott's family." These words must mean the first male heir of that [383] branch of the family of Chilcott which comes from my uncle Richard, which means the same as "first heir male," or "male descendant of my uncle Richard." But suppose these had been the terms of the devise, questions would certainly have arisen as to the meaning of the term "first." But I cannot conceive that it would have been held that no male descendant of Richard could take, whose mother was alive.

In the case supposed, as in the present, the testator does not refer the heirship of the male to take, to the mother, but to his uncle Richard, or to his branch of the family. Whatever meaning might be attributed to the word "first," the party to take must have stood in the same position with respect to the testator's uncle Richard, whether his mother was living or dead. The mother was not to take any interest in the estate. How, then, could her being alive or dead have, in the view of the testator, any influence upon his wishes, and the succession of her son? It might, indeed, have happened that the party to take would not be heir to his mother; as if the mother had left a granddaughter by a son and a grandson by a daughter. In the absence of preferable claims, the testator must have intended that the grandson should take as first male heir of Richard's family; but the granddaughter would be heir to the mother; and yet, according to the decision, his title would be defeated by his mother being alive, although, by her death, he would not be more her heir than he was before, and would, in either case, be equally heir of the branch. The provision in the will, that the heir male to take should, upon taking possession, pay 100*l.* to each of such of the daughters of R. Chilcott as should be then living, although perhaps not so conclusive as has been supposed by some of the learned judges, appears to me strongly to prove that the title of the party to take was not to depend upon the previous death of his mother.

[384] The period at which the heir male was to take possession was the death of the testator's widow, if she did not exercise the power, or the death of the survivor of Eleanor and Ann White, if she did; and every daughter of R. Chilcott then living was to have 100*l.* There is no exclusion of the mother of the party taking. It is true that she is not necessarily included, if others were living; but, suppose all the daughters but one had died without leaving any male descendant, and that the sole surviving sister had a son, according to the decision that daughter would not be entitled to the 100*l.*; and this leads to the consideration of how likely the construction adopted would be to defeat the devise altogether.

At the time of the testator's death the mothers of all the male descendants of Richard were living, and the remainder was to vest at the expiration of one or at most of three life estates. If the mothers had all continued to live until the expiration of these life estates, the whole devise, according to the decision, would have failed. This the testator could not possibly have intended; and this absurd consequence would have followed, not from any thing the testator has said, but from applying a merely technical maxim, of which the testator probably had never heard, to the construction of the terms he has used, which, it is admitted, can only be made intelligible by construing them in their popular sense, and to which therefore the rule of construction is to be applied.

Many instances might be suggested of consequences following from the construction adopted, which the testator could not possibly have contemplated. By the expression "first male heir of the family," he must have intended to describe some rational ground of preference, such as first in birth, i.e. in personal seniority, or first as being descended from an elder branch, and [385] therefore first in seniority of his family; but, according to the decision, he meant that one of the sons of the daughters of Richard, whose mother should first die, a circumstance which must have been wholly immaterial to any object or intention of the testator. If two daughters had died, each leaving a son, and the youngest daughter had died first, her son would have taken as first male heir of the branch of Richard's family, although he might be an infant, and the son of the elder sister had been born many years before him, and was therefore first in personal seniority, and in the seniority of his line. It is impossible that the testator could have intended that the title of his devisee should depend upon the chance of an event so utterly immaterial.

It appears to me, in the first place, that it is contrary to principle, after holding that the terms used must be construed according to the popular sense, and not accord-

ing to their technical meaning, to depart from that rule, and to restrain a popular expression within a rule of law purely technical; secondly, that, in the present case, there is sufficient upon the face of the will to prove that the testator did not use the terms according to their technical meaning, but in a popular sense—the heir of a line, branch, or family, and not of any individual; and that there are provisions sufficient to include the heir of a living parent; and, thirdly, that, adopting the technical meaning of the term “heir” as the ground of construction, might upon many suppositions have led to consequences which the testator could not have intended, and on some have defeated the devise altogether; and, consequently, my Lords, it appears to me, that the judgment of the court of King’s Bench, which has adopted this principle, is erroneous, and ought to be reversed.

On the 28th of February 1843, the judgment of the court of King’s Bench, in favour of Thomas Viney, was affirmed.

Judgment affirmed.

[386] SIR FRANCIS BURDETT, BART. AND OTHERS, v. DOE DEM. SPILSBURY AND ANOTHER. SKYNNER AND OTHERS v. THE SAME. August 18, 1843.

[S. C. 10 Cl. & F. 340; 8 E. R. 772 (with note).]

Held, by the House of Lords; (Lord Lyndhurst C., Lord Brougham, and Lord Campbell;) assentientibus Tindal C. J., Gurney B., Williams B., Coleridge J., Krakine J., Maule J., Wightman J.; dissentientibus Parke B., Patteson J., Coltman J., Rolfe B.,—reversing a judgment of the Exchequer Chamber, and affirming a judgment (given on different grounds) in B. R.,—that a power of appointment “by a will to be signed, sealed, and published by A. B., in the presence of, and attested by, three credible witnesses,” is well executed by an instrument concluding thus:—“I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, set my hand and seal, this 12th of December 1789;” such instrument being signed by A. B., and a seal appearing opposite to such signature, and the words “Witness C. D., C. F., G. H.,” appearing in the usual place of attestation, and it being shewn, by extrinsic evidence, that the instrument was, in fact, so signed, sealed and published.

These were actions of ejectment brought to recover the possession of certain lands, respectively situate in Derbyshire and in the town and county of the town of Nottingham. The former came on for trial before Tindal C. J. at the Derbyshire Lent assizes, 1834, the latter before Littledale J. at the Nottingham Lent assizes in the same year, when verdicts were found for the respective plaintiffs, subject to the opinion of the court of King’s Bench upon special cases. These cases were argued in H. T. 1835, and were in M. T. in the same year determined in favour of the respective defendants in error (see 4 Ad. & Ell. 1, 6 N. & M. 259). The special cases were afterwards turned into special verdicts, upon which judgment was entered for the defendants in error.

These verdicts stated, in substance, as follows:—

Lydia Henning Ward was the only child of Joseph Ward, and, at the time of the execution of the indenture of settlement hereinafter mentioned, was seised in fee-simple in possession of the hereditaments, thereby [387] settled, situate in the parish of Elwall and in Twyford and Stenson, which are within the parish of Barrow-upon-Trent, being part of the estates in question, and was seised in fee-tail, with remainder to herself in fee-simple, of certain hereditaments in Willington by her also settled, being other parts of the estate in question. She was also seised in fee-simple of other hereditaments in Willington and Repton, the residue of the estates in question, and by her also settled.

Of these last-mentioned hereditaments and of the other parts of the property settled by Lydia Henning Ward, upon her said marriage, situate in the counties of Nottingham and Leicester, Francis Ward, the father of the said Joseph Ward, died seised in fee, leaving Joseph Ward his eldest son and heir. Joseph Ward, by his will, dated the 16th of June 1767, devised all his real estate to his daughter, in fee. Joseph Ward died, leaving his said daughter him surviving.

On the 6th of December 1787, L. H. Ward intermarried with William Augustus

Skyunner, having previously executed a settlement, bearing date the 4th and 5th of December 1787, whereby the hereditaments in Elwall, Twyford, and Stenson were limited to the use of trustees and their heirs, during the life of L. H. Ward, upon trust, from time to time to receive the rents, and to pay the same to such person as she should appoint, and after the decease of L. H. Ward, to the use of such person or persons, and for such estate and estates, and upon such ends, intents, and purposes,

L. H. Ward, whether covert or sole, by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses, should give, devise, direct, limit, or appoint; and in default thereof and subject thereto, to the use of W. A. [388] Skyunner and his assigns, for life, without impeachment of waste; remainder to the use of the trustees and their heirs during his life, to preserve contingent remainders, &c. And as to the hereditaments in Willington and Repton, to the use of W. A. Skyunner and his assigns for life, without waste, remainder to the use of the trustees and their heirs during his life, to preserve, &c., remainder to the use of L. H. Ward, for life, without waste, &c. &c. And after the several deceases of W. A. Skyunner and L. H. Ward, remainder, as to the hereditaments in Elwall, Twyford, and Stenson, and as to all other the hereditaments thereinbefore granted and released, to certain uses [which had failed to take effect]; remainder to the use of such person or persons, for such estate and estates, and upon such trusts, and to and for such ends, intents, and purposes, as L. H. Ward, whether covert or sole, by her last will and testament in writing, or by any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses, or by any deed or deeds in writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of two or more credible witnesses, after the death of W. A. Skyunner, in case of her surviving him, should give, devise, direct, limit, or appoint; and in default thereof, and subject thereto, to the use of L. H. Ward, her heirs and assigns.

The special verdict then stated the facts necessary to shew the nature of the claims of the several parties, and that L. H. Skyunner (formerly Ward) died on the 30th of September 1789, leaving the following instrument in writing, purporting to be her last will and testament.

"I, Lydia Henning Skyunner, wife of William Augustus Skyunner, Esq., of Gould's Green, in the parish of Hillingdon, in the county of Middlesex, do publish and de-[389]clare this to be my last will and testament. I appoint my beloved husband, W. A. Skyunner, my executor, and my beloved mother Lydia Ward executrix with him. I give to my beloved mother L. Ward, for her life, the rents, &c. (setting out the appointments); and, hereby revoking all former wills and codicils, I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September,

"LYDIA HENNING SKYUNNER.

in the year of our Lord one thousand seven hundred and eighty-nine.

"LYDIA HENNING SKYUNNER (L.S.).

"Witness, Charles Ball.

"Elizabeth Ball.

"Ann Ball."

It was also found that the said instrument, purporting to be the last will and testament of the said Lydia Henning Skyunner was signed, sealed, and published by her in the presence of the said Charles Ball, Elizabeth Ball, and Ann Ball, and attested by them; and that their attestation was in manner and form as appears on the said instrument.

Upon these special verdicts judgment having been pronounced, pro forma, for the defendants in the ejectments, writs of error were brought and argued in the Exchequer Chamber, before Tindal C. J., Park J., Bosanquet J., Vaughan J., Coltman J., Parke B., Bolland B., Alderson B., and Gurney B. In Hilary vacation, 1839, the court of error pronounced judgment, reversing that of the court of King's Bench (see 9 Ad. & E. 936, 1 P. & D. 670).

The cases were then carried by writ of error to the House of Lords, and were argued, the judges being [390] present, on the 11th, 12th, and 20th of May 1842, by Sir W. Follett and Pemberton for the plaintiffs in error, and Sir F. Pollock and Bethell for the defendants in error. Besides the cases referred to by the learned judges, in delivering their opinion in the House of Lords, the following authorities are those which were principally relied upon in argument:—*Hands v. James* (2 Com. Rep. 531), *Croft v. Paolet* (2 Stra. 1109), *Hougham v. Sandys* (2 Sim. 95), *Allan v. Bradshaw* (1 Curt. 110), *Waterman v. Smith* (6 Sim. 629), *Simeon v. Simeon* (4 Sim. 555), *Lempriere v. Valpy* (5 Sim. 108), *Curtis v. Kenrick* (3 M. & W. 461, 9 Sim. 443), *Mackinlay v. Sisson* (8 Sim. 564), *Brooke v. Mitchell* (6 M. & W. 473).

The question submitted for the opinion of the judges was as follows:—

“Was the power given to the testatrix L. H. Ward by the settlement of the 4th and 5th days of December 1787, duly and effectually executed by her will, dated the 12th of December 1789?”

The judges differing, their several opinions were, on the 19th of June 1843, delivered seriatim as follows:—

WIGHTMAN J. My lords, upon the question referred by your lordships to the consideration of the judges, whether the will of L. H. Skynner is or is not a good execution of the power contained in her marriage-settlement, I am of opinion that it is.

By the power, she is enabled to devise by her last will and testament, or any writing purporting to be such, “to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses.” An instrument in writing purporting to be the [391] last will and testament of L. H. Skynner was, in fact, signed, sealed, and published by her in the presence of three witnesses, and was attested by them, by writing their names under the word “witness.”

The power does not require any form of attestation, but only that the instrument shall be attested by three witnesses, in whose presence it shall be signed, sealed, and published by the testatrix.

No distinction can, I think, be drawn between the words “witness” and “attest”; nor does it appear to me, that it would have made any difference if, instead of the words “in the presence of, and attested by, three or more witnesses,” the expression had been “in the presence of, and witnessed by, three or more witnesses;” and the case may be considered the same as if, instead of the word “witness” written over the names of the three persons subscribing, the words had been “attested by” those three persons.

The power, then, is literally complied with, in its terms, by the instrument in question. It does purport to be the last will and testament of L. H. Skynner; it was signed, sealed, and published by her in the presence of three witnesses; and the three witnesses did attest the instrument, by subscribing their names to it, as such.

But it is said that when the power required the instrument to be attested by three witnesses, in whose presence the testatrix was to sign, seal, and publish it, more was necessary to fulfil that requisition than that they should merely write their names as witnesses. The power requires them to be witnesses of three things—signing, sealing, and publication; and it is said that the party creating the power intended—when he required the will to be made in a certain manner in the presence of three witnesses, and to be attested by them—that to fulfil that requisition of the power which requires the attestation of three witnesses, they ought, in terms, to [392] mention that they did witness the performance of the three things required to be done by the testatrix, and that merely signing their names as witnesses is not enough, although they did, in fact, see all the formalities performed.

Independently of particular authorities, to which I shall presently allude, it appears to me that this objection is not well founded. The power requires that the instrument shall be signed, sealed, and published by the testatrix in the presence of three witnesses, and that they shall attest the instrument. No form of attestation would, for the first thirty years, have dispensed with the necessity of calling one of the subscribing witnesses, if any were alive, or in a situation to be called, to prove that the formalities required by the power had been complied with; but, after thirty years, the case would rest upon the presumption arising upon the production of the instrument itself. In the present case the instrument shews a general attestation of it by three witnesses, without any statement of the particular facts they attested; but they must be understood to have attested something; and to ascertain what that is, there is no

principle of law, nor any authority of which I am aware, that prohibits a reference to the instrument itself; and if we look at the instrument for information, as to that which it is to be presumed the witnesses did attest or witness, what do we find? Upon the face of the instrument which the witnesses attest, the testatrix says, "I do publish and declare this to be my last will and testament. In witness whereof, I have set my hand and seal to this my last will and testament;" and then follows a signature and seal, purporting to be those of the testatrix.

Can it be doubted but that the jury might presume that the witnesses, who do not specify what they saw, did see all that done which, on the face of the instru-^[393]ment, appears to have been done (a), and which it was requisite for the testatrix to do to make a perfect instrument? But supposing such a special form of attestation, as that contended for, to have been adopted, it would not have varied the character of the evidence derived from the terms of the instrument, and the general attestation of the witnesses: it would but have raised a presumption for the jury that they did witness that which is stated in the attestation, subject to any doubt that might be raised as to whether they really did witness that which is stated in the written attestation or not.

The statute of frauds requires that all wills of lands shall be signed by the party devising, and be attested and subscribed, in the presence of the deviser, by three or four witnesses; but there is no doubt but that a general attestation will satisfy the statute. In *Hands v. James* (2 Com. Rep. 531) it was decided that where all the witnesses to a will are dead, and it does not appear, in the attestation clause, that the witnesses set their names in the presence of the testatrix, it is a question for the jury,—which they may determine upon circumstances,—whether it was ^[394]so or not: and the court, in coming to that conclusion, say, that the witnesses are required by the statute of frauds to set their names in the presence of the testator, but that the statute does not require that this shall be noticed in the subscription of the witnesses; and in *Croft v. Pawlet* (2 Stra. 1109), it was held, upon the authority of *Hands v. James*, that a will of lands may be well executed, though it be not stated in the attestation that the witnesses signed in the presence of the testator. The same point was also decided in *Price v. Smith* (Willes, 1).

Independently then of express authority, and upon general principles, and with reference to the execution of wills under the statute of frauds, the terms of the power appear to have been complied with. It is, however, said that whatever may be the literal construction to be given to the terms of the power,—whatever may really have been the meaning of the person creating the power,—whatever might have been determined had this question arisen now for the first time,—there is a series of decisions, following and recognising each other, upon this very point, by which it is to be considered as settled and determined, that to fulfil such a power as the present, there must be a formal attestation by the witnesses, shewing, upon the face of it, that all the formalities required by the power have been complied with; and, unless these cases can be distinguished from the present, I should certainly not venture to give it as my opinion to your lordships, that, as the law stands at present, the power in question has been well executed.

The first of these, is the case of *Wright v. Wakeford* (4 Taunt. 213). A deed contained a power for trustees, by consent of the ceteux que trust, testified by writing under their hands and seals, attested by two or more credible witnesses, to ^[395]

(a) At the time the words "I have set my hand and seal" were written,—whether by the testatrix or by her scrivener,—no signing or sealing had actually taken place. At that moment, therefore, these words merely indicated an intention that the will should be so executed. The special verdict does not find that the will was sealed before it was signed; and the usual course is the other way; so that even the signature does not avouch an actual sealing, but, at most, raises the presumption of an intention to seal. That which really does appear on the face of the instrument is a piece of wax, or a wafer, which may perhaps be assumed to have been placed there for the purpose of being sealed; but with respect to which—whether it was sealed by the testatrix (either by impression or by adoption) or whether it was sealed at all,—*ex facie non liquet*. The finding by the jury, that the will was, in fact, sealed by the testatrix, is, of course, a matter which is entirely de hors both the instrument and the attestation. Vide post, 396, 397.

make sale of certain lands. The cettoux que trust did sign, seal, and deliver a deed, testifying their consent to a sale, in the presence of two witnesses; but the attestation was, in terms, of the sealing and delivering only. Upwards of twenty years afterwards, the witnesses added a fresh attestation to the deed, by which they attested the signature also. The case was sent by the Lord Chancellor for the opinion of the court of Common Pleas; and three of the Judges, Heath J., Lawrence J., and Chambre J. held that the power of sale was not well executed, by reason of the omission of any mention of "signing" in the first attestation, and that the second was of no avail to cure the defect in the first. Lord Chief Justice Mansfield seems to have considered that the first attestation was sufficient, and that the witnesses must be understood to have attested the signing; but that, at all events, the defect (if any) was cured by the second. The decision, therefore, was, that of the three other judges I have named, who state the grounds upon which they determined the question thus: "As a question of law, we think it must be determined by the true construction of the terms of the attestation, to which it appears to us that our consideration must be confined; and we do not think that the signature is comprehended in the words made use of in the attestation." The decision, therefore, turned expressly upon the special form of the attestation, by which the witnesses state in terms what they did attest, excluding thereby any presumption that they witnessed more than is expressly stated.

The effect of an attestation, in general terms, to a deed which, upon the face of it, imports that all the requisites of a power have been pursued, was not, and indeed could not, properly be considered in the case of *Wright v. Wakeford*, which was decided upon a principle which does not apply to such a case; and I have been unable to find one in which it has been held that a general [396] attestation is insufficient, where, upon the face of the instrument, the requisites of the power appear (a) to have been complied with.

Doe dem. Mansfield v. Peach (2 M. & S. 576) was determined expressly on the authority of *Wright v. Wakeford*, and upon facts nearly the same; the power requiring signing as well as sealing and delivering, and there being a special attestation of sealing and delivering only.

Wright v. Barlow (3 M. & S. 512) is to the same effect. The power required signing as well as sealing; and there was a special attestation of sealing and delivery only. In *Moodie v. Reid* (7 Taunt. 355) the power required the will to be signed and published by the testatrix in the presence of, and attested by, two or more witnesses. The attestation in that case was general, as in the present; the word "witness" only was used, as in this case; but there was nothing on the face of the instrument itself to indicate that it had been published; the words "publish" or "declare" are not to be found in it; and nothing more appears upon the whole instrument than that it was signed. In *Stanhope v. Keir* (2 Sim. & Stu. 37) the power required the will to be signed and published in the presence of, and attested by, three or more witnesses. The attestation was general; but there was nothing, on the face of the instrument, to shew that it had been published, though it had been signed. In *Buller v. Burt* (cited in 4 Ad. & E. 14) the power required that the will should be duly executed and published in the presence of witnesses; and the attestation was, that it was signed, sealed, and delivered as the last will; which was held sufficient.

These are the leading authorities upon which it is contended that the power in the present case, is not well executed, and that there ought to have been a special [397] attestation. It appears to me that they are all distinguishable, upon the grounds I have mentioned, and that they are not authorities to shew that a general attestation to an instrument, which, on the face of it, shews that the formalities have been complied with (a), is not sufficient. I should observe here, that there is the direct authority of Sir J. Leach in the case of *Buller v. Burt*, that where the attestation is general, as in this case, the instrument which is attested may be referred to, to ascertain from it, if possible, what it was that the witnesses attested. But it is said that this could only be available on the presumption that the witnesses read the instrument. This does not, however, appear to me to be the true ground; but that as the witnesses must be presumed to have intended to witness something, and as their signatures as witnesses shews that they did witness something, the deed may be referred to to raise a presumption that that was done which on the face of it appears to have been done (a).

(a) Vide supra, 393, n. (a).

It may be said, however, that in the present case, the terms of the instrument, if referred to, raise no such presumption, and that the words, "I do publish and declare this to be my last will and testament," are not sufficient to raise the presumption that the testatrix did publish and declare it. The power requires that she should publish her will in the presence of three witnesses; there are three witnesses to the will, and she says that she does publish it. Surely it is to be inferred that she did that which she says she did (a)¹, and not that she merely wrote the words without doing the act which was essential to the validity of the will.

In conclusion, I may add that all or nearly all the learned judges, who, in the previous stages of this case, have expressed an opinion contrary to that which I [306] entertain, have founded their judgment on the case of *Wright v. Wakeford*, with some expression of regret that the case had been so decided. It may therefore be presumed that, but for that case and those founded upon it, they would have been of a contrary opinion.

Upon the whole it appears to me that those cases are entirely distinguishable from the present, and that the power was well executed.

ROLFE B. The question in this case is, whether a power of appointment given to L. H., the wife of W. A. Skynner by her marriage-settlement, was duly executed by her will. The power was created by indentures of lease and release, dated the 4th and 5th of December, 1787, being the settlement executed previously to, and in contemplation of, the marriage between the said W. A. Skynner and L. H. Ward. By those deeds the lands in question were conveyed to trustees in fee, to the use,—after several preceding estates which have all either expired or become incapable of taking effect,—“of such person or persons, for such estate or estates, and for such trusts, intents, and purposes, as the said L. H. Ward, notwithstanding any coverture, by her last will and testament in writing, to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses, should give, devise, direct, limit, or appoint.”

The marriage took effect. Mrs. Skynner made her will on the 12th of September, 1789, and died soon afterwards. The will is set out in *hæc verba* in the special verdict; and for the purpose of considering the question proposed by your lordships, it is only necessary, so far as relates to the contents of that will, to observe, first, that the testatrix declares in the body of the instrument that she publishes it as her last will; secondly, that by it, she disposes of all her real estate; [399] thirdly, that it purports to be signed and sealed by her; and, lastly, that at the foot of the will the names of three credible persons are written under the word “witness,” but without any form of attestation. The will contains no reference to the power (a)². The verdict finds that, in fact, the will was signed, sealed, and published, in the presence of three persons who had so signed their names under the word “witness”; so that the only point to be considered is, whether, according to the terms of the power, it was necessary not merely that the testatrix should sign, seal, and publish in the presence of three credible persons who should sign their names as witnesses, but further, that the fact of that having been done, should be expressed on the face of the attestation. If the case of *Wright v. Wakeford* (17 Ves. 454, 4 Taunt. 213) be a decision which ought to be considered as binding on this House, then it is clear that the will would not have been a valid execution of the power, if instead of the word “witness” there had been the words, “sealed and published in the presence of;” and the first point to be considered is, whether this variation in the form of the attestation, i.e. the use of the general word “witness” instead of the special words, “sealed and published in the presence of,” makes any real difference in principle; whether the doctrine involved in the case of *Wright v. Wakeford* at all turns on the point of the attestation being special and not general. I am of opinion that it does not.

The principle on which that case proceeded was, that the power, according to its true construction, required a form of attestation expressing that the parties executing the instrument, had signed as well as sealed, in the presence of the witnesses, i.e. an attestation expressing a [400] compliance with all the acts required by the power. This is stated, by the majority of the judges who certified, to have been the ground

(a)¹ Vide *supra*, 393, n. (a).

(a)² If, therefore, the witnesses had read the will, it would not have appeared that the sealing, though mentioned, was a matter to be attested.

on which their certificate proceeded; and because the attestation in that case expressed a compliance with one only of the requisites of the power, namely, sealing, and was silent as to the other, namely, signing, they held that the attestation did not, on the face of it, necessarily import a compliance with both requisites, and was consequently bad. Now here, there is no form of attestation at all. The witnesses merely sign their names under the word "witness"; and the argument by which the present case is attempted to be distinguished from *Wright v. Wakeford*, is, that here, there is no *expressio unius* which may reasonably lead to the *exclusio alterius*, that is,—as nothing is expressed, all may fairly be presumed. If the question were, what was in fact done at the time of the execution,—whether the executing party really did sign, seal, and publish, in the presence of these persons, who have subscribed their names as witnesses,—the distinction might perhaps be of great importance; but the question, when it is attempted to distinguish this case from *Wright v. Wakeford*, is, not what in fact was done at the time of the execution, but what the attestation necessarily imports to have been done. Looking at the question in this point of view, it seems to me just as impossible to say of a general, as of a special attestation, that it necessarily imports a compliance with all the terms of the power. I am therefore of opinion that the present case cannot be, successfully, distinguished from *Wright v. Wakeford*.

If that be so, it remains to be considered whether that case is or is not one which your lordships ought to treat as binding on this House, as the ultimate court of appeal.

Now the certificate in *Wright v. Wakeford* was given, it is to be observed, in Hilary term 1812, being above thirty years before it has been called in question in this House, and above twenty years before the present eject-[401]-ments were brought. It was a certificate of three most eminent judges, delivering an opinion, differing, it is true, from that of Sir James Mansfield, but concurring, I think it must be considered, with that of Lord Eldon. It is true that we have no report of what was done by the court of Chancery on the return of the certificate; and it must be admitted that the mere refusal to decree a specific performance in such a case, would certainly not, of itself, conclusively shew Lord Eldon's view of the law. But it is difficult to read the report of his judgment (17 Ves. 454), when he directed the opinion of the court of Common Pleas to be taken, without believing that his mind then strongly leaned towards the view of the law afterwards adopted by Heath J., Lawrence J., and Chambre J. Besides, Lord Eldon held the great seal for more than fifteen years after the certificate was given; and if he had not considered it as correctly laying down the law, it is difficult to believe that he would not, either during the progress through parliament of the retrospective act, to which it gave rise (54 G. 3, c. 168), or on some occasion either in the court of Chancery or in this House, have expressed his doubts on the subject, more especially considering the great respect and deference which Lord Eldon always expressed towards Sir James Mansfield, whose opinion was opposed to that of the other three judges (c). With a judgment then proceeding from such judges, and thus sanctioned, it is impossible not to feel the very strong probability that sales and purchases may have been made, and tithes [402] have been accepted and rejected, for a period now exceeding a quarter of a century, on the faith of the law being such as the case of *Wright v. Wakeford* stated it to be; and though such considerations are not necessarily binding on this House, like an act of parliament, yet they have, in doubtful cases, like the practice of conveyancers, been always treated as of great weight in ascertaining what the law is.

Now with reference to the present question, there has been not only an acquiescence in the case of *Wright v. Wakeford*,—and, it must be presumed a practice among conveyancers conformable to it, for a period of more than thirty years (a),—but there has been also a long string of cases recognising it as settled law, following it, where the facts have been the same, and distinguishing it, where they have been different.

The first case which occurred on this point after the decision of *Wright v. Wakeford*,

(c) If any dissatisfaction had been manifested by Lord Eldon with the opinion distinctly expressed by the three judges as the foundation of their certificate, such dissatisfaction could hardly have remained unknown to all the judges who decided the subsequent cases, and to all the counsel interested in impugning that opinion, when not merely the decision in *Wright v. Wakeford*, but the wide and important principle, upon which that decision proceeded, was successfully referred to.

(a) Probably much longer, unless that case altered the law.

was *Doe dem. Mansfield v. Peach*. There the terms of the power and the form of the attestation were substantially the same as in *Wright v. Wakeford*. The court of King's Bench took time to consider their judgment, expressly with the view of deciding between the conflicting opinions of the Chief Justice and the other judges of the court of Common Pleas; and, after deliberation, Lord Ellenborough, in pronouncing the judgment of the court of King's Bench, expressed his concurrence with the doctrine laid down in the certificate of the three judges; and stated the true principle to be, that the attestation must be co-extensive with the things required to be done. This decision was in Easter term, 1814; and when the same question was again attempted to be argued in the case of *Wright v. Barlow*, in Hilary term, 1815, in the King's Bench, and in *Doe dem. [403] Hotchkiss v. Pearce* (6 Taunt. 402), in Michaelmas term, 1815, in the Common Pleas, Lord Ellenborough in the one court, and Gibbs C. J. in the other, said they considered the question as settled by the two preceding decisions.

Two years afterwards, the same question arose in *Moodie v. Reid* (7 Taunt. 355), which was a case from Chancery. The power there was, to appoint by any will, signed and published in the presence of and attested by two or more credible witnesses. The will was attested by two witnesses. In the testimonium clause the testatrix says, that "these bequests are signed by me;" but there was no clause of attestation, except the word "witness" preceding the names of the witnesses. Gibbs C. J. stated, (whether quite accurately is not now the question,) that this was clearly a good attestation of the signing, but added that the question was, whether by attesting the signing, the witnesses also attested the publication. Now, it appeared clearly in that case, that the testatrix, in fact, signed the will in the presence of the two witnesses, and, at the time of doing so, made use of expressions indicating that the instrument was her will. This, I conceive, was clearly a publication; and the doubt therefore must have been, not whether the will was in fact published,—but whether the attestation sufficiently expressed that it had been published,—in the presence of the witnesses. The court, after taking time to consider, certified against the validity of the execution, manifestly on the ground of the insufficiency of the attestation, adopting, to its full extent, the principle of the previous cases.

The next reported case in which this principle was acted on, is *Stanhope v. Keir* (c), where Sir J. Leach held that a power to appoint by a will signed and published [404] in the presence of and attested by two credible witnesses, was ill executed by a will in which the attestation did not extend to the publication; and in *Buller v. Burt* (an unreported case in 1829) the same learned judge held, on the same ground, that where the power was to appoint by a deed signed, sealed, and delivered in the presence of and attested by two witnesses, the appointment was bad, by reason of the attestation not extending to delivery. It is true that in that case his Honor is reported to have held that where the form of attestation is general, the witnesses must be taken to attest all which is stated, in the body of the deed, to be done in their presence; and consequently, that if, in the body of the deed, the instrument had been stated to have been delivered as well as signed and sealed in the presence of the witnesses, he should have held the power well executed. That opinion, however, was not necessary to support the judgment. It was therefore extra-judicial, and, as I humbly conceive, altogether erroneous; assuming, as it does, contrary to every day's experience, that the contents of the deed are known to the witnesses (a).

In *Hougham v. Sandys* (2 Sim. 95) a question arose as to the application of the retrospective act, in that particular case. The facts there are not applicable to the present: but the case is so far important, as affording an additional recognition of the general doctrine.

These cases were followed by several others, in which the question arose, whether, where the power requires a will signed and published in the presence of and attested by three witnesses, the attestation is good, expressing the will to have been signed and delivered in the presence of, and attested by, the three witnesses—whether, in short, delivery under such circumstances [405] was not the same thing as publication. His Honor the Vice-Chancellor of England in *Simeon v. Simeon* (4 Sim. 558), and in *Lempriere v. Valpy* (5 Sim. 118), held that it was; and the same thing was decided by the court of Exchequer in *Ward v. Swift* (1 C. & M. 171, 3 Tyrwh. 122) and *Curteis*

(c) 2 Sim. & Stu. 37. And see *Doe dem. Daniel v. Keir*, 4 Man. & Ryl. 101.

(a) Vide infra.

v. Kenrick (3 M. & W. 461). These decisions evidently left the general question untouched. The principle is, not that the words of the attestation must be the same as those of the power, but that they must necessarily import a compliance with all the requisites of the power; and when once it was decided, as a matter of construction, that delivery means the same thing as publication, the consequence necessarily followed that the powers in those cases were well executed.

In the more recent case of *Mackinlay v. Sison* (8 Sim. 561), Shadwell V. C. decided in favour of the appointment, on similar grounds. Whether it is quite clear that the words of attestation there used did necessarily import publication, may perhaps admit of doubt; but it is sufficient to say that such was the ground upon which the judgment rested.

The only remaining case is that of *Waterman v. Smith*, decided by the same learned judge, the Vice-Chancellor of England, so lately as the year 1840, and reported in 9 Simons, 629. There, the only question was, as to the validity of an appointment made under circumstances exactly the same as those which existed in *Wright v. Wakeford*. His Honor treated that case as established law, and would not hear the counsel who were to have argued in support of it. The property in question in that case was administered on the assumption of the law being such as was laid down in *Wright v. Wakeford*; and there can be no doubt but that in other unreported [406] cases the same principle has been acted on. Such being the uniform current of the authorities during a period of more than thirty years, and the rule itself being one which results naturally from the language of the power, and being easily intelligible, and well calculated to secure accuracy in carrying out the intentions of those by whom powers are given, I see no reason to think that it was not well laid down at first, and still less, to think that it ought now to be departed from.

I beg leave, therefore, in answer to your lordships' question, to say that, in my opinion, the power in question was not duly executed.

MAULE J. My lords, I am of opinion that the power was well executed. All that is required to make a good execution by will is, that the will be in writing, signed, sealed, and published in the presence of and attested by three credible witnesses. The jury have found that the will was signed and sealed and published in the presence of three persons whom it names, and that it was attested by them in the manner which appears in the instrument, which is by writing their names under the word "witness." The will, on the face of it, professes to be signed, sealed, and published. Considering this case independently of authority, I could feel no doubt that the will was a good execution of the power, inasmuch as it is signed, sealed, and published in the presence of and attested by three witnesses; which are all the conditions imposed by the instrument conferring the power; for I cannot doubt that the substantive to which the participle "attested" is to be referred, is the will, which is mentioned; not signature, execution, &c. which are not mentioned (a)¹. If this be [407] otherwise, it will be necessary, when a party creating a power means that the will shall be attested, to state that the power must be executed, by will signed, by will sealed, by will published, and by will attested. It is doing as much violence to language to consider signature, &c., to be the substantive to which attested is to be applied, as it would be to consider signature to be that to which seal is to be applied, and to require that the signature should be sealed in order to a good execution.

With regard to the decisions in which executions have been held defective, there is no case that has decided that a will purporting on the face of it to be duly executed and attested generally, is a bad execution of such a power as this, and therefore none requiring this execution to be so held.

The use of such restrictions as those in this power is, to secure due deliberation and solemnity in the execution; that of requiring attesting witnesses is, further to have certain known persons, who may be called (a)² when the execution of the deed shall be to be proved. All these advantages are secured by such an execution as the

(a)¹ If the witnesses attest the will, and not the execution, whereby the writing becomes a will, *quære*, whether names affixed to the instrument, merely to identify the instrument, *ne summutetur*, by persons who had never seen or known the testator, would not be sufficient.

(a)² *Quære*, if not also, to inform parties interested under and against the appointment, as to what the witnesses will be able to prove when called.

present. A rule requiring any thing further is merely arbitrary, and ought not to be extended.

ERSKINE J. My lords, in answer to your lordships' question, I have to state my opinion that the power given to the testatrix Ward, was duly and effectually executed by her will.

By the deed of settlement conferring the power, it was required that the appointment should be by will, to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses. The special verdict expressly finds that the will in question was signed, sealed, and published by the testatrix [408] in the presence of three witnesses, and attested by them; and the only question raised on the argument was, whether the attestation which is set out in the special verdict was sufficient. The attestation in form is by the witnesses affixing their signatures to the word "witness," under the signature and seal of the testatrix; and the objection to this form of attestation is, that it does not specify of what the persons signing were witnesses; whereas it is said that, by the decided cases, it has been held that it should appear upon the face of the memorandum of attestation that the will had been executed with all the formalities required by the settlement conferring the power.

Before I proceed to examine the several authorities cited in support of this position, I would remind your lordships, that although, in the case of a common bond or deed, the execution must be by sealing and delivering the instrument, and although, in most instances, the attesting witnesses sign their names under a memorandum that the deed was sealed and delivered in their presence, yet that, in point of law, a person who has signed his name to the word "witness" (a) is considered as much the attesting witness to the instrument as if he had signed the more formal attestation (b)¹. So also, although by the statute of frauds, the legislature required that all devises of lands should be attested and subscribed in the presence of the devisor, by three or more credible witnesses, it has always been held that a devise of land was well attested by the witnesses subscribing their names to the word "witness" (c)¹ as, in the case now [409] under discussion. From this it is clear that in general the execution of an instrument may be well attested although the memorandum of attestation does not specify the acts that were necessary to make the execution effectual and perfect. In what respect, then, did a devise of land, made before the late statute (7 W. 4, & 1 Vict. c. 26), in execution of a power, vary from any other devise of land? In this respect only, that its execution must have been attended with all the formalities prescribed by the donor of the power, as well as with those prescribed by the statute of frauds; and therefore, if the donor of the power had required that the memorandum of attestation should be in a specific form, a general attestation, like that under discussion, would have been insufficient. But the donor of the power has not, in this case, prescribed any particular form of attestation; and therefore, when he uses the term "attested," he must, I think, be taken to use it in its ordinary sense; and we have seen that when taken in its ordinary sense, both as applicable to deeds and wills, under the statute of frauds, the term is fully satisfied by the witnesses affixing their signature to the word "witness" (b)². Why then should it be necessary that, in a will made in execution of a power, the memorandum of attestation should state the particulars of the execution? The object of the attestation is in both cases the same, namely, that the persons whose interests may be affected by the will, should have the means of knowing who the parties present were, and of ascertaining, through them, whether the requirements of the statute in the one instance, and of the power in the other, had been duly complied with; and this purpose is as well answered by a general, as by a particular, attestation (c)³; and that no sufficient reason exists for [410]

(a) A person so signing is bound to know that he is attesting an instrument which the law of the land requires to be sealed and delivered. He is not bound to know, and seldom does know, the private law created by the settlor.

(b)¹ An attesting witness may be presumed to be acquainted with the provisions of the statute of frauds, as well as to know the rules of the common law.

(c)¹ Vide supra, 393, n.

(b)² Vide infra, note (b).

(c)² It appears to be here assumed that, at every time at which any inquiry as to the due execution of the power may take place, all the witnesses will be competent, credible, accessible, and producible.

requiring in such cases a special memorandum of attestation, may be now affirmed without presumption, since the legislature has thought it right to declare that no form of attestation (a) shall for the future be necessary to render valid an appointment by will, even though the donor of the power may have expressly required it. (7 W. 4 & 1 Vict. c. 26, s. 10.) As the donor of the power therefore, in this case, has not required any special attestation, and as all that he has required is found to have been performed, I can discover no legal principle on which your lordships should be called upon to declare the power not well executed.

But it has been argued that it is too late now to inquire into the propriety of requiring a special memorandum of attestation to a will made in execution of a power before the statute 7 W. 4 & 1 Vict. c. 26, because a long series of decisions has established the rule that the memorandum of attestation to such a will must expressly specify that the execution was attended with all the formalities required by the instrument conferring the power. It will be necessary, therefore, to examine the cases somewhat in detail, that your lordships may see to what extent the House, by affirming the judgment of the court of King's Bench in the present case, will in effect overrule the decisions in former cases.

Wright v. Wakeford (4 Taunt. 213, and 17 Ves. 454) was the first of the series of cases upon which the defendant in error relied. In that case a power of sale was given to trustees, with the consent and approbation of the *cetteux que trusts*, testified by any writing under their hands and seals, attested by two or more credible witnesses. The premises were afterwards sold by the surviving trustee, with the consent and approbation of the *cetteux que trusts*, who signed, [411] sealed, and delivered certain deeds of lease and release, conveying the premises to the purchaser; and, by the deed, it was expressly stated that the sale and conveyance was with the consent and approbation of the *cetteux que trusts*, testified by their being parties to, and signing, sealing, and delivering the said indenture. But the memorandum of attestation only stated that the deeds had been sealed and delivered by the *cetteux que trusts*, and omitted to state that they had been also signed by them. Upon a case sent by Lord Eldon to the Common Pleas, the three puisne judges of the court held, in opposition to the opinion of Mansfield C. J., that the power of sale was not duly and effectually executed by the indenture so attested; and, in their certificate, they assume, as the foundation of their judgment, that the witnesses must be considered as attesting only those formalities that were specified in the memorandum of attestation; and that, as the signature of the *cetteux que trusts* was not comprehended in the words made use of in the attestation, the execution of the power was incomplete.

Now, the decision might be supported upon one or two grounds, either that it was necessary that the memorandum of attestation should, in terms, expressly specify the several formalities which the witnesses professed to attest, or that, as the memorandum of attestation in that case expressly stated that the deeds were sealed and delivered in the presence of witnesses, their signatures would be taken as attesting those facts, and those only. If the case was decided upon the first of these grounds, it would be a direct authority against the plaintiffs in error in the case before the House; if upon the latter, it would leave untouched the question as to the sufficiency of a general attestation like the present. The certificate does not clearly point out upon which of these grounds the learned judges who signed it rested [412] their judgment; and as the decision might, in my opinion, be well supported upon the latter ground, although inconsistent with some of the cases under the statute of frauds, I should not have considered it as an authority conclusive on the present inquiry, especially as I do not find that any case was cited, either at the bar or from the bench, that would support the former proposition. But the difficulties with which the plaintiffs in error have to contend, arise, not so much upon the case of *Wright v. Wakeford* as reported, as upon the interpretation put upon the decision in later cases.

In *Doe dem. Mansfield v. Peach* (2 M. & Sel. 576), the court of King's Bench adopted the decision of *Wright v. Wakeford*, and the reasons given in the certificate of the three puisne judges; but, in delivering the judgment of court, Lord Ellenborough makes use of this expression: "But it seems to us, that to make a due execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms.

(a) Conveyancers do not appear to be yet agreed upon the meaning of these words.

The intention of the parties was, that the attestation should be co-extensive with the things required to be done; and this makes the case directly the same as *Wright v. Wakeford*."

But although it may be collected from this passage, that it was the opinion of the court of King's Bench that the witness could only be considered as attesting the circumstances specified in the memorandum of attestation, yet, as in that case the memorandum specified two of the requisites, and omitted the third, the decision of the case does not necessarily exclude the sufficiency of a general form of attestation, like that now under consideration.

In *Wright v. Barlow* (3 M. & Sel. 312) the question was precisely [413] the same as that in *Doe dem. Mansfield v. Peach*, and was decided by the court of King's Bench upon the authority of that case, still referring to *Wright v. Wakeford* as the foundation of both; and there are no expressions used by the court indicating an opinion as to the insufficiency of a general form of attestation. The question therefore remained as *Doe dem. Mansfield v. Peach* had left it (a).

In *Doe dem. Hotchkiss v. Pearce* (6 Taunt. 402), the deed creating the power, required the instrument to be under hand and seal, and attested by two or more credible witnesses. The will, in execution of the power, was signed and sealed, but the attestation was of the signing only. The question therefore, in this case, though differing in form, was in principle the same as that raised in the three former cases, and was decided upon the authority of *Wright v. Wakeford*.

In the case of *Ward v. Swift* (1 Cr. & M. 171, 3 Tyrwh. 122), in 1832, the question was, whether a memorandum of attestation, stating that the will in question had been "signed, sealed, and delivered as the last will and testament of Mary Swift, who in her presence and in the presence of each other have put our names as witnesses thereof," was a sufficient attestation of the signing, sealing, and publication of the will by Mary Swift in the presence of the witnesses. The court of Exchequer held the attestation sufficient; and I find nothing in the case to affect the question now before your lordships, except this question put by Bayley B. to the counsel: "Must not your attestation reach all that the witnesses are required by the instrument creating the power to attest?" But as there was, [414] in that case, a special attestation, the question became the same as that in *Wright v. Wakeford*, whether the attestation included all the formalities required by the power; and the only difficulty was that suggested by Lord Lyndhurst at the close of the argument, whether the attestation imported that the will was signed, sealed, and delivered, in the presence of the witnesses; but the decision of the case shews that the difficulty was removed.

None of these cases, therefore, appear to me to be direct authorities for the position, that a general attestation, as in the present case, is insufficient.

There are other cases, however, in which the form of attestation was general, and which require particular consideration, namely, *Moodie v. Reid* (7 Taunt. 355); *Stanhope v. Keir* (2 Sim. & Stu. 37); and *Buller v. Burt* (cited in 4 Ad. & E. 15, 6 N. & M. 281). In *Moodie v. Reid*, the attestation was by the signature of the witnesses under the word "witness"; but there the case sent to the Common Pleas from the court of Chancery, involved the question of the due execution of the will by the testatrix, as well as the sufficiency of its attestation by the witnesses; and the certificate sent to the court of Chancery did not specify on which of the two grounds the court finally held that the power had not been well executed. And although Gibbs C. J., at the close of the argument, observed that the case of *Wright v. Wakeford* established that the witnesses must attest every thing that is necessary for the execution of the power, and did not express any disapprobation of that decision, yet by his remark, that the witnesses had clearly attested the signing, it is plain that, at that time, he did not consider that the case of *Wright v. Wakeford* had established that in no case could the signatures of the [415] witnesses be taken as an attestation of any formality not expressly specified in the memorandum of attestation; for the signing was not so specified in that case; and it does not appear, from the report, upon what grounds the decision ultimately rested.

In *Stanhope v. Keir* the power was to be executed by will signed and published by the donee of the power, in the presence of and attested by three or more credible

(a) In point of argument, but not as to the effect of cumulative authority, establishing a course of practice. Vide *supra*, 400 (c), 401 (a).

witnesses. The will in dispute concluded with the words, "and this is my last will and testament, made and signed in the year of our Lord 1818, on the 19th of November, at Gravesend in the county of Kent;" to which were subjoined the signature and seal of the testatrix; and under those words were written the words "in the presence of," and then followed the signatures of the three witnesses. In that case there was no question whether the will had in fact been duly signed and published by the testatrix in the presence of the witnesses. The question turned upon the sufficiency of the attestation; and it was argued, in support of the will, that the declaration with which the will concluded was in effect a publication as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts. Leach V. C. said that the argument for the defendant supposed the witnesses to be acquainted with the contents of the will; but that he could not assume more from that attestation than that they saw Mrs. Keir sign the instrument. But here again, the signing was not mentioned in the memorandum of attestation; and Sir John Leach, therefore, could not have thought that compliance with the formalities required, must be expressly certified by the memorandum of attestation. It must, however, be admitted that, by overruling the plea of the defendant, Sir John Leach must be understood to have decided that, by the adoption of this general form of attestation, [416] the witnesses could not be considered as attesting all that really took place at the execution, and that the court could not refer the term "witness" to the allegations in the will. This case therefore is an authority against the opinion which I have formed.

Buller v. Burt was also decided by Sir John Leach when Master of the Rolls. There, the execution of the power was to be by deed, sealed and delivered in the presence of, and attested by, two or more credible witnesses. The defendant Burt claimed under a deed which was found amongst the papers of his father, who was one of the witnesses to the deed. This instrument concluded with the words, "signed and sealed, at Colton aforesaid, the 13th day of September, in the year of our Lord 1813," and then followed the signatures of two witnesses. The plaintiffs, by their bill, alleged that the instrument had never been delivered, and that, even if it had been delivered, it was not a due execution of the power. The defendant swore that he believed that it had been delivered to his father, amongst whose papers it was found. But there does not appear to have been any evidence, beyond the inference to be drawn from the attestation itself, that the deed had, in fact, been sealed and delivered in the presence of two witnesses, as required by the settlement conferring the power. From the report of this case Sir John Leach appears to have assumed, contrary to his former opinion, in *Stanhope v. Keir*, that the court might look to the will itself for the purpose of ascertaining what facts had been attested by the witnesses when they affixed their signatures to the word "witness," and then to have decided, that, as there was no allegation on the face of the deed that it had been delivered, the witnesses could not be considered as attesting that fact to have taken place in their presence.

[417] The decision of Sir John Leach seems to have proceeded on the ground that, assuming that all had taken place that the deed itself recites, and that the attestation was evidence of all the facts recited, still that there was no evidence of the deed having been delivered in the presence of the witnesses, and consequently no attestation of that fact. And if this may be taken as the real ground of decision, the case supports the view taken by the court of King's Bench, and adopted by other learned judges in the court of error, in the cases now under consideration, namely, that such a general form of attestation may be taken as referring to the allegations in the latter part of the will itself, and in effect to attest all that appears upon the face of the will to have been done, and would not interfere with another suggestion, which I submit to your lordships' consideration, namely, that a general attestation like the present in effect attests the execution, as it actually took place; and that as the special verdict finds that all the required formalities were in fact complied with, the witnesses must be held to have attested that those formalities took place in their presence.

Stanhope v. Keir appears to me to be the only authority directly opposed to either of these grounds for concluding that the will was in this case well attested; and therefore, as the word "witness" must be taken to refer either to the facts that really took place, or to the acts recited in the latter part of the will (a); and as it appears, both

(a) Quære, the necessity of adopting either of these alternatives, except for the

from the facts found by the special verdict, and from the statements in the will that precede the signature of the testatrix, that all that was required by the donor of the power was actually done, I [418] think the attestation was sufficient, and I answer your lordships' question in the affirmative.

COLTMAN J. My lords, in answer to the question proposed by your lordships, I humbly beg to state my opinion that the power given to the testatrix L. H. Ward, by the settlement set forth in the special verdict, was not duly and effectually executed by her will, dated the 12th December 1789, as stated in the said verdict.

The grounds on which I have come to this conclusion were stated by me in a former stage of this cause in detail; and as, on mature reflection, I have found nothing to alter in that judgment, or to add to the reasons which I then urged, it would be a useless occupation of your lordships' time to re-urge them; and therefore I humbly crave leave to refer to the printed report of them, which is to be found in 9 Ad. & E. 940, 1 P. & D. 671, as containing all that I can usefully suggest on the subject.

COLERIDGE J. My lords, in the settlement to which your lordships' question refers, the power given to L. H. Ward is to be executed "by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses."

This power requires acts to be done by the donee, and by the witnesses; she is to sign, seal, and publish in the presence of the witnesses; they are to attest the acts so done by her in their presence. No question is now made but that she, on her part, has done all that she was required to do: the question is, whether they have done what was necessary on their parts; and as that is comprised in the single word "attested," without specifying any particular form, the only inquiry will be, what is the proper meaning of that word? It will be convenient, however, to place before the House, as we proceed, what has been really done by the donee and the witnesses. She has made a will, in the last sentence of which she says, "I declare this only to be my last will and testament; in witness whereof I have to this my last will, &c., contained in one sheet, set my hand and seal this 12th day of December in the year of our lord 1789." She has signed her name, once between the month and the year, and once after the latter. She has also sealed it. The word "witness" then appears, and under it the three witnesses have signed their names.

"To attest," in common language, means either to call to witness or to witness (a). The former sense in the present case is out of the question. Any one reading the sentence in the power now under consideration who was not conversant with legal decisions would understand it to imply that the execution was to take place in the presence of three credible persons, who were not to be merely present, but present as witnesses, and taking cognizance of what was done; the words being "in the presence of, and attested by;" and looking on the will, he would pronounce that there appeared to have been a valid execution of the power in the present instance; for he would see that three persons had written their names as having witnessed the transaction. If such a person had been shewn the fifth section of the statute of frauds, the written law which makes a provision in a matter of all others the most analogous to the present, the execution, namely, of ordinary wills in writing;—[420] which are, in truth, but instruments framed in the exercise of a statutory power;—he would not only be confirmed in his conclusion, but be led to think that the witnesses, by writing their names, had perhaps done something more than was strictly necessary; for he would have found that where signing by the witness as well as merely witnessing was required, the legislature, in language cautiously and technically framed, had said that they should not only attest, but subscribe the instrument. He could not doubt that those who framed that clause had considered attestation and subscription to be different things, the latter being something superadded to the former. He would be still further confirmed in his first opinion if he were told that although the same section prescribed certain conditions as necessarily attaching to the attestation and

purpose of supporting the execution. As to the former, vide 432, n., as to the latter, vide 393, n.

(a) It is also not unfrequently used in the sense of making a memorandum of the fact of having witnessed; such memorandum being generally, but not necessarily, subscribed with the name of the witness so attesting.

subscription of the witnesses, yet the courts of law had held it unnecessary that a compliance with those conditions should be stated by the witnesses on the face of their attestation or subscription. From all which he would necessarily infer that, in common parlance, in the language of the statute law, and by the construction of judges, such conditions formed no part of, nor were implied in, the term "attestation" or "subscription," or in both together. Further, if the power, the will, and the attestation, now before me, were laid before any jurist skilled in the principles of legal construction, but unacquainted with the decisions of our courts, I am persuaded that, trying the question upon those principles, he would be satisfied that all had been done that was required,—all that the framer of the power had required by way of security for the due, considerate, and solemn exercise of it by the donee.

My lords, it will not be supposed that, I think, I am disposing of the question propounded by your lordships by this mode of illustrating it; but I venture to think that [421] the considerations which are suggested by this illustration, if it be true in fact, ought not to be without their weight in examining what remains of the question—the course of decisions, namely, in our courts; which are said to militate against the foregoing conclusions. It is something surely if those decisions should be found not agreeable to the conclusions of mere common-sense statutory interpretation, judicial construction by our courts, and the reasonings of jurists on general principles. It is something, but I admit far from all; for if the decisions of our courts have proceeded in a uniform course, although that course may be ever so unsatisfactory, yet we, in Westminster Hall, are bound by them, however your lordships may be unfettered (a)¹; and it has been the wisdom of your lordships also to regulate your own freedom of decision on the principle that the greatest of evils in the administration of the law is uncertainty and inconsistency.

It is not at variance, however, with this principle that we should deal with decisions which we think wise and just, in a different spirit from that in which we treat those which we think mistaken and unjust. In applying the former, we regard the principle involved even more than the mere circumstances, and consider them authority beyond the latter for every case ranging within the former. In the latter there is a natural conflict of the mind in every instance of acting on their authority between a sense of the necessity of so doing on general principles and of the particular hardship and injustice [422] which we work in the application. It is therefore a well-known rule familiar in use that such decisions are authority only when the very same circumstances arise again. If ever there were decisions to which this rule was applicable, I conceive these to be such. My learned brothers who formed the majority in the court of error below, unite in regretting that they have been made. They introduce uncertainty and inconsistency into a branch of our law wherein, beyond any other, certainty and consistency are desirable to an extent which, until examined, we are hardly aware of. Sir Edward Sugden puts the case of a power framed, as to the attestation, in the exact words of the fifth section of the statute of frauds, and according to the decisions, a will under the statute would be held good, and one under such a power invalid, attested in exactly the same words (a)². These decisions have been twice condemned by the legislature; first, by the 54 G. 3, c. 168, which Chancellor Kent, in speaking of them, characterizes as a miserably lame and timid

(a)¹ Quære, if a court of law, though deciding in the last resort,—whether it be the House of Lords, or a magistrate exercising summary jurisdiction,—is not bound by a state of the law arising out of a long course of decisions. Though the suitor would be without remedy, except by appeal to a subsequent parliament, the House of Lords would not consider itself as legally entitled to hold, that a common recovery is void, on the ground that such a proceeding was—what no one doubts—a fraudulent evasion of the statute de donis.

(a)² A person who attests a will executed under a statute, is presumed to know, that in so doing he certifies that the requisites of that general law have been complied with. But when he attests a quasi will, or any other instrument, the requisites of which are arbitrarily prescribed by an individual, a general attestation clause would appear to derive no greater force from the circumstance that the requisites prescribed happen, unknown to the witness, to coincide with the requirements of the law in relation to a true will, than it would have possessed, if the formalities required by the public and by the private law, had been totally different.

provision, 4 Comm. 331, and more decidedly and effectually by the 7 W. 4 & 1 Vict. c. 26, s. 10, which, in imitation of the New York revised statutes, enacts that all appointments by will in exercise of any power shall be executed in the manner therebefore required as to other wills, that is, without any form of attestation, and that every will so executed "shall, so far as requires the execution and attestation [423] thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should [shall] be executed with some additional or other form of execution or solemnity."

These decisions have undoubtedly raised a general impression in the profession, that in order to exercise a power securely the attestation clause should state, in terms, the performance of all solemnities prescribed with regard to the execution of the instrument. I do not propose to examine the whole series in detail. It has already been done in the learned arguments of the judges in the court below in this very case, and with great minuteness at the bar of the House, and your lordships are perfectly familiar with them. The cases of *Wright v. Wakeford*, however, and of *Doe d. Mansfield v. Peach* may be said to be the foundation of the whole. It will, therefore, be worth while to see exactly what they decided. In the former, the deed was required to be "under hand and seal, attested by two or more credible witnesses." The attestation indorsed on the deed was "sealed and delivered by the within-named —, in the presence of —." The majority of the court certified "that the word 'sealed' did not necessarily imply that the party sealing had also signed in the presence of the witnesses,—that signature was not comprehended in the words made use of in the attestation." *Doe d. Mansfield v. Peach* cannot be distinguished from the preceding; and Lord Ellenborough said, "If the question be, whether it follows, as a legal consequence, that an attestation of the sealing and delivery of a deed is an attestation of the signing, we are bound to answer that it does not."

Place by the side of these propositions that for which the defendants in error now contend; and see whether this foundation is at all co-extensive with the super-[424]-structure. A power requires that a deed in exercise of it shall be under hand and seal, attested by two witnesses. The witnesses in the attestation clause say that they saw it sealed and delivered. The court concludes that these words do not import that they saw it signed. Whether from that conclusion, which in itself was unobjectionable, they ought to have inferred a bad execution of the power, is not at this moment the question; but the conclusion itself was merely one of verbal construction. The proposition now contended for as necessarily flowing from this—so necessarily, that it binds us against our sense of propriety and justice (a)¹, is this, that an attestation clause must, in terms, express every formality prescribed in the execution by the power. This last may be a conclusion to be worked out from the former. It may be said that "attestation" means "attestation clause," and attestation of certain things means an attestation clause stating, in terms, expressly, their performance. All this may be very reasonable inference; but it has not been inferred in those cases by the judges who decided them. It is not a necessary inference; nor can I find that in any one of the decisions cited in the various arguments of this case, the court has ever, in terms, drawn this inference.

It cannot, I am sure, escape your lordships, that the answer to your present question turns upon a consideration which does not appear to have been presented to the minds of those very learned judges. There must be an attestation of all the formalities required. This I can afford to grant. The performance of the formalities must appear from the attestation clause. I can afford to grant this also. If the clause in terms states the performance of one or more, and is silent as to others, the analogy of legal reasoning will infer the non-performance of those [425] others in the presence of the witnesses. It is as much as if they had said, "We can only say we saw the deed sealed and delivered; as to the signing, we can say nothing—we did not see it done." This too I can afford to concede. But what is the meaning of a general attestation clause, that condescends upon no particulars? Whether, if by the last words of the instrument, the party professes to perform all the particulars required for a due execution, the witness, by such general attestation, does or does not import an attesting of them all (a)². These are questions wholly distinct from the former, and which the two cases, above cited, leave wholly undecided.

(a)¹ Vide post, 428 (a), 443 (b).

(a)² Vide supra, 392; infra, 431, n., 432, n.

One of the earliest comments on *Wright v. Wakeford* and *Doe d. Mansfield v. Peach*, was that of Sir Thomas Plumer V. C. and Gibbs C. J., in *Moodie v. Reid* (1 Madd. 523, 7 Taunt. 361), both of them authorities much to be respected, and especially on such a point as this. There, the will was to be "signed and published," the testatrix at the close of her will said merely, "signed by me this, &c.;" the attestation clause was only "witness B. H., J. H." Sir T. Plumer thought that *Wright v. Wakeford* did not rule this case. He put that decision on its true ground—the expression of some being the exclusion of others. He said the question raised was new, and sent it for the opinion of a court of law. And how did the court of law deal with it? They certified indeed, that the power was not well executed; but why? Because the signing and publication were not attested. By no means, and yet neither were stated. The Lord Chief Justice expressly said, "The witnesses have clearly attested the signing; the question is, whether they have attested the other formality of, publication in attesting the signing." The principle of the decision there was the same as in *Wright* [426] v. *Wakeford*. Your attestation is to one only out of two requisites; you exclude thereby the other. But how was it an attestation to that one? Not by its expression of it in terms, but only because, being entirely general, it was to be referred to that act which was stated, in the close of the will, by the testatrix herself (a)¹. If, in that part of the will, she had said "signed and published" instead of "signed" only, must not Gibbs C. J. have held that the witnesses had attested both, and that the power was well executed? I see no escape from this conclusion (b). And that is this very case. It is clear then, he did not draw the inference from *Wright v. Wakeford*, which is now pressed on us; and his high authority is in my favour. But was he warranted in holding that opinion? A power requires certain things to be done and attested by witnesses; the donee in terms states that she has performed them, and so far as they can be shewn on the face of the instrument (c) they appear to have been performed. Immediately under is the word "witness"; and the witnesses sign their names. It cannot be denied that they state themselves to be witnesses; but witnesses of what? Will you say of nothing? Is not that unreasonable, unauthorised? Is it not, at least, to construe an ambiguous act so as to invalidate an instrument, when legal principle enjoins you to construe it so as to make it valid? If you admit that they witness something, why one act more than another? why not all (d)? I agree that powers are to [427] be strictly performed; but the reasoning by which we are to determine the question of a disputed performance is to be the same, in kind, as that by which we determine any other disputed question of fact or construction in law.

It will be said that where the instrument must be, and on the face of it professes to have been, executed with several specified formalities, and the attestation is general, it is left uncertain whether the witnesses attested all, and, if not all, which, of those formalities; and therefore is defective. I think, if sifted a little, this argument will be found based on premises which have no place properly in the discussion. If you read what is called the testimonium clause with the attestation, there is no uncertainty. Then the conclusion is clear, that the latter imports a presence at, and a witnessing of, the whole.

But it is said you cannot do this, because witnesses commonly do not see, or do not regard, what is stated in the testimonium clause. I deny that you can enter into that consideration. If you could, how far might it not go? Witnesses very commonly do not even read the attestation clause. Are we to inquire, in each particular case, whether they have done so (a)²? In truth, determining this as a question of law, we

(a)¹ Vide supra, 392, n.

(b) Quære, whether the meaning of Gibbs C. J. must not have been, that the witnesses shall be taken to have meant to attest the signature which lay before them, but that the same inference does not arise as to the act of sealing.

(c) Vide supra, 392 (a).

(d) The case of the lessors of the plaintiff seems to have been, that the attestation left it doubtful whether the witnesses attested one, or more than one act, and if but one, which act.

(a)² If it could be shewn that an attesting witness had not read the attestation clause, and that nothing had passed equivalent to a communication of its contents, it is conceived that the attestation would be void.

are to consider, not what witnesses do when the creator of a power requires that witnesses shall attest certain acts as a security for their performance; we must assume him to proceed on the footing that the witnesses will discharge their duty properly, otherwise the whole provision is futile. Then, what is the duty of a witness? Not to sign his name to he knows not what. He must be aware [428] that he is called to see something done, and to affirm, by his signature, that he has seen it done. Surely then he is to ascertain what it is that he is required to see and to affirm; if so, it seems to me a most reasonable presumption, that where the attestation is general, and, in terms, excludes nothing, it makes no selection by inference, but affirmatively includes every thing stated in the testimonium clause. There is then no uncertainty. In *Stanhope v. Keir*, and in *Buller v. Burt*, Sir John Leach appears to have entertained the same opinion.

The extreme length to which I have already gone forbids me to examine the authorities further in detail; and it is unnecessary, because it is admitted that none can be found which exactly meets the facts of the present case. That would be enough for my argument; but, unless I deceive myself, I have gone further, and shewn that a conclusion against the execution of the power in the present case is not only not a necessary, but not even a highly probable, one, from the cases, on which it is admitted that the course of decision rests, or from the general body of those decisions.

I may observe, in conclusion, that, with regard to wills, no uncertainty for the future can arise from adopting the conclusion to which I come; as in respect of powers at present unimpeached for supposed defects in the attestation, this decision will operate to secure the title and possession of the grantees; and, as to all wills executed under powers since the 1st January 1838, the statute passed in the first year of H. M.'s reign makes the provision before stated, which puts an end to all these questions (a)¹.

I beg to state, therefore, in answer to your lordships' question, that, in my opinion, the power in question has been well executed.

[429] WILLIAMS J. My lords, I believe that all my learned brothers who have delivered their opinions against the decision of the court of Queen's Bench did so with an expression of regret; they came to the conclusion that the execution of the power in this case was invalid with reluctance, but felt themselves borne down by the overwhelming weight of authority. From the course of reasoning adopted by them all, I am warranted in inferring that, if they had considered it still an open question, they would have arrived at a different conclusion. It becomes a matter, therefore, of much importance to consider (before we consider their application to the present case) what is the nature of those decisions to which so much weight is attributed,—whether they establish any important principle connected with the observance of the intent and meaning of the creator of a power,—whether they introduce any additional checks and securities,—whether, in short, they are productive of any practical result, more or less, or are of a character purely formal and technical; because I presume it will not be denied, but that a more ample and liberal compliance and adoption are to be expected in the former case than in the latter. In the latter they need only be pursued in cases precisely resembling them, more especially if they should chance to be in direct opposition to a great body of authority upon a kindred, but much more important, branch of the law.

Before I pursue this view of the subject further, I must beg leave to premise that the requisites of the power have, in my opinion, been complied with in point of form, as, in substance (a)², they unquestionably have. [430] Upon this the special verdict

(a)¹ I.e., in respect of powers executed after that day.

(a)² In the case of the execution of a power, it is not easy to distinguish between matter of form and matter of substance. Where A. gives a life estate to B, with remainder in fee to C., with power to B. to intercept C.'s estate by an appointment, provided such appointment be accompanied with the observance of some arbitrary formalities prescribed by A., the observance of those formalities is of the substance of the title of the appointee, and the non-observance of all or of some of those formalities is of the substance of the title of C. In the principal case the donor of the power is personally the same individual as the donee; but the case stands as it would have done if L. H. Ward's father, instead of herself, had been the settlor. The donor of the power was L. H. Ward sui juris, whilst the donee was L. H. Skynner sub potestate

has left no doubt; the will was executed, in every respect, according to the power. But I was adverting to the nature of these decisions. What is the difference, as to any substantial effect, between an attestation containing all the forms which my learned brothers require, and find wanting, as they think, and that which has been pursued here? To try this question, it is only necessary to suppose that the validity of the will is disputed. The selfsame quantity of proof is required, whether the word "witness" stands by itself, or whether there be added "signed, sealed, read, published, and declared," or whatever else the dull ingenuity, and unmeaning exaggeration, of an attorney's clerk (for the witnesses themselves have no more to do with it than with the body of the will), may choose to accumulate into the clause of attestation. In each case the proof must be given, or the will fails; the indorsement supplies nothing, profits nothing. The substance therefore of the transaction is, that the witnesses should see, and be able to prove, that the requisites have been complied with; the form is, that it should be written by somebody else (a)¹, that they did so. Except, therefore, the present case precisely resembles those to which I am alluding, I see no reason for extending their authority.

The question, however, undoubtedly is, whether the forms required by the power have been pursued by the [431] testatrix; and whether those, who are described as such, appear to have been witnesses that she so pursued them; which, I presume, is the meaning of attestation, or I know not what it is.

Now the language of the power (as has been already so often mentioned) is, "by her last will and testament, to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses." All this, as is found, has been done; and we are now to see whether, by ordinary and fair construction, neither forcing any interpretation in favour of it, nor wilfully excluding any reasonable inference for the mere purpose of defeating what we know to have been rightly done, the requisites appear to have been complied with. And here it seems to me very important to attend particularly to the document itself. The will first contains the whole testamentary part; every disposition of the property is first fully made, and the will is therefore, as to that, its principal object, complete. The rest regards the manner and form of execution. It is thus: "I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, contained in one sheet, set my hand and seal." The testatrix signed this part twice, once after the above words, and again where her seal is affixed; and directly opposite to the latter is the word "witness," and immediately under it are the names of the witnesses; and the question is, whether from this it is to be understood that they attested, or in other words were witnesses to, any thing, and, if so, how much?

And first, it must be asked, for what purpose was this testimonium clause (as it has been called) introduced, or rather added? Certainly not to explain or qualify the will, or any part of it. To its provisions it has no allusion; but it respects the forms to be observed in the execution of the will, and that only. Why are we to [432] assume that the testatrix was ignorant of the terms upon which alone her dispositions could be available? This, the very language of the clause itself, shews that she did understand. The clause therefore having this object, we come to consider the purpose for which the witnesses are introduced; and I confess I cannot conceive it possible to understand the meaning of their presence except to witness something. To suppose that the witnesses signed their names without any meaning or reference to what is alleged (opposite to their names) to have been done, seems to me to outrage all probability. If it be said, and with truth, that the witnesses cannot be presumed to be cognizant of the contents of a will, because that is contrary to experience, it is surely somewhat contrary to the same experience to suppose that when the presence of the witnesses is to be accounted for only by their being brought there to witness something, certain ceremonies were (a)² performed, but that they saw nothing of them,

vi. The object of the settlement may have been to oppose a barrier, however feeble, against martial control.

(a)¹ Q. d. by one of themselves or by somebody else.

(a)² The question seems to be—whether the clause of attestation should inform appointees and remainder-men, vendors and purchasers, that the conditions imposed by the donor of the power, have or have not been complied with,—whether, upon a contract of sale under a power, the vendor is bound to shew a valid appointment upon

and that, too, when the very language of the testimonium clause ("I declare," &c.) imports that the testatrix was making the declaration, not to the winds, but to persons to whom she might address herself,—who were there to see and to hear (b)¹.

[433] If then the witnesses must be understood (as I think they must) to have attested something, I can see no possible reason for stopping short of the conclusion that they attested every thing which, by the clause (a)¹, purports to have been done, that is, the signing, sealing and publication,—the forms required. I shall not take up time in considering what is, in point of law, a publication. Gibbs C. J., indeed, in *Moodie v. Reid*, is reported to have inquired of the bar what publication was; and that, having received no answer, he expressed no surprise; from which I presume we are to understand that he considered it to be involved in some difficulty. If, however, a declaration before witnesses (present for the purpose of hearing it), that the document is the will of the testatrix, be not a publication, the question of Gibbs C. J. will probably remain unanswered. I think that such is a publication, and that it can mean nothing else.

I come now to notice the cases upon which reliance is placed, which have been considered and reconsidered so often, that I shall advert to them as briefly as possible; and that only in order to shew that they are not precisely in point, and that therefore, for the reasons already given, they ought not, in my opinion, to govern the decision of the present case. They are principally *Wright v. Wakeford*, *Doe d. Hotchkiss v. Pierce*, and *Doe d. Mansfield v. Peach*.

Now in *Wright v. Wakeford* the power required "the consent of A. and B., testified by any writing or writings under their hands and seals, attested by two or more [434] credible witnesses." The attesting clause is "sealed and delivered by the within named A. & B. in the presence of C. B. and G. B." Here, the ceremony of signing was omitted, in an attestation which professed to give an account of what had been done; and there was not, as in the present instance, a testimonium clause (a)², which, by direct reference to it, could cure the omission. That this was the view taken by the learned counsel who argued the case, is apparent from the report. "Admitting," says he, "that if the attestation were general, the due observance of all the ceremonies might be presumed (b)², yet the same inference does not arise from a defective attestation." In *Doe d. Hotchkiss v. Pierce*, the power required "a deed of writing, under hand and seal, attested by two or more credible witnesses." The attesting clause was "Signed in the presence of A. R., E. S., I. B.," and the defect was, that there was no notice of sealing. In the next case, *Doe d. Mansfield v. Peach*, the power required that "R. P. and T. B. should give, grant, convey, &c., by some deed or writing, under both their hands and seals, to be duly executed by them, and attested by two or more credible witnesses." The attestation was, as in *Wright v. Wakeford*, "Sealed and delivered by the said R. P. and T. P., in the presence of T. M. E. S." The want of signing, apparent upon the attestation, was the defect which prevailed.

On the other hand in *Moodie v. Reid*, already noticed, "signing and publication were requisite," and the attestation clause was, "These my last bequeaths." Signed, the 4th day of February 1812. Witness, B. H., J. H." The defect was in the publication. Gibbs C. J., however, expressly declared that there was sufficient proof of signing; his language being "the witnesses [435] have clearly attested the signing."

the face of his deeds, or may eke out his title by affidavits of non-apparent, and perhaps non-existent, facts. If the extrinsic fact of the observance of the formalities on the part of L. H. Skynner, can in any degree validate the attestation, a purchaser may be compelled to accept a conveyance upon the testimony of a witness whose death may afterwards leave him without any defence to an ejectment brought by the party who would be entitled to take in the absence of a valid appointment.

(b)¹ If this declaration was made at the time the words were inserted, it would be untrue; if at the time the quasi testatrix signed her name, it would be equally untrue, unless, contrary to the usual course, she sealed before she signed. There is no evidence, upon the face of the instrument, of any subsequent declaration, unless it can be collected from the attestation itself. If it can be so collected, any reference to the testimonium clause may be dispensed with.

(a)¹ See the preceding note; supra, 393, n.

(a)² As to the operation of the attestation clause, vide supra, 393, note (a).

(b)² Q. d. not caring how the law might stand in such a case.

Now this could only have been so held by referring (not to the body of the will, which is going much further, but) to the testimonium clause, which is all that is requisite in the present case (a)¹. Again, in *Stanhope v. Keir* the power was, "to dispose by will, signed, and published, in the presence of, and attested by witnesses." The conclusion of the will was, "This is my last will and testament, made and signed, 19th of November 1818, Eugenia Keir." Thereupon Leach V. C., observed, that he could not assume more from the attestation than the signing; but that which he did assume (viz. the signing) could only have been by connecting the attestation with the testimonium clause. In *Buller v. Burt* the power was, to dispose by deed "sealed, and delivered, in the presence of, and attested by, witnesses." At the end was "signed and sealed, by L. S. witness J. P., H. P." Sir John Leach held the delivery not to be attested, but observed "that where the word 'witnesses' without more is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed, and, that as it was not stated therein that it was delivered, the word 'witnesses' could affirm no more than was affirmed in the deed itself." These remarks, I presume, are to be understood as referring to the testimonium clause, which is sufficient for the present purpose. The last case which I shall notice is, *Ward v. Swift*. There the power required a will "duly executed, and published, in the presence of, and to be attested by, three or more credible witnesses." The attestation was "signed, sealed, and delivered, in the presence of" three witnesses. The question was, whether the publication was proved; and the court of Exchequer held that it was, by the fact of delivery; [436] which, at all events, was not a literal compliance with the power.

In conclusion, I cannot avoid remarking that, in my humble judgment, the decisions upon the statute of frauds, so closely in *pari materia*, have not had their due weight in the consideration of the present case. It might have been supposed that a statute of the realm, under which such a mass of property has been disposed of, during a period of nearly two centuries, a statute upon which such eulogies (upon the justice of which I shall not stop to inquire,) have been bestowed, might have had, as it surely deserved, as much attention and observance as the will or whim of a private individual (a)². But to too much wisdom it has seemed otherwise. In the construction of that statute, the thing required has been (as according to all sense and reason it ought), that the forms thereby prescribed should be proved to have been complied with, but that the simple attestation by the word "witnesses" is sufficient. But in the case of a power, even if the things required by it be in the very words and letters of the statute of frauds, (viz. "attested and subscribed in the presence of the deviser by three or four credible witnesses,") a will which would be clearly good under the statute, is to be held invalid without the addition of an idle formula.

The result is, that, in my opinion, the power was duly executed.

GURNEY B. My lords, the argument which I have heard at your Lordship's bar, has failed to convince me that the opinion which I gave on this case, in the Exchequer Chamber, was erroneous. That opinion is, that the power in this case was well executed. I am of that opinion, even if it is to be taken that *Wright v. [437] Wakeford* was well decided, and that it is still to be allowed to prescribe the rule in cases of this description.

The case of *Wright v. Wakeford*, I humbly conceive, went to the extremest verge; and I cannot consent to be governed by it except in a case which shall correspond in all its parts. In that case the terms of the power were "by any writing under their hands and seals attested by two or more credible witnesses." The form of the attestation was "sealed and delivered by the within-named A. B. in the presence of," &c. The objection was, that the attestation did not extend to the signing. As the witnesses attested the sealing and delivery, it was said it must be presumed that they did not mean to attest the signing. The case was sent to the Court of Common Pleas by Lord Eldon. Mansfield C. J. was of opinion that the execution was good; the other three judges were of opinion, that it was not. Upon those certificates being returned Lord Eldon acted upon the opinion of the majority of the court, and dismissed the bill, which was for a specific performance by a purchaser.

It is impossible to mention the names of Lord Eldon and the three other judges of the Common Pleas, Heath J., Lawrence J., and Chambre J., otherwise than in terms

(a)¹ Vide supra, 393, n.

(a)² Vide supra, 428 (a), 430 (a).

of great respect; nevertheless, with all the respect which is due to their authority, I cannot but think it most unfortunate that this decision was ever made. It has led to great injustice. It has disappointed the just expectations of sellers and devisors, and involved the courts in great difficulties. It seems that if the word "attested" had not been in the power, the decision would have been the other way; and it is to be observed that the argument proceeds upon the supposition that a general attestation would have been sufficient (a)¹. If [438] the case now before your lordships had been the case then under consideration, I think that the decision would have confirmed the execution of the power.

In *M^cQueen v. Farquhar* (11 Ves. 467), the power directed the instrument to be signed and sealed in the presence of witnesses (but did not require an attestation), and the attestation was to the sealing and delivery, Lord Eldon held that the execution was good; and said it would be a miscarriage on a judge if he did not direct a jury to presume that the deed was signed, as it professed to be upon the face of it, in the presence of the witnesses who attested the sealing and delivery. I would take the liberty to suggest, that it cannot be too much for a judge to make the same presumption which he may direct a jury to make.

Other cases, which have been cited in the argument and in the judgments of my learned brothers, who have already given their opinions, have been decided; but all resting upon the authority of *Wright v. Wakeford*. In the last two cases that have come before the courts, the extreme severity of the rule has been somewhat relaxed. In *Simeon v. Simeon* (4 Sim. 455), the power directed the will to be signed, and published, in the presence of, and attested by, witnesses. The form of the attestation was "Signed, and delivered, in the presence of," &c. In that case the power was decided to be well executed.

In *Ward v. Swift*, a case sent by the Lord Chancellor to the court of Exchequer, the power was by will to be "published under hand and seal, in the presence of, and attested by, three witnesses," the attestation was "Signed, sealed, and delivered." The court decided the power to be well executed. In both these cases the word "delivered" was held to be equivalent to "published."

[439] In the case now before your lordships, the power is, "to the use of such person as the said L. H. Skynner, by her last will or testament in writing to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses." The execution of the power is this: the testatrix commences her will thus: "I, Lydia Henning Skynner, do publish and declare this to be my last will and testament," and then, at the conclusion, she says, "I declare this to be my last will and testament. In witness whereof I have, to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September, in the year of our Lord, 1789, Lydia Henning Skynner. Witness, Charles Ball, Elizabeth Ball, Anne Ball." And the special verdict finds that the will was signed, sealed, and published, by Mrs. Skynner, in the presence of the above witnesses, and attested by them, and their attestation was in manner and form as appears in the instrument. In this case it appears to me, that the testatrix has done all that the power requires. She published, she signed, and sealed: the attestation is general; there is no selection of one thing, from which it can be argued that the others are to be excluded. I think that it is to be taken that the witnesses attested all that the testatrix did (a)².

This is the opinion which I humbly tender to your lordships, even taking the case of *Wright v. Wakeford* to be law. It is necessarily with some hesitation and diffidence that I would with all humility submit to your lordships' consideration, whether that case should be allowed to stand. It has never yet, I believe, received the sanction of this the ultimate court of appeal (b). I have scarcely ever heard the case cited in the courts below, but judges have expressed their regret that that case [440] was so decided, and their sense of the injustice (a)³ that it has done; and more than once or twice I have heard it said, that, although, while that case stood, they have felt themselves bound by it, yet that if the question should come before this House, they should feel themselves at liberty to suggest the consideration, whether the case should be allowed to stand.

(a)¹ The judgment is the other way.
(a)² Vide supra, 393 (a).

(b) Vide supra, 420, n.
(a)³ Ibid., 429, n., 431, n.

That case, and the cases which have been decided in deference to it, have adopted a principle of decision totally different from the principle upon which the cases on the execution of wills under the statute of frauds have been decided (*b*)¹. Neither *Wright v. Wakeford*, nor any of the cases founded upon it, would have been so decided if the validity of the wills had come under the statute of frauds. Why, I beg to ask, is so much more respect to be paid to the language which the caprice of a conveyancer may have dictated than the words of the legislature: one conveyancer has used one form of expression, and another, another; when all that they meant was, just that which the statute of frauds had required (*c*).

My lords, the view which I take of this case is conveyed by Sir E. Sugden in so clear and forcible a manner, that I beg leave to cite two or three pages of his invaluable work on Powers (pp. 317, et seq.). "The strong ground, however, against the rule has not yet been stated. It is the construction which the statute of frauds has received (*d*). By that statute, it is enacted [441] that all devises shall be in writing, and signed by the testator, and shall be attested, and subscribed, in the presence of the said devisor, by three or four credible witnesses. These words are very forcible; for, as the attestation and subscription are required to be made by the witnesses in the presence of the devisor, it was clearly intended that the will should be signed by him in their presence; and the witnesses are expressly required to subscribe in the presence of the testator. It has however been decided, first, that the devisor need not sign in the presence of the witnesses (*a*)¹; secondly, that the subscription of the witnesses to an attestation which only contains the words sealed and delivered by, &c. is sufficient; and, thirdly, it has in three different cases been holden, that although the fact of the subscription of the witnesses in the presence of the testator is omitted in the attestation, yet, if the witnesses be dead and their hands proved in common form, it is evidence to be left to a jury of a compliance with all the circumstances; and yet it was contended that the hands of the witnesses could only stand to the facts they had subscribed. Verdicts were given in favour of the wills; and indeed it seems clear that in every case of this nature, free from any particular suspicion, a jury would find the solemnities adhered to. There is certainly no distinction between a power to be executed by will, and a power to be executed by deed, in regard to the rule that the solemnities required must be adhered to. In the case of *Dormer v. Thurland* (2 P. Wms. 506), where the power was 'by will, or any instrument in the nature of a will, under hand and seal, attested by three witnesses,' it was considered that an execution according to the statute of frauds would be a sufficient compliance with the power, with the addition of sealing; and it seems clear, that if a power were given to be executed by will in the words [442] of the statute, the courts could not decide, that an execution sufficient within the statute was not a due exercise of the power. If any distinction is made between the cases, the statute ought to receive a strict construction rather than a private power (*a*)². Every argument which can be urged upon a private power applies more forcibly to the statute. The legislature, in order to prevent frauds and perjuries, prescribed a new rule, which ought (*b*)² to have been strictly followed; whereas the powers in question were merely intended to follow the established practice, and not to introduce a new one (*c*). In

(*b*)¹ Vide supra, 421 (*a*).

(*c*) Why should the remainder-man be excluded where the donee of the power has left an easy condition unperformed, more than where an onerous condition is not complied with?

(*d*) The argument seems to be this,—inasmuch as the judges have dispensed with the formal, express, plain and unequivocal provisions of the statute of frauds (as their predecessors had done with those of the statute de donis, supra, 421, n.) à fortiori may they disregard the terms upon which a settlor has directed that his estate shall belong to A. in one event and to B. in another.

(*a*)¹ Vide supra, 440 (*d*).

(*a*)² Ibid., 429, n., 431, n.

(*b*)² If, as cannot be doubted, this ought to have been done, what is the value of the analogy founded upon the fact of the judges having adopted a different course?

(*c*) What is the "established practice" by which the right of testators or settlors to impose their own conditions, is controlled? If A. makes a feoffment to B., to be void on tender of a rose on his return from St. James, may he re-enter upon B. without

deciding upon the due construction of the statute of frauds, the judges did not attempt to cut down its provisions, but construed them according to the intention of the legislature; and although one learned judge thought that the witnesses should attest the signing by the testator, yet that was overruled. It was also held, that an attestation containing the words 'sealed and delivered' was sufficient; and it was said that this was grounded on the inconvenience that might arise in families from having it known that a person had made his will (*d*). The inconvenience which a contrary decision upon private powers has occasioned in [443] families, shews how strongly the same rule was called for in regard to them. The statute of frauds does not, like the common powers, merely require an attestation, but it expressly requires an attestation and subscription; and yet the subscription, as we have seen, need not contain all the facts which the witnesses attest. It is nevertheless held that, in the case of a private power, a subscription, although not required by the powers, excludes the proof or presumption of the witnesses having attested any act which is not stated in the attestation. The statute, too, in express words, requires that the witnesses shall attest and subscribe in the presence of the testator. It is however settled that the attestation need not state that fact. The judges have said, that the witnesses ought to set their names, as witnesses, in the presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription of the will, and, whether inserted or not, it must be proved; if inserted it does not conclude, but it may be proved contra; then if not conclusive when inserted, the omission does not conclude that it was so. If we compare the common power, upon which it is held that the attestation must contain the word 'signed,' with the words in the statute which have received a contrary construction, we shall at once see how difficult it would be to attempt to reconcile the cases. The words of the statute are 'devises to be in writing and signed by the party so devising the same (or by some other person in his presence, and by his express direction), and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses.' The words of a common power are 'by deed or writing under his hand and seal, attested by two or more credible witnesses.' The common power requires much less than the statute. Let us suppose that a power was given to be executed by will, in the very words of the [444] statute, could the courts put a different construction on those very words to that which they have already received? The answer is obvious (*a*). Suppose a power to be in the very words of the statute, but the word 'writing' to be used, generally, and not to be confined to a will; it is settled that such a power may be executed by deed or will. If a will attested so as to satisfy the statute would be a good execution of the power, could it be contended that a deed executed under the same power, in the attestation to which the word 'signed' was omitted, was a bad execution of the power? And if such powers must be held to be duly executed, upon what ground can a power, to be executed by writing under hand and seal, and attested by witnesses, be considered to require the fact of signature to be inserted in the attestation? It seems impossible to reconcile the cases. If the recent decisions are to stand, all the decisions on the statute of frauds, to which I have adverted, and which have been so long held sacred, will, in effect, be overruled (*b*). If, however, the decisions on the statute should be deemed to rule the case under consideration, not only would contrary decisions on the same words be avoided, but the daily contracts of mankind would be upheld according to their intention; and the bounty of testators would flow

having visited Spain, and without making the tender, because no such conditions as these are now to be found amongst the common forms in a conveyancer's office!

(*d*) If "delivered" when predicated of a will, means "published," the courts would have no power to require the insertion of the word "published." If it does not, the preservation of the peace of families would appear to be rather an object to be attained by an application to the legislature, than a ground for a judicial rejection of the express and formal provisions of an act of parliament.

(*a*) The construction may be the same, although the effect may be totally different. A bill of exchange drawn in Paris will have the same construction as a bill, in *eadem* verbis, drawn in London; but the drawer of the latter will be discharged by the omission to give notice of dishonour; the drawer of the former will remain liable, except so far as he is damnified by the omission.

(*b*) Quære.

in the channel in which it was intended to go (c). In this case the courts [445] have not to struggle with the words in order to support the execution of the power. But if even the words were hard to manage, yet the general opinion of the profession under which men have so long been induced to act, would seriously call on the courts to struggle with the words and make them bend to that construction which they have in practice so long received (a). [446] The case of *Wright v. Wakeford* gave such a shock to the security of titles, that part of its mischief was speedily remedied by an act of parliament 54 G. 3, c. 168, intituled, 'An act to amend the laws respecting the attestation of instruments of appointment and revocation made in exercise of certain powers in deeds, wills, and other instruments.' That act provided (but retrospectively only), that an instrument (if duly signed and executed, and, in other respects, duly attested) should have the same force and effect as if a memorandum of attestation of signature had been subscribed, by the witness expressing the fact of sealing, or sealing and delivery; and it is not to be denied that that statute,

(c) This observation would apply to wills; as a testator never intends that to descend to his heir, which he attempts, however imperfectly, to devise to another. But in the case of a power, the testator, or settlor, may be presumed to have in view both the donee and the party whom he authorizes to take in the event of the power not being formally executed.

(a) In September 1833, Sir Edward Sugden, when advising upon the will of Mrs. L. H. Skynner, expressed himself as follows, in a joint opinion given by that learned person and Mr. W. Hayes:—"The state of the authorities does not warrant an opinion that the will of Mrs. Skynner was a valid execution of the power of appointment given to her by the settlement; but there are strong grounds of argument in support of the sufficiency of the attestation. We think that by the word 'witness' the persons whose names are subscribed must be taken to attest the observance of the solemnities with which the testatrix has, in the concluding or witnessing clause, expressed the instrument to be perfected, namely, the signing and the sealing—and that there is, in effect, an attestation of these facts; and this opinion has the sanction of authority. (Sed vide supra, 393, n.). But the difficulty remains of satisfying the requisitions of the power in regard to the attestation of the fact of publication. This cannot be done, unless the operation of the word 'witness' can be extended beyond the concluding or witnessing clause, to the declaration at the close of the will itself. Unquestionably, a declaration by the testatrix, in the language of the clause, would be, for all purposes, an effectual publication; and it has been recently decided, that a power requiring the witnesses to attest the prescribed ceremonies, is satisfied by an attestation which expresses those ceremonies substantially, though not in accordance either with the language of the power, or with technical accuracy. In the case alluded to (probably *Moodie v. Reid*, 7 Taunt. 355), the power required the will to be duly executed and published under the hand and seal of the donee, in the presence of, and attested by, the witnesses, and the attestation expressed the will to be 'signed, sealed, and delivered' (not published), and did not state those ceremonies to have taken place in the presence of the witnesses; this was adjudged a good attestation.

"It is very probable that the court, following up the principle and the spirit of this determination, which manifests a disposition to relax the literal strictness of previous decisions, may be inclined to construe the declaration which concludes the will in connection with the witnessing clause, so as to incorporate in that clause the ceremony of declaring or publishing the will, and thus admit of the application of the word 'witness' to all the ceremonies required by the power. It may even be contended, that resort to the declaratory clause of the will itself is unnecessary, inasmuch as it is apparent on the face of the witnessing clause, that the testatrix signed and sealed the paper as her last will and testament, 'in witness whereof I have to this my last will and testament, &c.,' and the witness must be taken to attest such signing and sealing, which would amount to a publication. But the success of the argument in favour of the will must depend, in a great degree, upon the inclination of the court to relax the rigour of the doctrine, and help out the meagreness of the attestation by a liberal construction. *But as the law now stands, we think that the appointment was badly executed.*" The words in italics were omitted in the note to *Doe d. Spilsbury v. Burdett*, 6 N. & M. 267, as the matter was then, to a certain extent, sub judice.

having corrected one part of *Wright v. Wakeford*, and having left the remainder untouched, affords some sanction to the authority of that case." Sir Edward Sugden, I humbly think, observes justly "that it is much to be regretted that the measure was not made at once a complete remedy for the evil which it professed to cure. Every sound principle of legislation required that the act should have been prospective. The act, however, was limited, in its progress through parliament, to a retrospective operation."

[447] All the difficulties would be obviated by a decision by this House, applying to [these cases the principle of the whole current of authorities on the statute of frauds; and now that this point is completely before your lordships, I am unwilling to relinquish the hope that the case of *Wright v. Wakeford* may be overruled.

PATTESON J. My lords, the power set forth on the special verdict referred to by your lordships in these cases, requires that any will by which it is to be exercised shall be "signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses." The first question which arises, appears to me to be, what is the meaning of the word "attested"? Now the fair meaning of the previous words "in the presence of three or more credible witnesses" must be, that three or more credible persons should see what is done; not merely that they should be present, without having their attention drawn to what is done. Therefore the word "attested," if it have any meaning at all, must import something more than merely being present and seeing what is done. Independently of authority, I should have thought that it meant this, and no more, namely, that the will must not only be signed, sealed, and published, in the presence of witnesses, but that those witnesses must affix their names to it. I find, however, that a sense has been given to the word "attest," when found in a power, in a long series of decisions from *Wright v. Wakeford* downwards, by a great number of eminent judges, according to all which, without exception, as I understand them, the word "attest" means "certify by their signature and by written expressions, that the formalities required by the power have been complied with," or to that effect (a).

The authority of those decisions appears to me to [448] be much too strong to be resisted; and I agree that it would be very dangerous, especially in matters regarding real property, to unsettle established rules, on which, probably, many titles would depend. Some of those decisions are undoubtedly in cases where the memorandum of attestation has stated some of the requisite formalities, and omitted others; and those cases might have been decided on the ground that "expressio unius est exclusio alterius;" but I do not find that such ground was taken in them; and in some other cases it could not have been taken, because the memorandum was general. I am obliged, therefore, to come to the conclusion that if the memorandum of attestation is in this case to be considered as consisting of the words "Witness, Charles Ball, Elizabeth Ball, Ann Ball," and no more, this will is not attested at all within the meaning of the power.

The second question which arises is, whether any, and what part, of the body of the will itself, is to be considered as forming part of the memorandum of attestation. I have great difficulty in saying that any part of the body of the will can be considered. The language of the body of a will is that of the testator, and not of the witnesses, who need not, and in practice do not in general, see or read any part of the will. The language of a memorandum of attestation, on the other hand, is that of the witnesses; and I am at a loss to see how one can fairly be taken as incorporated with the other. In *Moodie v. Reid*, the court of Common Pleas seemed to consider that the concluding part of a will, or, at all events, the signature, might be taken as part of the memorandum of attestation (which was, as here, quite general, being only the word "witness"); but they did not determine that point, for they held the will insufficient, because the publication was not attested. So, also, in *Stanhope v. Keir*, Sir John Leach, M. R., said that he could not take the attestation, which was merely [449] by the words "in the presence of" to extend to more than the signing; but he held the will bad, and therefore did not determine the present point. Why, it might extend to the signing, and not to the publication, the Master of the Rolls does not explain, nor did the court of Common Pleas in *Moodie v. Reid*; and I confess, it appears to me that such a distinction is entirely without foundation, and was plainly unnecessary to

(a) Vide supra, 393, n., infra, 430 (d), 431 (a).

the decision of either of the cases. So, again, the same learned judge, in *Buller v. Bur*, expressed himself still more strongly; but as he held the execution bad in that case also, the present point was not determined. I have not been able to find any case in which it has been held affirmatively, that any part of the body of an instrument can be imported into the memorandum of attestation so as to shew, and to make the witness certify in writing, what it is they profess to attest.

Neither do I find the contrary expressly decided any where; and I do not think that the cases of *Wright v. Wakeford*, *Doe d. Mansfield v. Peach*, *Wright v. Barlow*, *Brougham v. Sandys*, *Allen v. Bradshawe*, and some similar cases, even impliedly decide the point; for in those cases, the maxim *expressio unius est exclusio alterius*, seems to me to apply, and to prevent the importing of the words of the party executing the instrument, into the memorandum of attestation, and adding them to the words of the witnesses, there used. The recent case of *Simeon v. Simeon* (4 Sim. 555), and *Curteis v. Kenrick* (3 M. & W. 461), and similar cases, where equivalent words, used in a memorandum of attestation, have been held sufficient, do not appear to me to bear upon this question. In antient times, no doubt, the clause of *hiis testibus* was part of the instrument, and the names of the witnesses were inscribed in it; and when the names of the witnesses came to be put at the bottom of the instrument itself, [450] they might, for many purposes, be considered as part of the instrument. But when a power requires that the instrument shall be attested, assuming that the construction of that word which I have before stated is the right one, it appears to me, in the absence of any direct authority, that the instrument itself, and the memorandum of attestation, ought to be considered as quite distinct from each other, and as being the acts and the language of different parties,—that the memorandum of attestation ought to be complete in itself, and that any omission or defect in it cannot be supplied, or cured, by reference to the instrument.

For these reasons, I am of opinion that the power in this case was not duly and effectually executed by the will.

PARKE B. My lords, if the question proposed by your lordships had now arisen for the first time, I feel little doubt that I should have answered it by stating to your lordships that the power was well executed; and that, on the ground that where the donor of a power requires an instrument to be executed with certain formalities in the presence of, and to be attested by, credible witnesses, he does not require the witnesses to sign a memorandum of attestation expressing that all the formalities were complied with, but simply to put their names to the instrument as witnesses; and if there had been a special verdict and writ of error in the case of *Wright v. Wakeford*, and I had been called upon by your lordships to give an opinion on the propriety of that decision before it had been confirmed by others, I should, probably, have given my humble advice to your lordships that it ought to be reversed.

The decision, however, in *Wright v. Wakeford* not having been reversed, but, on the contrary, followed in others, none of which have been questioned before the highest tribunal, and having been recognised by an act [451] of parliament, the statute 54 G. 3, c. 168, I think myself bound by the authority of that and the subsequent cases; and feeling so bound, I regret that I have to answer the question proposed by your lordships in the negative.

In the Exchequer Chamber, I gave my reasons for the opinion which I had formed; and as my judgment is printed together with that of the other judges of that court (9 A. & E. 940), I think it unnecessary to trouble your lordships with a repetition of those reasons. The argument at your lordships' bar, has not induced me to think that they were wrong, or to qualify or alter the judgment I pronounced. That judgment was founded upon the supposition that the cases had established a rule of construction,—that if the donor of a power required an instrument to be executed with certain formalities in the presence of, and attested by, witnesses, he must be understood to mean, not only that the instrument (*b*), but all the required formalities, shall be attested by the witnesses, and stated, by a memorandum in writing, to have taken place in their presence; the presumed intention being that there should be, on the face of the instrument itself, a memorandum that all the conditions necessary to the due execution of the power had been complied with. I have heard nothing from the learned counsel, who have argued the case, nor from the judges, who have delivered

(b) Vide *supra*, 406, n.

their opinions, to lead me to doubt that this rule of construction had been established by the case of *Wright v. Wakeford* and the subsequent authorities; and it is remarkable that on this point, the opinions of all the judges in the courts below, both those of the Queen's Bench and Exchequer Chamber, agree; and I certainly consider it to be incontrovertibly established.

[452] The only question then appears to me to be, whether this attestation can be so connected with the statements in the will itself, or some of them, as to import that all the requisites intended by the donor of the power, were seen by the witnesses; this being the ground upon which the court of Queen's Bench proceeded.

I fully stated, in my former judgment, the grounds upon which I came to the conclusion, that this could not possibly be done; and as that conclusion is unaltered, I deem it unnecessary to add any thing further.

My opinion, therefore, is, that the power was not well executed.

I am desired to say to your lordships, that my brother Alderson wishes to give his opinion that the will was not duly executed. It is the opinion he formerly gave, and which has not been altered by hearing the arguments at your lordships' bar.

TINDAL C. J. My lords,—In answer to the question proposed by your lordships to H. M. judges, I beg to state that the opinion at which I have arrived is, that the power given to the testatrix by the settlement has been duly and effectually executed by her will.

The opinion of such of my brethren as have held the execution of this power to be defective, has not been grounded upon any apprehension of danger that if the attestation in the present instance is allowed to be good, the restrictions imposed by those who created the power will have been frustrated or evaded. On the contrary, all admit, what indeed is expressly found by the jury, that every requisite which the settlor imposed, except the form of the attestation, has been duly observed; the will having been, in fact, signed, sealed, and published, by the testatrix, in the presence of three credible witnesses. But they rest their opinion upon the authority of cases—of which that of *Wright v. Wakeford* is the [453] earliest and the leading authority,—that the memorandum of attestation, in order to make it a good attestation, within the words of the deed which creates the power, must specify and enumerate the several particulars which are required by such deed; and that the attestation now under consideration, on the authority of that case, cannot be held to contain such enumeration.

Most who have given their opinion against the due execution of this power, have accompanied it with expressions of regret that they have been compelled so to do by the authority of that which is called the leading case; and many, on former occasions where the authority of that case has been examined and discussed, have stated their wish that the doctrine derived from it should be reconsidered when an opportunity offered before the House of Lords; from which I infer that the propriety of the decision in that case is not entirely acquiesced in, and that, at all events, in their judgment, it ought never to be held as an authority to bind future cases which do not strictly, and in every particular, fall within its terms.

My lords, it is upon the precise ground—that I think this case is distinguishable from that of *Wright v. Wakeford*, and those which have followed it,—that I now humbly offer my opinion to your lordships in favour of the execution of the power.

I propose very briefly to refer, in the first place, to those decided cases. In *Wright v. Wakeford*, the earliest case on the subject, the power required the appointment to be "by any writing under hand and seal attested by two or more credible witnesses." The memorandum of attestation in that case was "sealed and delivered," omitting the word "signed." The three judges who certified their opinion to the court of Chancery, that the execution of the power was defective, expressly ground it on the consideration "that the point in [454] question is simply whether the attestation written on the deed asserts both the facts, the signing as well as the sealing." That is, whether the word "sealed" necessarily implied that the parties who put their seals to it, put also their hands to it, or "signed" it in the presence of the witnesses; and they held it did not, and that the execution was therefore bad, as the attestation mentioned the sealing only, and omitted the signing.

The three cases which followed, viz., *Doe d. Mansfield v. Peach*, *Doe d. Hotchkiss v. Pierce*, and *Wright v. Barlow*, presented each the very same ground of objection as to their respective forms of attestation, with the former, namely, that the power required two or more acts to be done, and the memorandum of attestation mentioned some

only, omitting the rest. None of those cases presented any new question for the court, but they were decided on the express ground that they could not be distinguished from it; Lord Ellenborough observing, in *Doe d. Mansfield v. Peach*, "that if it was thought proper to agitate the question further, it should be brought before a court of error." And, in giving the latter judgment, Lord Ellenborough also observed, "that the intention was, that the attestation should be co-extensive with the things required to be done; and this makes the case directly the same as that of *Wright v. Wakeford*."

I consider, therefore, the rule deducible from those cases to be, that wherever it does not appear by the attestation itself, either by express enumeration and specification, or by necessary intendment, that every solemnity prescribed by the instrument creating the power, has been complied with, the execution of the power is bad, and that the four cases above referred to have also established, affirmatively, that a memorandum of attestation, mentioning the observance of some, or one only of several solemnities required and omitting [455] the mention of one or more, is not an attestation within the meaning of the instrument creating the power.

But the present attestation does not, as it appears to me, fall within the latter predicament; and it is upon this precise ground that my opinion is rested, viz., that the attestation of the will of L. H. Skynner does not express some only of the solemnities directed to be observed and omit the rest, but, by necessary intendment, shews that all have been observed. It might, indeed, be argued that it mentions none expressly, and is therefore bad upon that ground; but it cannot be held bad on the ground upon which *Wright v. Wakeford* was determined. I do conceive, however, that the signature of the names of the witnesses immediately underneath the general word "witness" at the foot of the will, constitutes a good attestation, the same being free from the objection raised by those cases, and being supported by the authority of others, to which I shall afterwards refer. For if that word is taken, abstractedly, by itself, as constituting the whole of the attestation, I can see no objection to holding that the three persons whose names are subjoined to it, must be taken to be witnesses to all that was actually done at the time, which is found, by the special verdict to be, all that was required to be done. Or, if the word "witness" is to be construed with reference to the statement immediately preceding it at the end of the will (and one or other must be the sense to be put on the word "witness"), then the word "witness" necessarily implies that the testatrix did, in their presence, declare the instrument to be her will, and that she did in their presence put her hand and seal thereto, that is, in the language of the settlement, that she "signed, sealed, and published it" in the presence of those three witnesses; for I think it cannot be contended successfully that if a testatrix declares an instrument, which she executed to be her will, any other [456] publication beyond such declaration can possibly be required.

To this construction an objection was taken, by the counsel at your lordships' bar, which had also been relied upon by some of the learned judges who delivered their opinions before me, viz., that it proceeds upon the supposition, that the whole of the instrument may legally be read together to explain the meaning of the word "witness," and that it supposes the witnesses are conusant of the contents of the instrument, neither of which circumstances can be supposed. But I cannot feel the force of this objection. There has been, from the earliest time at which deeds were known, a marked and acknowledged distinction between the operative part of the deed itself, and the testimonium clause (as it is called), at the end of the deed. The essential part of the deed is properly that part, and that only, which contains the grant. The clause at the end is introduced, not as constituting any part of the deed, but merely to preserve the evidence of the due execution of it. Admitting, therefore, the deed itself is matter which may be properly held to be confined to the knowledge of the parties, namely, the grantor and the grantee (a), the testimonium clause is

(a) Even in an ordinary grant, knowledge on the part of the grantee appears to be immaterial, as the estate vests in the grantee upon the execution of the deed or instrument of grant, until disclaimer. Vide 4 Mann. & Ryl. 189 (a). A fortiori is the use executed, and the estate vested, in the appointee, upon the due completion of the deed or instrument of appointment, without any knowledge or concurrence on his part.

A use may be disclaimed by parol (3 Co. Rep. 27, 4 Mann. & Ry. 191, n.); and

expressly introduced into it for the use of the public and the witnesses to the deed (vide supra, 393, n.).

[457] It is well known that a similar clause was constantly inserted in old deeds and charters at the close thereof, beginning with the words "*hiis testibus*," and thence generally called "*the hiis testibus clause*," in which the names of the persons present who heard the deed read by the clerk were written, not by themselves, but by the clerk who prepared the deed. Spelman, in his Glossary, p. 228, traces out the variations in the form of the clause, at different periods of our history; and Madox, in the "*Dissertation*" prefixed to his *Formulare Anglicanum*, goes more fully into the matter; and, in the work itself, gives numerous instances, which, it is impossible to read, without being satisfied that the sense requires that the witnesses whose names are inserted in the *hiis testibus* clause, must, of necessity, have known the words preceding it, or, in fact, they would have witnessed nothing at all. Take, for example, among many, that numbered 312. "And that this my gift grant and confirmation may remain firm for ever, I have confirmed this present charter with the impression of my seal, *hiis testibus*," &c., or again, No. 631. "And for the greater security of my obligation, I have made oath, and put my seal to this present writing, *hiis testibus*," &c. Who can doubt, for a moment, that these witnesses, either actually read, or heard read over to them, the words of the deed immediately preceding their names, and that the introduction of that preceding clause, had no other object or purpose; and this practice continued down to the reign of Henry VIII., as appears on the authority of Lord Coke (2 Inst. 78), who states the practice then began, of separating the attestation from the deed itself, and for the witnesses to subscribe their own names to it, either at the bottom of, or indorsed on, the deed (b).

But that the clause, "*in cujus rei testimonium*," so long [458] as it was found at the close of the deed itself, never formed part of the deed itself, is evident from Sheppard's Touchstone (page 55), where he says, "A deed is good, albeit these words in the close thereof '*in cujus rei testimonium, sigillum meum apposui*' be omitted," citing the authorities which shew it is no more, in fact, than,—what it imports to be,—the very attestation of the deed which has preceded it.

There is, therefore, no reason why the word "*witness*," written immediately after this testimonium clause in the case now under consideration, should not be considered as incorporated with it, and as calling the attention of the witnesses to all that had preceded in the testimonium clause. On the contrary, there is every reason why it should have that effect. The bare inspection of the fac-simile, set out in the appendix to the case of the defendant in error, shewing as much; and the sense and context also proving, that it must have been written for that very purpose, and no other. And this appears to me to be the answer to the argument on the ground of the danger which is apprehended if the witnesses must necessarily be supposed to be conversant of the contents of the deed; for the witnesses are not supposed to be conversant of the contents of the deed, but of the testimonium clause only, which is introduced for their express use, and for that express object and purpose.

If all the particulars of the solemnities required by the instrument creating the power, were formally enumerated in this will, just before the testimonium clause, and therein stated to have been performed; and if the three witnesses had signed their names beneath the word "*witness*" immediately subjoined to that clause, it could not, I think, have been denied that such attes-[459]-tation was sufficient, whilst it is admitted that if the very same particulars were repeated in a separate attestation at a small distance below the will, and such attestation was signed by the very same witnesses, the latter attestation would be complete. This would be rather struggling for a formal, than a substantial, distinction, and would be in direct opposition to the acknowledged maxim in the construction of all instruments, namely, "*ut res magis valeat quam pereat*" (a). And further, so far is it from being a rule of law that

though the 27 H. 8, c. 10, has annexed the seisin to the use, that statute contains nothing which purports to affect the disclaimability of the use. It would therefore seem that an use, though executed, may still be disclaimed by parol, and that a disclaimer, so made, will defeat, ab initio, the statutory seisin.

(b) Vide supra, 419, n.

(a) This maxim would apply to the deed creating the power; but upon the execution of the power the question is simply, which of the two estates contemplated by

you may not, in the attestation to a deed, look back to that which is found at the close of the deed itself, that, on the contrary, in most of the cases which have been relied on by the defendant in error, express reference has been made to the close of the deed itself (b). Thus in *Moodie v. Reid*, the power is directed to be executed "by will signed and published in the presence of and attested by two or more credible witnesses," and there are found at the end of the will these words, namely, "these my last bequeathes, signed by me," and immediately beneath the word "witness" follow the names of the two witnesses. Now, upon this state of facts Gibbs C. J. says (c), "Here, the witnesses have clearly attested the signing. The question is, whether they have attested the other formality of publication." But how does it appear that they have attested the signing, except by looking [460] back to that which is inserted in the close of the will itself, and importing it into the attestation?

Again, in *Stanhope v. Keir*, a direct reference is made to the words which are inserted in the will. The will concludes, "This is my last will and testament, made and signed, &c." The words at the bottom of the will are, "in the presence of;" and Sir John Leach V. C. said he could not assume more from the attestation than that the witnesses saw Mrs. Keir sign the instrument (a), and held the execution bad, the power being directed "to be signed and published" in the presence of, and attested by three witnesses. But in that case, as in the former, the court look back to the statement of the testatrix contained in the will itself in order to see what it is that the witnesses attest. And, lastly, the authority of Sir John Leach, M. R., in *Buller v. Burt*, is express to the very point,—that where the word "witnesses," without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses, which has been stated in the body of the deed.

It appears, therefore, upon the authority of these cases, that the courts do look beyond the general words of attestation,—whether it be "witness" or "in the presence of,"—to the concluding clause of the will itself, to discover what it is that the witnesses do attest; and in the present case, if such reference be made, I think it appears, upon the face of the will, that the witnesses do attest the signature, sealing, and publication of the will; which are all the solemnities prescribed by the settlement, for the execution of the power.

For these reasons, the opinion which I offer humbly [461] to your lordships is, that, under the particular circumstances of this case, the power is well executed.

LORD LYNDEHURST C. The question in this case is, whether the will of L. H. Skyenner was a good execution of the power contained in her marriage settlement. The power required that the will should be signed, sealed, and published, by her, in the presence of, and attested by, three or more credible witnesses. The will is set out in the special verdict; and it is found to have been signed, sealed, and published, by her, in the presence of the three witnesses named therein, and attested by them, and that their attestations are in manner and form as stated in the said instrument. The will concludes thus:—"I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September." Then follows the signature of the testatrix at the bottom of the page; and, at the top of the following page, it goes on thus: "in the year of our Lord, 1789." The signature is then repeated; and on the side, in the usual place where witnesses sign, is the word "witness"; and the names of the three witnesses are subscribed thereto.

the donor of the power—that of the appointee, or that of the party intended to be benefited, in the absence of a strictly formal appointment—is to subsist, and which is to perish.

(b) Vide supra, 393, n.

(c) It is not impossible that this very learned judge may have made the uncalled-for and extrajudicial concession here referred to, without adverting to the use which might afterwards be made of it. It may, however, be observed that many of the positions attributed to him, could hardly have proceeded, even in moments of inadvertence, from so very eminent a lawyer.

(a) Q. d., "taking it most favourably for the appointee, and assuming from the attestation that the witnesses saw Mrs. Keir sign the instrument, he would not assume more," &c. The words in italics were probably omitted by the reporter, as being implied in that which is stated.

If this question were *res integra*, entirely new, I think your lordships would have felt very little difficulty in deciding it. The will is to be signed, sealed, and published, in the presence of, and attested by, three credible witnesses. It was, in fact, signed, sealed, and published, in the presence of the witnesses. It is so found by the special verdict; and they subscribed their names to it, attesting it as witnesses. I think if this had come before your lordships unaffected by previous decisions, you would have been disposed to consider this a sufficient execution of the power; and the more so, as under the statute of frauds, which requires that all devises shall [462] be in writing and signed by the testator, and shall be attested and subscribed in the presence of the devisor by three or more credible witnesses,—it has been held that an attestation containing only the words “sealed and delivered by,” &c. (omitting the word “signed”) is a sufficient compliance of the statute (a)¹.

But, it is contended that the question is controlled by previous decisions; and it becomes necessary therefore to consider how far they apply to, and govern, this case.

The first, and leading authority, and upon which, in fact, all the others depend, is that of *Wright v. Wakeford*. In that case the power was to be executed by the donees, testified by any writing, under their hands and seals, attested by two or more credible witnesses. The attestation contained the words “sealed and delivered,” and nothing more; only two of the requisites were attested, the signing was omitted. It was contended that the word “sealed” implied that the parties who put their seals, also put their hands to the instrument; but the majority of the judges were of opinion that it did not so imply, according to the true interpretation of the word “sealed.” This decision turned therefore entirely upon the construction of the clause of attestation; and, undoubtedly, if two of the requisites were inserted, and the third omitted, the execution could not be correct. The signature of the witnesses to the memorandum, was an attestation to the sealing and delivery only. The cases of *Doe d. Mansfield v. Peach*, *Wright v. Barlow*, and *Doe d. Hotchkiss v. Pierce*, were decided entirely on the authority of *Wright v. Wakeford*, and do not appear to me to carry the rule further. Notwithstanding the doubts which have been entertained as to the propriety of the decision in *Wright v. Wakeford*, [463] and the repeated expressions of regret by very learned judges that that case had been so decided, still, as it has been so frequently acted upon, and for so long a period, I should have felt it my duty, if this case had not been distinguishable from it, to recommend to your lordships to adhere to that decision, and to pronounce the execution of the power, in the present instance, to be insufficient (a)². Certainty as to the rules affecting property, and its disposition, is of far more consequence than the consideration of what the rules should be; because the transactions of mankind are regulated accordingly. But the question, here, is, not, as in *Wright v. Wakeford*, whether a memorandum of attestation, mentioning some of the requisites and omitting others, is valid, but whether the general memorandum is, in this case, sufficient. And, first, it is worthy of observation, that the language of the power, and the grammatical construction of it, are not the same in this case as in *Wright v. Wakeford*. There, the power was to be executed by any writing under the hands and seals of the donees, attested, &c. The writing under hand and seal,—which may be considered as a description of the completed instrument,—was to be attested. But, in this case, the power is to be executed by a writing to be by the donee signed, sealed, and published, in the presence of, and attested by, three or more witnesses. The word “attested” in grammatical construction relates only to the word “writing,” not, as in *Wright v. Wakeford*, to the whole description, viz. “writing under hand and seal.” It would not, therefore, I think, necessarily follow, that because the insertion of the words “sealed and delivered” in the memorandum of attestation, might be considered requisites in the former case, it would also be necessary in the present (b).

[464] In *Doe dem. Mansfield v. Peach*, and *Wright v. Barlow*, the words are the same as in *Wright v. Wakeford*. Independently, however, of this distinction, and without relying upon it, there is no case which has decided that a general attestation is not sufficient; and I see no reason why, if there be a general attestation, and the witnesses

(a)¹ Vide supra, 440 (d).

(a)² Many have probably acted upon the decision in *Wright v. Wakeford*; perhaps many more upon the principle on which that decision proceeded.

(b) Vide supra, 406, n.

prove (a) that all was done, such a general attestation should not be sufficient. In this case the attestation follows immediately after the testimonium clause, and may, I think, be considered as referring to, and connected with it (b).

In *Moodie v. Reid*, the testatrix concluded her will thus: "These my last bequeathes, signed by me, this 4 February 1812. Sarah Moodie. Witness B. H. J. H." Gibbs C. J. in that case said, "Here, the witnesses have clearly attested the signing." But the attestation was general, and they could have only been considered as attesting the signing, by connecting the attestation with the words that immediately preceded it, "these my last bequeathes, signed by me" (c).

Again, in *Stanhope v. Keir*, before Sir John Leach V. C., the will concluded thus: "This is my last will and testament, made and signed, on, &c., at, &c." It was signed by the testatrix, Eugenia Keir. The attestation was as follows: "In the presence of," then followed the names of the witnesses. The Vice-Chancellor considered this a sufficient attestation of the signing; which could only be, by reference to the testimonium clause.

The case of *Buller v. Burt* before the same judge, when Master of the Rolls (4 Ad. & E. 15, 6 N. & M. 281), is to the like effect.

In that case the deed concluded as follows: "Signed and sealed at," &c., on, &c., "by L. Smith" (the signa-[465]-ture of the grantee, "witness," then followed the names of the witnesses. The Master of the Rolls said, that as the general word "witnesses" can affirm no more than the deed states, there is in this case no attestation of that essential part of what is required for the due execution of the power—the delivery of the deed, the power therefore is not well executed. In a former part of his judgment he speaks of the "body of the deed," but it is obvious, I think, that he means the testimonium clause. In using the terms "body of the deed," he uses them as distinguished from the attestation. In this, therefore, as in the former case, he seems to have considered a reference to the testimonium clause legitimate.

In the present case the reference would embrace all the requisites for the due execution of the power, and render it complete. These considerations lead me to the conclusion that the power was properly executed; and I recommend your lordships, therefore, to reverse the judgment of the court of Exchequer Chamber; the effect of which will be to affirm the judgment of the court of Queen's Bench; and in following this recommendation, your lordships will conform to the opinion, contained in the paper upon your lordships' table, of the Chief Justice of the court of Common Pleas, and the majority of the judges who were consulted by your lordships upon this occasion.

LORD BROUGHAM. My lords, I entirely agree in the course recommended by my noble and learned friend. If this case had been, and this we all of us felt, I am sure, during the whole of the argument, if this case had been in terms the same as, and was not distinguishable by any material difference from, the case of *Wright v. Wakeford*, followed by the two other cases of *Doe dem. Mansfield v. Peach* and *Wright v. Barlow*, which were in [466] terms the same with *Wright v. Wakeford*, as regarded the material parts of the power, and the facts of the execution, in that case we should have been very reluctant indeed to have run counter to that authority, and for the reason assigned by my noble and learned friend. I hardly know a case which has excited at different times more remark than *Wright v. Wakeford*. It has been again and again questioned; it has been again and again criticised by the learned judges. It cannot, therefore, be said to have been, at any time, a case that commanded any thing like the entire concurrence of Westminster Hall. Nevertheless for the reasons assigned, judiciously and soundly assigned, by my noble and learned friend, I should have been the last to recommend a departure from that case over-ruling it, and adopting the contrary principle of decision; because it is perfectly true, as was stated by my noble and learned friend, that in this, as in all other cases, where a decision has been held to make the law, where it has been acted upon, as this has been, in other cases, two of which particularly have been mentioned by my noble and learned friend, when it has been acted upon by professional men, has been assumed to be the law by professional

(a) The attestation will thus be made good by extrinsic evidence, produced on some trial, or upon a bill to perpetuate testimony.

(b) Vide supra, 393, n.

(c) Ibid., 393, n., 395, 420 (b).

men, and has obtained the faith of parties, and has regulated the transactions of men upon most material points affecting their most important interests, it is of the highest possible importance, and even of the most absolute necessity, that the courts should not, without a very strong reason indeed to induce them so to do, depart from that rule, it being of very much more importance in nine cases out of ten, that the law which is to regulate the advice of professional men, and to govern the transactions of their clients, should be known and fixed, than that perhaps the best possible rule of law should, in each case, be adopted.

But, my lords, here differences have been pointed out [467] by my noble and learned friend, and dwelt upon by a considerable majority of the judges whose valuable assistance we had in disposing of this question; and there is no doubt, a perfectly sufficient difference in this case, to justify us in reversing the decision of the Exchequer Chamber, and setting up the decision of the court below, and agreeing therefore with the majority of the judges.

I shall not, as my noble and learned friend has entered at length into this case, go further into it than to say, that I certainly have always felt in this case, in the consideration I have been able to bestow upon it, that there is a manifest connection here between the attestation itself and the testimonium clause. This is the ground, chiefly, upon which I have formed my opinion upon this case; and the more I have considered it, after hearing it so very ably argued at the bar, the better I am satisfied with having come to that conclusion.

I, therefore, without troubling your lordships at greater length, will merely state that I entirely agree with the reasoning of my noble and learned friend, and of the majority of the learned judges, in coming to the conclusion of a reversal, for those reasons which have led my noble and learned friend to that result.

LORD CAMPBELL. My lords, it gives me great satisfaction in this case, to agree in opinion with the majority of the learned judges.

When your lordships consult the Queen's judges, I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give. But it is always a very painful thing to differ from those venerable magistrates, who are always to be looked to with so much reverence and respect.

My lords, in this case, the only question is, whether the will was attested by three credible witnesses. It is [468] not at all disputed,—indeed, that is found by the special verdict,—that it was signed, sealed, and published, in the presence of the witnesses. The question is, whether it has been attested by them. The witnesses saw all these solemnities performed, and they signed their names to the will as attesting witnesses. The question is, Is not that will attested by them?

My lords, independently of authority, I cannot doubt that for a moment. The only objection that can be made is this, that the will, upon the face of it, does not contain any process-verbal, or history, of the transaction. But the power imposes no such condition. It does not say—a will signed, sealed, and published in the presence of three witnesses, and attested by them, and a will containing a history of the solemnity. There are no such words in the power; and I know not how such a condition is to be added to the power which the donor has given.

Then, my lords, I am glad to think that there is no authority in this case to prevent us from giving the natural construction which such a power ought to receive, a construction in analogy to the statute of frauds respecting the execution of wills (a).

My lords, the statute of frauds regulates the execution of wills. In the case of powers, the testator or settlor is the donor of the power; and unless the donee complies with the solemnities required by the donor, the power is not well executed. Now the statute of frauds, as your lordships are aware, upon this subject is [469]

(a) May not the analogy from the statute be pursued further? and may it not be said, that as, in construing, or rather in overruling, that statute, the judges have dispensed with the presence of the deviser, which the statute (s. 5) expressly requires, so here, they may dispense with any, and if with any, with every, formality prescribed by the donor, holding it sufficient if the intention of the donee of the power, to execute it, can be shewn?

As to the difference between a statutory, and a private, formality, vide *supra*, 422 (a). See also *supra*, 408 (a), (b), 429 (a), 440 (d).

almost *ipaisimis verbis*, the same with the power the construction of which we are now considering; and it has been determined, over and over again, that if a will is properly executed in the presence of witnesses, and they simply sign the will, that is a due execution of the power, and the will is good under the statute of frauds.

With regard to powers contained in private deeds, we have *Wright v. Wakeford*, and the class of cases which have succeeded that case. Now, fortunately, it is not necessary for this House to overturn those cases to-day; although had they been brought by appeal before this House in proper time, I apprehend that the probability is that your lordships would not have approved of them. But in those cases there is not a mere simple attestation by witnesses, that is, the subscription of their names, but there is an imperfect history of the transaction. There is a declaration by them that they saw certain solemnities performed which are required by the power, without having seen all; and that maxim of law has, I think, been misapplied (a)¹, that the expression of one is the exclusion of the other, and, therefore, this has been supposed sufficient to negative the performance of any solemnity which is not mentioned in the history of the transaction of the will.

But, my lords, there is no case, I am happy to think, in which there has been a simple signature by witnesses,—the witnesses having seen all the solemnities duly performed,—which has been held not to be a due execution of a power.

If it were necessary, my lords, I think that the testi-[470]-monium clause here might be resorted to both upon principle and upon authority. I beg leave humbly to express my opinion, that without the testimonium clause, there would have been a good execution of the power, because here the will was signed, sealed, and published in the presence of three credible witnesses who signed that will as the attesting witnesses. I say that that was an attestation, and that this is a good execution of the power without reference to the testimonium clause.

My lords, the very common expression we have, of “attesting witnesses to a deed” explains this. What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness. He is a good attesting witness, although there should not be, upon the deed itself, a memorandum saying that it is “signed, sealed, and delivered” in his presence (a)².

My lords, the witnesses to Mrs. Skynner’s will are good attesting witnesses; and I apprehend that, upon principle, unopposed by authority, this will was attested in the presence of three credible witnesses; and that the power, therefore, was well executed. The consequence is, that the judgment of the court of Exchequer Chamber will be reversed, and that of the court of Queen’s Bench will be affirmed.

LORD BROUGHAM. There is no authority, for saying that a general attestation of an instrument in execution of a power is insufficient.

LORD LYNTHURST C. The party who sees the will executed is, in fact, a witness to it. If he subscribes as a witness, he is then an attesting witness.

(a)¹ This maxim was not necessary to the decision of those cases, which were determined in accordance with the broad and intelligible principle—that compliance with the terms of the power should be established by intrinsic evidence, impressed on the instrument, and accessible to every person who might have to deal with the appointment, and should not rest upon extrinsic, perishable, uncertain, verbal testimony. The maxim would appear to be useful only to those who seek to distinguish between *Wright v. Wakefield* and *Doe v. Burdett*.

(a)² The terms of a power require an execution of it accompanied with the observance of certain formalities, and with an attestation of that execution. A deed at common law is well executed without any attestation. An attestation which would not satisfy the terms of a power, may be a good attestation in cases where no attestation whatever is required.

[471] IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COMMON PLEAS.)

ELIZABETH DAVIES, *Plaintiff*, WILLIAM SELBY LOWNDES, *Defendant*, IN ERROR.
Tuesday, Jan. 24th, 1843.

[S. C. 7 Scott, N. R. 141; 12 L. J. Ex. 506.]

On the trial of a writ of right, a decree of the court of Chancery, made in March 1783, in a suit between the father of the tenant and other persons, in no way connected with the demandant, brought to establish the will, under which the tenant's title arose, and by which decree the court directed that the estates were to be considered as belonging to the tenant's father, the devisee, and that he should be let into possession and have all the title-deeds delivered to him, was admitted in evidence, for the purpose of explaining the character in which the devisee took possession of the estates. Held, that the decree was properly admitted.—In 1768 J. Selby, by his will, devised as follows:—"I give and devise to my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published immediately after my decease, in some of the public papers) all my manors, lands, &c. in Z. (Habendum, to my heir-at-law, his heir, executors, administrators, or assigns, subject to and chargeable with the payment of all debts, and various legacies); all which debts and legacies I do direct to be paid by the said heir-at-law, his heirs, executors, or assigns, within twelve months after my decease; but should no heir-at-law be found, I then do constitute and appoint W. Lowndes, of, &c. my lawful heir, on condition he change his name to Selby; and I give the estates and all the manors before mentioned to the said W. Lowndes, subject to and chargeable with the said legacies and debts." The testator died in 1772. In 1773 W. Lowndes was appointed receiver of the estates, and in May 1783 he took possession under the decree of March 1783, and thence to the time of his death retained it, claiming the freehold, and exercising dominion over the property as his own. In April 1784 the devisee (W. Lowndes) executed two deeds in the name of Selby, and the manor courts held by him after that date were held in that name. Held, that a fine levied by the devisee in May 1784, with proclamations, was admissible on the mise joined on the mere right, and need not be pleaded specially; and that the devisee had at the time of levying the fine such an estate of freehold as would give effect to the fine.—At the trial, the demandant offered in evidence a Welsh pedigree, which was intituled "The genealogie of the Lloyd's of Cwmgloyne, county of Pembroke, shewing their descent from the Princes of Wales, together with some collaterale branches of the same family;" and which was traced from a Prince of South Wales, who died in 1233, to a William Lloyd of Treviggin, living in 1733. The pedigree stated, in one of the accounts of one of the collateral branches, the marriage of the sister of William Lloyd's grandfather to a Thomas Selby, from whom the demandant alleged that Thomas James Selby, the testator, was descended; and it also stated that Erasmus Lloyd was his cousin, and the marriage of the daughter of his great-grandfather's brother with a person of the name of Ellis, and, as evidence of both these facts, was material to the demandant's case. At the foot of the pedigree was the following memorandum:—"Collected from parish registers, wills, monumental inscriptions, family records, and history, this account is now presented as correct and as confirming the tradition handed down from one generation to another to Thomas Lloyd, Esquire, of Cwm Gloyne, this 4th day of July 1733 by his loving kinsman, &c. William Lloyd." The signature was proved to correspond with that to the will of W. Lloyd, one of the ancestors of the demandant, named in the count. On the back of the document was indorsed: "A true account of my family and origin, Thomas Lloyd Cwm Gloyne." This document was found by the person who produced it, fifty years ago, amongst the papers of the Cwm Gloyne family, in a drawer in the mansion-house of the Cwm Gloyne estate, which had devolved upon him, and the witness proved the indorsement to be in the handwriting of Thomas Lloyd of Cwm Gloyne.—This pedigree was offered by the demandant as being altogether admissible; but the court

rejected it. It was then successively offered as evidence of the pedigree of the first collateral branch, as evidence to prove who the grandfather of William Lloyd was, as evidence to shew who the father of William Lloyd was, and again rejected. It was then insisted that the portion which stated who the paternal uncle and first cousins of William Lloyd were, was admissible; then that those parts which shewed that William Lloyd's uncle John died a bachelor, and that his uncle George had certain children then living, were admissible; and, lastly, that such part of it was admissible as shewed a marriage of Henry Lloyd's sister with Ellis. The court below rejected the document altogether. Held, that the document had been improperly rejected, it being at all events admissible to shew the relationship of those persons who were described by the framer of the pedigree as living, and who might be presumed to be personally known to him.

A writ of right close was brought to recover certain messuages, lands, &c. in the county of Buckingham. The writ was sued out on the 6th of December, 1832.

[472] The count was as follows:—

Buckinghamshire, to wit, Thomas Davies and Elizabeth his wife, by their attorney, demand against William Selby Lowndes the manors of Whaddon, Nash Giffords, &c., &c., in the county of Buckingham, containing five thousand acres of arable land, &c., situate and being in the several parishes of Whaddon, &c., in the county of Buckingham, which they the said Thomas Davies and Elizabeth his wife claim to be the right and inheritance of her the said Elizabeth, by writ of our said lord the king, of right. And whereupon they say that Thomas James Selby, deceased, whose heir the said [473] Elizabeth is, was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of Lord George the Third, late king of Great Britain, within sixty years next before the commencement of this suit, by taking the esplees thereof, to the value, &c. And the said Thomas Davies and Elizabeth his wife further say that the said Thomas James Selby died so seised of the tenements aforesaid with the appurtenances, without leaving any heir, save and except Erasmus Lloyd, hereinafter mentioned, and that the said Thomas James Selby was the son and heir of James Selby, who died without any other issue of his body, and without having any heir save and except the said Thomas James Selby; and that the said James Selby was the son and heir of James Selby, the grandfather of the said Thomas James Selby, and which last-mentioned James Selby also died without having any other heir save and except the first-mentioned James Selby, and which James Selby was the son and heir of Thomas Selby by Mary his wife, theretofore Mary Lloyd; and which Thomas Selby died without other issue of his body, and without any other heir by the said Mary than the said James Selby, secondly above named. And the said Thomas Davies and Elizabeth his wife further say that the said Mary, the mother of the said James Selby secondly above named, in her lifetime, and at the time of her death, was the daughter of Alban Lloyd and Mary his wife, and that James Lloyd was the son and heir of the said Alban Lloyd by the said Mary his wife, and also the brother of the said Mary, the wife of the said Thomas Selby; and that Evan Lloyd was the son and heir of the said James Lloyd, and that William Lloyd was the son and heir of the said Evan Lloyd, and that Erasmus Lloyd was the son of George Lloyd, who was the son of the said James Lloyd; and that the said Erasmus Lloyd was the cousin and heir of the said William Lloyd; and that upon and at the time of the [474] death of the said Thomas James Selby, who died so seised without issue as aforesaid, the right of the tenements aforesaid, with the appurtenances, descended from the said Thomas James Selby to the said Erasmus Lloyd, as the cousin and heir as aforesaid of the said Thomas James Selby, who died so seised as aforesaid. And the said Thomas Davies and Elizabeth his wife further say, that from the said Erasmus Lloyd the right of the tenements aforesaid, with the appurtenances upon his death, descended to and upon John Lloyd as the son and heir of the said Erasmus Lloyd, and from the said John Lloyd the right of the said tenements, with the appurtenances upon his death descended to Catherine Frances and one other, Mary, as the daughters and co-heirs of the said John Lloyd, and from the said Catherine Lloyd, who married Thomas Julian, upon her death all her part of and in the said right which came to her as co-heir as aforesaid, descended to and upon the said Elizabeth, who is wife as aforesaid of the said Thomas Davies, as the daughter and heir of the said Catherine, and afterwards, upon

the death of the said Frances, all her part of and in the said right which came to her as aforesaid, descended to and upon the last-mentioned Mary and Elizabeth, as the sister and niece respectively, and co-heirs of the said Frances; and afterwards, upon the death of the said last-mentioned Mary, all her part of and in the said right which came to her as aforesaid, descended to and upon the said Elizabeth, as the niece and heir of the last-mentioned Mary, which Elizabeth thereupon, and before the commencement of this suit, became and was entitled to the whole of the said tenements, with the appurtenances, as such heir and cousin of the said Thomas Selby as aforesaid, and which Thomas Davies and Elizabeth his wife now demand the same; and that such is their right (a)¹ they offer, &c.

[475] Plea. And the said William Selby Lowndes, by Thomas White, his attorney, comes and defends the right of the said Thomas Davies and Elizabeth his wife (a)², and the seisin of the said Thomas James Selby, when, &c., and the whole, &c., or whatsoever, &c., and chiefly of the tenements aforesaid, with the appurtenances as of free and right, &c. And he puts himself upon the Grand Assize of our said lord the king, and prays a recognition to be made whether he the said William Selby Lowndes hath a greater title to hold the tenements aforesaid with the appurtenances to him and his heirs, as he now holds the same, or whether the said Thomas Davies and Elizabeth his wife, the now demandants, as they have above demanded the same, &c. And the said Thomas Davies and Elizabeth his wife do the like.

The cause was tried at the bar of the court of Common Pleas, in Trinity term 1835, when a verdict was found for the tenant (1 New Cases, 597, 2 Scott, 71). A bill of exceptions being tendered on the part of the demandant to the ruling of the court, a transcript of the record was carried by writ of error to the Exchequer Chamber; which court, in Easter vacation 1838, awarded a venire de novo (4 New Cases, 478, 5 Scott, 835).

Thomas Davies having died on the 9th of May 1835, a suggestion of that fact was entered on the record.

The cause was again tried at the bar of the court of Common Pleas in Michaelmas vacation 1838, when a verdict was found for the tenant. On this occasion also (5 New Cases, 61, 7 Scott, 21) a bill of exceptions was tendered on behalf of the demandant to the ruling of the court, which, after setting out the [476] pleadings and the proceedings under the former bill of exceptions, the election of the Grand Assize, &c. proceeded as follows:—

“And upon the trial of the last-mentioned assize (a)³, the counsel for the said William Selby Lowndes did rely upon several grounds of defence; one whereof was, that the said Elizabeth Davies, the demandant, was not, nor is, the heir of the said Thomas James Selby, as alleged in the said count; and another whereof was, that one William Selby, whose heir the said William Selby Lowndes was, and is, having a sufficient estate in the said tenements in that behalf, did in the year 1783 levy a fine with proclamations, of the said tenements, by the operation whereof the right of the said Elizabeth Davies, even if she had been the heir of the said Thomas James Selby, was barred.

“And upon the aforesaid trial, the counsel for the said tenant did prove, and shew in evidence, the will of the said Thomas James Selby in the said count of the said demandants mentioned, and who was proved to have died seised of the premises above demanded on the 7th of December 1772, and within sixty years of the commencement of the suit by the said demandants, which was duly executed so as to pass real estates, and was in the words following:—

“Praised be the Lord God for all his mercies vouchsafed to me a miserable sinner.—This is the will of me Thomas James Selby of Wavendon, alias Wandon, in the county of Buckingham, all wrote with my own hand, this 18th August 1768. In the first place, I order and direct my body to be decently buried without the least pomp or show, in the churchyard of Wavendon aforesaid, hoping for a forgiveness of my sins through intercession of our Blessed Saviour Jesus Christ, who [477] suffered for us; to be deposited as near as possible to that part of the chancel

(a)¹ Rather, “that such is the right of the said Elizabeth.”

(a)² The defence (or denial) of the right follows the count. See preceding note.

(a)³ Q. d. Trial of the said mise by the last-mentioned assize.

where my dear father and mother are buried, and to have a large grave made, and walled, either with stone or brick, sufficient to contain another coffin, that should Mrs. Vane, otherwise Hone, choose to be buried there, there may be room for her coffin likewise; and this grave I desire may be surrounded by strong plain iron rails, to keep the cattle from trampling; and I desire neither stone nor monument, nor inscription of any kind to be placed on my grave, only the earth raised as is commonly done for the poor people; and I desire I may be carried either by my tenants, servants, or labourers, without any coach, hearse, or any other paltry show. Next, I give and devise to my right and lawful heir-at-law,—for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers,—all my manors of Whaddon and Nash, with all manors, rights, members, and appurtenances thereto belonging; also all my capital messuage known by the name of Whaddon Hall, &c., &c., in the county of Buckingham, with their rights, members, and appurtenances; to hold the same to my heir-at-law, his heirs, executors, administrators, or assigns, for ever, subject to, and chargeable nevertheless with, the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereafter mentioned; that is to say, to the Rev. Mr. Thomas Sawell, son of, &c., I give 1000l. (Then follow other legacies, amounting altogether to above 10,000l.) All of which debts, and all other debts by me owed, together with all which legacies, funeral charges, and appointments, I do hereby order and direct to be paid by the said heir-at-law, his heirs, executors, or assigns within twelve months after my decease. But, should it so happen that no heir-at-law is found, I then do hereby constitute and appoint William Lowndes, [478] Esq., of Winslow, in the county of Buckingham, and now major in the militia, my lawful heir, on condition he changes his name to Selby; and I give the estates and all the manors before mentioned, together with all rights, hereditaments, members, and appurtenances before mentioned to the aforesaid William Lowndes, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned. Next, I give and bequeath all my tenements or messuages, with their appurtenances thereto belonging, situate and being in St. Clement's Church Yard, in the parish of St. Clement Danes, London; and also all those my messuages, farms, lands, and tenements, tithe, and hereditaments and premises, with every of their appurtenances, situate, lying, and being in the Isle of Ely, in the county of Cambridge; and also all that my manor of Hertingford Bury, in the county of Hertford, with all rights, members, manors, and appurtenances thereto belonging, together with farms, lands, tenements, and hereditaments whatsoever, to the Rev. Mr. John Lord, minister of Drayton, in the county of Buckingham, and to Mr. Richard Filkes, the elder, apothecary, at Woburn, Bedfordshire, their heirs, administrators, and assigns, in trust that they the said John Lord and Richard Filkes, or the survivor of them, their heirs, executors, administrators, or assigns, do and shall, as soon as conveniently may be after my decease, sell and dispose thereof; that is to say, the houses in St. Clement's Church Yard, and estates in the Isle of Ely and Hertfordshire, by public auction, in the best manner that may be, for the best price and prices that can be gotten for the same; and the moneys that shall arise by the sale or sales thereof, after my said trustees, or the survivor of them, their heirs or assigns, have paid all costs and charges whatsoever attending the sale thereof, I give and bequeath, to be forthwith paid into the hands [479] of the treasurer of three charities hereinafter mentioned, for the use and behoof of the said charities, share and share alike; that is to say, to the Foundling Hospital one third share, to the Magdalen Hospital one third share, and to the Asylum in Lambeth parish one third share. Next, I give to my dear cousin Temperance Bedford, of Husborne Crawley, daughter of the late Aurthur Bedford, minister of Sharnbrook aforementioned, 1000l. over and above what is before recited, this being part of my personal estate, together with all interest that is or shall become due, and which 1000l. is out at use and lent by me to Sir Thomas Alston, Bart., of Odel, in the county of Bedford; and I do also give and bequeath to the said Temperance Bedford the two pictures of my mother that hang up in my study, also the picture of my grandmother, also an union chest now in the hands of Mr. Hoare, my banker in Fleet Street, containing my mother's jewels, and some other trifles, and also my mahogany chest of drawers in the dressing-room at Wandon, together with my mother's picture, and other family pictures, together with all notes, bonds, moneys, and whatsoever else is contained in the same. I also give to the said Temperance Bedford, her heirs, executors, adminis-

trators, and assigns for ever, after the decease of my dearly beloved Mrs. Elizabeth Hone, commonly called and known by the name of Vane, all that my dwelling-house at Waverdon, together with all messuages, farms, lands, and tenements, hereditaments, and premises, with their appurtenances, in Waverdon, otherwise Wandon aforesaid, Apsley Guise, Husborne Crawley, Heath, and Reach, in the several counties of Buckingham and Bedford. I do also give and bequeath to the said Temperance Bedford the perpetual advowson and disposal of the living or rectory of Waverdon aforesaid, for ever, together with the tithes of all sorts thereof. I give to [480] Sir W. Stonehouse, Bart., of Oxfordshire, my picture of the battle of Boyne, by Wyke, together with the picture of my grey mare, and a picture of hounds, the fellow to it. I give to Francis Page, Esq., of Middle Acton, in Oxfordshire, my picture of the School of Athens, which I think will suit his large room. I give to the Rev. Mr. Harvey, of Alcott, my gun with the pistora barrel. I give to the Duke of Grafton the bay horse my huntsman rides, that I bought of Farmer Kelsley, and my grey mare and stump gelding to Sir W. Stonehouse aforesaid; my hounds and dogs of all sorts and kinds I give to Alexander Small, Esq., of Clifton, in Buckinghamshire. Next, I give and bequeath to my very dearly beloved Mrs. Elizabeth Hone, commonly known and called by the name of Mrs. Vane, all my interest, dividends, and produce that is now due or shall hereafter arise and become due, from all my bank stock to me appertaining, whether bought in my name or that of others, together with all interest, dividends, and produce now due, or hereafter to arise, from all my South Sea stock, South Sea annuities, India bonds in Mr. Hoare's hands, and all other my securities vested in the public funds, to the said Elizabeth Hone, alias Vane, for the term of her natural life, to be received by her and by her order, and for her use and behoof; and I do likewise give to my very dear Elizabeth Hone, alias Vane, all that my dwelling-house at Wavendon or Wandon, together with all messuages, farms, lands and tenements, and hereditaments, together with their premises and appurtenances, situate, lying, and being in Wavendon or Wandon aforesaid, Apsley Guise, Husborne Crawley, Heath, and Reach, in the several counties of Buckingham and Bedford, together with the use of all the furniture, plate, and every the goods, &c. contained and now being in the said dwelling-house, for her use and her friends during the term of her natural life. All the [481] residue and remainder of my goods and chattels, together with the several sums of money that shall be due to me at the time of my death from my tenants and others, save and except whatever bonds and other personals are contained in the bureau given to Miss Bedford, I do hereby give and bequeath to the said Mrs. Hone, otherwise Vane, and also all moneys that are vested in my bankers' hands, and all moneys whatsoever or wheresoever, excepting as before excepted: and I do hereby constitute and appoint her the aforesaid my dear Mrs. Hone, commonly called Vane, together with the Rev. Mr. John Lord and Mr. Richard Filkes the elder, aforesaid, joint executrix and executors of this my last will and testament; and I do give and bequeath to the aforesaid the Rev. Mr. John Lord, minister of Drayton, in the county of Buckingham, and to Mr. Richard Filkes the elder, apothecary, of Woburn, in the county of Bedford, to each of them 1000*l.* for their trouble in executing the above trusts, and for their aiding, advising, and assisting my dear Mrs. Hone, otherwise Vane, in the management and direction of her affairs, which I trust, for this consideration, they will do. And to this my last will and testament, all wrote with my own hand on one large sheet of paper, having as before declared, do now declare the aforesaid Elizabeth Hone, otherwise Vane, the Rev. Mr. John Lord, and Richard Filkes the elder, joint executors and executrix of this my will and testament, hereby revoking all other wills by me before made, and declare this only to be my last will and testament. In witness, &c.

"And the said counsel for the said William Selby Lowndes did then further prove and give in evidence the bills and answers filed in the court of Chancery in two several causes—the one between Elizabeth Hone, widow, one of the executors, and also a devisee and residuary legatee, named in the last will and testament [482] of T. J. Selby, Esq., deceased, plaintiff, and Rachael Medcraft, Ellen Wells, John Franklyn, and Catharine his wife, Henrietta Franklyn and Elizabeth Franklyn, infants, by John Franklyn, their uncle and guardian, Samuel Selby and Oliver Thorne, William Lowndes, Esq., (which William Lowndes afterwards took the name of William Lowndes Selby, and which William Lowndes Selby was the said William Lowndes in

the said will mentioned, the father of the said William Selby Lowndes, the said tenant, and whose heir the said tenant was,) His Majesty's Attorney-General, Daniel Shipton, and Temperance his wife, late the said Temperance Bedford, spinster, Richard Filkes, one of the executors of the testator T. J. Selby, with the plaintiff, the governor and guardians of the hospital for the maintenance and education of exposed and deserted young children, the president, vice-president and governors of the Magdalen Hospital, for the reception of penitent prostitutes, Francis Kelly Mackwell, clerk, the treasurer of the Asylum, Sir Rowland Alston, Bart., John Fox, gentleman, Margaret Lee, Mary Lord, widow, Mary Lord, the daughter, John Rickett, and Elizabeth his wife, late Elizabeth Lord, and Ann Lord, Thomas Edmunds, and Mary Harry, defendants—and the other of such causes between the said William Lowndes, Esq. (who afterwards took the name of William Lowndes Selby, as aforesaid), plaintiff, the said Ellen Wells, John Franklyn, and Catharine his wife, Henrietta Franklyn and Elizabeth Franklyn, infants, by their guardian, Sir Rowland Alston, Bart., Samuel Selby, Oliver Thorne, Elizabeth King, widow, Elizabeth Vane, otherwise Hone, John Lord, and Richard Filkes, defendants; from which bills and answer, or some of them, it appeared that the said Rachael Medcraft, Ellen Wells, John Franklyn, and Catharine his wife, Henrietta Franklyn, Elizabeth Franklyn, Sir Rowland Alston, Bart., Samuel Selby, Oliver [483] Thorne, and Elizabeth King, widow, severally and respectively claimed to be the heirs, or heir, at law of the testator Thomas James Selby, and, as such, to be entitled to all the said testator's manors, and real estates so devised by his said will to his right and lawful heir-at-law as aforesaid.

"And the said counsel for the said William Selby Lowndes did then herein prove, and give in evidence, a certain order of the court of Chancery in the cause first above mentioned, and bearing date the 26th of July 1773, whereby it was ordered that a receiver should be appointed of the rents and profits of the manor of Whaddon, &c., being late the estate of the said Thomas James Selby, deceased,—and it was further ordered by consent of the parties to the said suit, that the said William Lowndes Selby, by the name of William Lowndes (he not having then, nor until some years afterwards, taken the name of Selby), should be appointed receiver as aforesaid, upon his entering into a recognizance, by himself only, to be approved of by one of the masters of the said court, duly and annually to account for what he should so receive, and to pay the same as the said court should direct; and the said master was to allow him a reasonable salary for his care and pains in his receivership: and the tenants of the said estates were to attend and pay their rents in arrear, and growing rents to such receiver, who was to be at liberty to let the said estates with the approbation of the said master, as there should be occasion,—and it was ordered that such receiver should, from time to time, pass his accounts before the said master, and pay the balance from time to time into the Bank, with the privity of the accountant-general of the said court, to be there placed to the credit of the said cause, subject to the further order of the said court.

[484] "And the said counsel for the said William Selby Lowndes herein proved and shewed in evidence that from the time of the making of the last mentioned decree down to the time of making of the decree hereinafter mentioned, the said William Lowndes received the rents and profits of the said estates and held the courts of the said manor, by the name of William Lowndes, the receiver appointed under the aforesaid order.

"And the said counsel for the said William Selby Lowndes did then herein offer to prove and give in evidence a certain decree of the said High Court of Chancery, made by the Lord Chancellor on the 28th of March 1783 in the aforesaid two several causes, in which decree—after reciting that the above causes had been heard on the 22nd and 23d of April 1779 before the Lord Chancellor, and the scope of the original bill in the first mentioned cause, and that bills of revivor and supplement had been exhibited, and the respective answers of the defendants thereto and the order made upon such hearing of the said causes as aforesaid, the proceedings had and taken pursuant thereto, particularly the bringing of ejectments by some of the above claimants and their failure therein, and reciting the defaults of the others of the said claimants to appear on the said hearing, and also an order in the said causes on the same being heard on further directions, and purporting to bear date the 26th of February 1781, and the proceedings had and taken pursuant thereto—the said Lord Chancellor did declare the will of the said Thomas James Selby, to be well proved,

and that the same ought to be established and the trusts thereof performed and carried into execution accordingly; and, by the same decree, it was further ordered that what had been reported due from the said testator's debts and certain legacies bequeathed by him, should be raised by mortgage or sale of the testator's estate called Whaddon Chase, [485] Whaddon Park (which estate is part of the lands in the said count mentioned), and other his lands subjected to the payment thereof by his will, or of a sufficient part thereof, with the approbation of the master, and as he should direct, and all proper parties were ordered to join in such mortgage or sale: and his lordship did declare that the lease of the rectory of Whaddon in the county of Buckingham, and the lands and tithes thereto belonging, having been surrendered by the testator, and a new lease taken thereof after the making of the said testator's will, the same fell into, and was to be considered as part of, the residue of his personal estate: and by the consent of the said Elizabeth Hone, and the said William Lowndes Selby, by their counsel, it was ordered that 22,658l. 18s. bank annuities standing in the name of the accountant-general, in trust in the said causes under the title of '*Hone v. Medcroft*,' and '*Lowndes v. Wells*,' which had arisen from the rents and profits of the manor, park, tithes, and other estates at Whaddon, and were paid into the Bank by the said William Lowndes Selby, the receiver of those estates, should be transferred to the said William Lowndes Selby, the parties having agreed to settle the proportions thereof belonging to them respectively among themselves; and his lordship by the said decree did further declare that the manors of Whaddon and Nash and other the premises devised by the said testator's will, in manner therein mentioned, to the said William Lowndes Selby, were to be considered as belonging to the said William Lowndes Selby: and it was further ordered that the said William Lowndes Selby should be let into possession thereof, and that all the title-deeds and writings relating to the said estates should be also delivered to him: and it was further ordered that the like deeds and writings of the said testator's estates lying in St. Clement's churchyard, in the county of Middlesex, and at Hertingfordbury, [486] in the county of Hertford, should be delivered to the defendant, Sir Rowland Alston, who had recovered possession thereof: and it was further ordered that the receiver who had been appointed of those estates should be discharged and pass his accounts before the said master, and pay the balance that should be reported to be remaining in his hands on account of the said estates to the said defendant Sir R. Alston: and it was further ordered that the title-deeds and writings of the estates purchased by the testator after the making his will, should be delivered to the defendants Ellen Wells and Henrietta Franklyn, and Elizabeth Franklyn, who had recovered the possession thereof: and it was further ordered by the said decree, that so much of the costs as related to the manors of Whaddon and Nash and other the premises devised to the defendant Lowndes, should be paid out of those estates, and, if necessary, that the same should be raised by the sale or mortgage of those estates, in like manner as the testator's debts and legacies had, by the said decree, been before directed to be raised as aforesaid.

"Whereupon the counsel for the said Elizabeth Davies interposed, and insisted that the said evidence of the said decree so offered to be given by the said counsel for the said William Selby Lowndes, was not good or admissible in law.

"But the said chief justice and his said companions held and affirmed that the said evidence so offered to be given, was good and admissible in law, but only as evidence of the character in which the said William Lowndes Selby held, and claimed to hold the possession of the said tenements subsequently to the date of the said decree, and as evidence upon the question, whether the said William Lowndes Selby had any estate in the said tenements at the time of the levying of a certain fine proposed to be given in evidence, and which was afterwards given [487] in evidence as hereinafter mentioned; and thereupon the said counsel for the said tenant gave in evidence and proved the said decree.

"Whereupon the said counsel for the demandant, conceiving that, by the law of the land, the matter aforesaid so as last aforesaid given in evidence by the said counsel for the said W. S. Lowndes, was not admissible in law for any purpose whatsoever, made their exceptions to the said opinions of the said chief justice and his companions.

"And the said counsel for the said W. S. Lowndes further proved, that on the 30th of May 1783 the said sum of 22,658l. 18s. Bank annuities, mentioned in the said decree, was transferred in the books of the Bank of England, by the accountant-

general of the court of Chancery to the said W. Lowndes Selby, pursuant to the said decree.

"And the said counsel for the said W. S. Lowndes further proved, that after the making of the said decree on some day in April 1783, the said W. Lowndes Selby (who then resided at Winslow Hall, about six or seven miles from Whaddon Hall), came in a carriage from Winslow Hall, accompanied by some friends, to Whaddon Hall, to take formal possession of the tenements in the said count mentioned; that he came to 'heir' the estate; that the tenants and tradesmen on the estate had a holiday; and that they went in procession and met the said W. L. Selby in Whaddon Park, about a mile from Whaddon Hall, and then accompanied him in procession to Whaddon Hall; that some of them were decorated with ribands, and they had with them a man playing on the violin; that there were afterwards dancing, rejoicing, and festivities at Whaddon Hall, and at the village of Nash, (at which latter place a may-pole was set up,) which were kept up until late in the evening; and that from thenceforth until the time of his death, [488] the said W. L. Selby continued and was in full possession of the premises in the count mentioned, and in the receipt of the rents and profits thereof for his own use.

"And it was further proved, that a certain part of the premises in the count mentioned, was purchased by James Selby the grandfather in the count mentioned, and that a certain other part of the premises was purchased by James Selby the father in the count mentioned, and that a certain other part of the premises was purchased by the testator Thomas James Selby, and that the mother of the said testator was Mary Alston, and that Temperance Bedford in the said will mentioned as aforesaid, was of kindred with the said mother of the testator, and not of the half-blood.

"And it was proved, that on the 23d of April 1784, the said William Lowndes, by his then name of William Selby, did execute a certain deed of covenant to lead to the uses of the fine hereinafter mentioned, by which deed it was declared, that the fine should enure to the use of the said William Selby, his heirs and assigns for ever.

"And the said counsel for this William Selby Lowndes then offered to prove and shew in evidence a certain fine with proclamations levied by the said William Lowndes, (who at and before that time had taken the name of Selby,) in Easter term 1784, in and by the name of William Selby of the said premises above demanded. Whereupon the said counsel for the said Elizabeth Davies (a)¹ on her part interposed, and insisted that the said fine was not good or admissible in law upon the issue joined on the mere mise (b), but that the said fine ought to have been specially pleaded [489] in bar to the said count. But the said chief justice and his said companions held and affirmed that the said fine was good evidence and admissible in law, on the trial of the said assize upon the mere mise (a)², without having been so specially pleaded; and thereupon the counsel for the said W. S. Lowndes gave in evidence, and proved the said fine and the proclamations. Whereupon the said counsel for the said Elizabeth Davies made their exceptions to the said last-mentioned opinion of the said chief justice and his companions.

"And the said counsel for the said Elizabeth Davies then called certain witnesses, and proved certain documents, amongst others, a certain pedigree hereinafter set out (see the next page), with a view to shew and prove that the said Elizabeth Davies was the heir of the said testator Thomas James Selby, and descended from the brother of the mother of the paternal grandfather of the said testator, as in the said count mentioned.

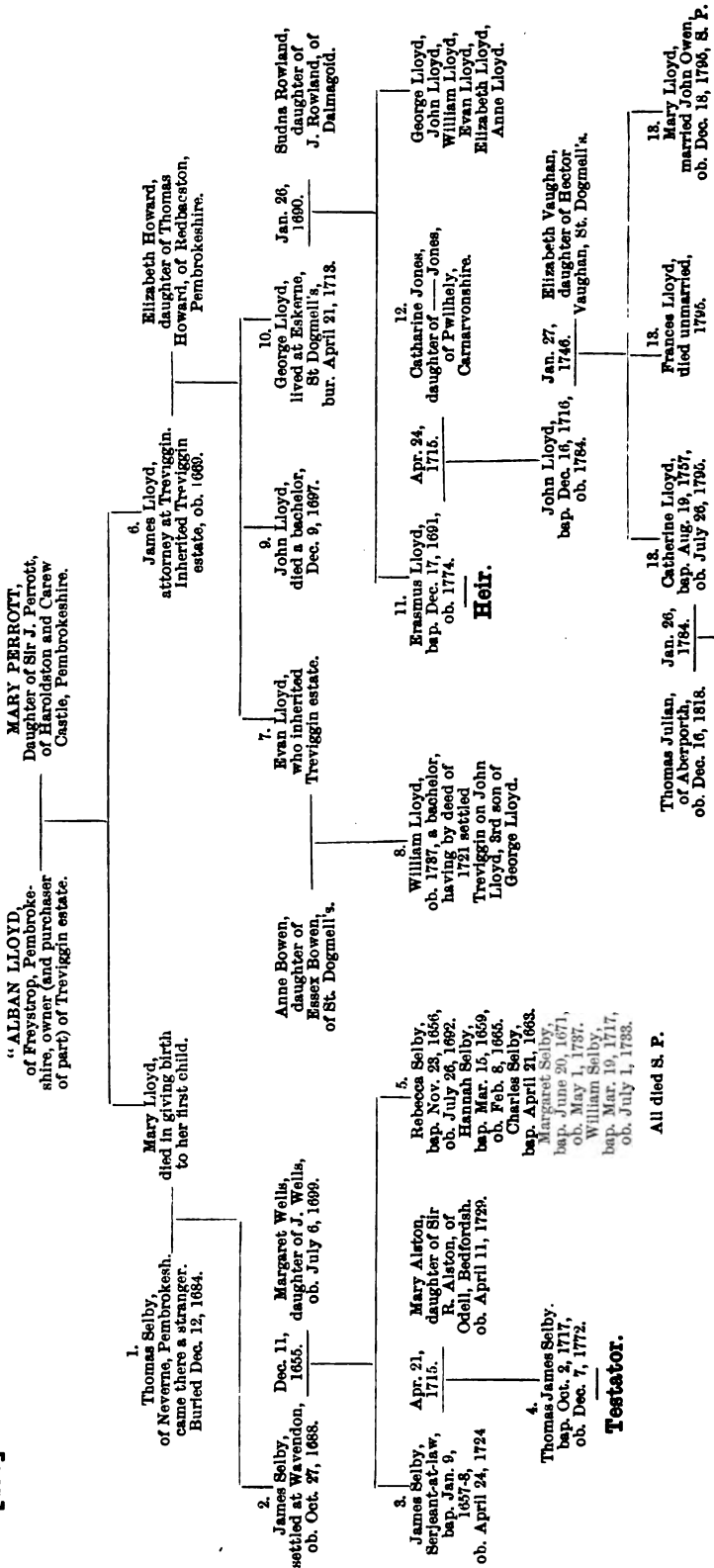
"And among the last-mentioned documents the said counsel for the said Elizabeth Davies did produce, shew, and prove in evidence, the last will of one William Lloyd, who was proved and shewn to be the son and heir of Evan Lloyd, which Evan Lloyd was proved and shewn to be the son and heir of James Lloyd, which James Lloyd was proved and shewn to be the son and heir of Alban Lloyd, as in the said count of the said demandant is mentioned.

(a)¹ The counsel were of counsel with both husband and wife, though the right was in the wife only.

(b) Q. d. "Upon the mise so joined on the mere right."

(a)² Q. d. "On the trial of the mise so joined upon the mere right."

[490]



Elizabeth Julian,
 bap. 1787; married 1808
 to Thomas Davies.

Demandants.

[491] "And also produced from the registry of the archdeaconry court of Bedford, and gave in evidence, the last will of one Judith Odell, which said will was in these words:—'In the name of God, Amen. I, Judith Odell, of Salford, in the county of Bedds, widow, doe this iij day of June, anno Dom. 1643, make and ordain this my last will and testament in manner and forme following: First, I commend my soule into the hands of Jesus Christ, my onely Saviour and Redemer, by whom alone I hope to be saved; and my body I desire might be buried in the same grave in wich my dear husband now lieth: and as for my temporall estate, I dispose of it in the manner—Item, I give and bequeath unto my dear couszins, Henry Lloyd of Soulberry, in the county of Bucks, clerk, and James Selby of Monnington, in the county of Pembroke, gentleman, all my live and dead stock, household furniture, plate, money, and other effects, the same to be divided between them in equal parts; and as for my leasehold estate now in my occupation, I give the same to my dear cousins for their joint lives, and my will is that the longest liver shall take the whole: Item, I give and bequeath unto Mary Binns, if she be living in my service at the time of my deceasse, 20s., to be paid her immediely: and I doe appoint my said couszins executors of this my last will and testament: In witnes whereof I have sett to it my hand and seale before witnesses.'

"And also produced from the prerogative court of Canterbury, and gave in evidence, the last will of one Henry Lloyd, which said will was in these words:—'In the name of God, Amen. On the 11th day of April in the two and twentieth year of His Majesty's reign, that now is, anno Domini 1646, I, Henry Lloyd, of Soulberry, in the county of Bucks, clerk, weak of body, yet in perfect mind and memory (thanks be given to God), revoking all former wills and testaments, do make this my last will [492] and testament in manner and form following; wherein, first, believing to be saved by the only merits and mercies of Christ Jesus, my only Saviour and Redeemer, I return my soul to God that in his mercy gave it, and my body I bequeath unto the earth (in perfect hope of a glorious resurrection), to be decently interred at the discretion of my executor: Item, I give and bequeath to my godson William Hopkins five shillings, and to my godson, the son of Francis Kimms, clerk, five shillings, and to all the rest of my godchildren twelve pence a-piece (all the said several legacies to be paid upon demand): Item, I give and bequeath unto the said Francis Kimms, clerk, my best suit and my best coat, to be delivered to him immediately after my decease: Item, I give to the poor of the parish of Soulberry, twenty shillings, to be distributed amongst them at my funeral by my executors with the advice of the churchwardens and overseers of the poor of the said parish: Item, I give ten shillings, to be disposed of to those that shall ring at my funeral: Item, whereas, at my last being in Wales, I left some money, clothes, and other things with some friends there, my will is that those things, whatever they are, shall be disposed according to that order and to those persons as I have formerly directed by writing under my hand and seal, which said writing remaineth in the hands of my sister Ellen Ellis: Item, I give and bequeath twenty and five pairs of gloves, and as many mourning ribands, to be disposed of to such of my friends as I have appointed: And all the rest of my goods and chattels, debts, and credits (my debts, these legacies, and my funeral expenses being first paid and satisfied), I give and bequeath unto William Hopkins of Soulberry aforesaid, towards his satisfaction for the great pains and care he and his wife have taken with me in my sickness: [493] and I do make the said William Hopkins my sole executor of this my last will and testament.'

"And, in order to shew that the said Elizabeth was so heir of the testator Thomas James Selby, and so descended as last aforesaid, a witness was called named Morrice Williams, who produced a certain document as follows:—

[494] "THE GENEALOGIE OF THE LLOYDS OF CWMGLOVNE, Co. PEMBROKE, SHEWING THEIR DESCENT FROM THE PRINCES OF WALES,
TOGETHER WITH SOME COLATERALE BRANCHES OF THE SAME FAMILY.

RHYS GRUG.
Son of Lord Rhys, Prince of South Wales,
died A.D. 1233. Buried at St. David's.

Married A.D. 1219, Joan, daughter to Gilbert de
Clare, Earl of Hertford and Earl of Gloucester.

Rhys Vychan.

Married to Glades, daughter to Griffith ap
Llewellyn ap Perworth.

David ap Rhys Vychan.

Married to Nesta, daughter to Madog ap
Howell ap Griffith ap Robert.

Edmonett ap David.

Married to Ardun, daughter to David ap
Kindrick ap Howell.

Ithell ap Edmonett.

Married to Joice, daughter to William ap
Madog ap Dious.

Dious ap Ithell.

Married to Ankaret, daughter to William ap
Lloyd ap Puleston.*

David Lloyd ap Dious.

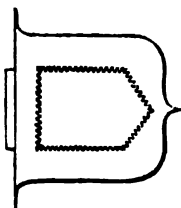
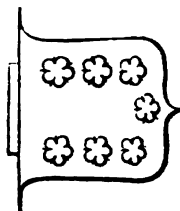
Married to Ankaret, daughter and heir to
Llewellyn ap Edmonett ap Sombry.

William Lloyd,
of Hendref in Cemaea.*

Married to Margaret, daughter and heir to
Llewellyn ap Howell ap Jenkin, of
Nevern, Emj.

* To this William Lloyd there was an indulgence granted A.D. 1442, by Pope Eugenius, dated 14th November, at the city of Florence, to have Altare portabile, ad missas et alia divina officia, etiam ante diem et loca in-ordinata, celebranda.

* This Lloyd was lineally descended from Grinifard Dyfel, who was the son of Peryllpendeg Dyfel, who was the son of Meyrig, King of Dyfel.



[495]

Alban Lloyd,
of Hendref.

Married to Agnes, daughter to Evan ap Rhyd-
derch ap Evan Lloyd, Esq., Governor
of Cardigan.

Robert Lloyd,
of Hendref.

Married to Elizabeth, daughter to John ap
Howell, of Cardigan, Esq.

Jenkin Lloyd,
of Hendref.

Married to Gwenllian, daughter to John ap
Rees Gwynne, of Cardigan, Esq.

John Lloyd,
High Sheriff of the co. of
Pembroke, A.D. 1624.

Married to Jane, daughter to Evan ap
Llewbellin of Pantyryls, in co.
Cardigan, Esq.

Evan Lloyd,
of Cwmgloyne in Cemasa.

Married to Elizabeth, daughter to George
Owens, of Hentleys, Esq.

John Lloyd,
of Cwmgloyne.

Married to Dorothy, daughter to John Lloyd,
of Blaiddpwl, Esq.

John Lloyd,
of Cwmgloyne.

Married to Frances, daughter to John Davies,
of Haverfordwest, Esq.,

George Lloyd,
High Sheriff of the co.
Pembroke, 1696.

Married to Elizabeth, daughter to Nicholas
Lewis, Esq., of Pantyrodin.

Thomas Lloyd,
of Cwmgloyne. Now living.

Married to Ann, daughter to William Scour-
field, Esq., of New Most.

Thomas Lloyd,
Infant. Now living.

Elizabeth Lloyd, married David Morgan, of
Rhydoarwen, Esq. Has issue.

4. Thomas Lloyd.
5. Eliza Lloyd.*
* See Collaterale, Sect. I.

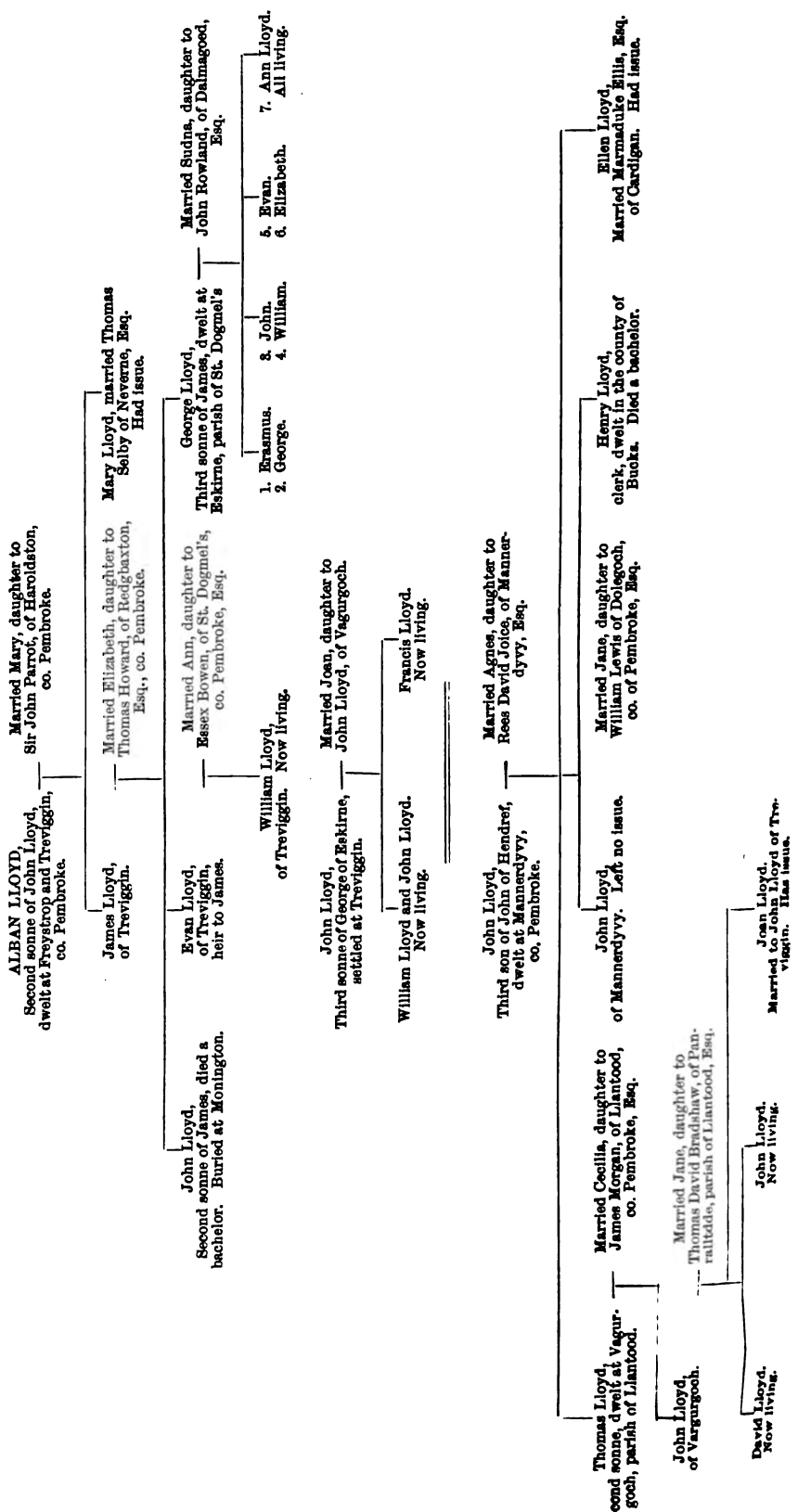
2. Alban Lloyd.
3. John Lloyd.

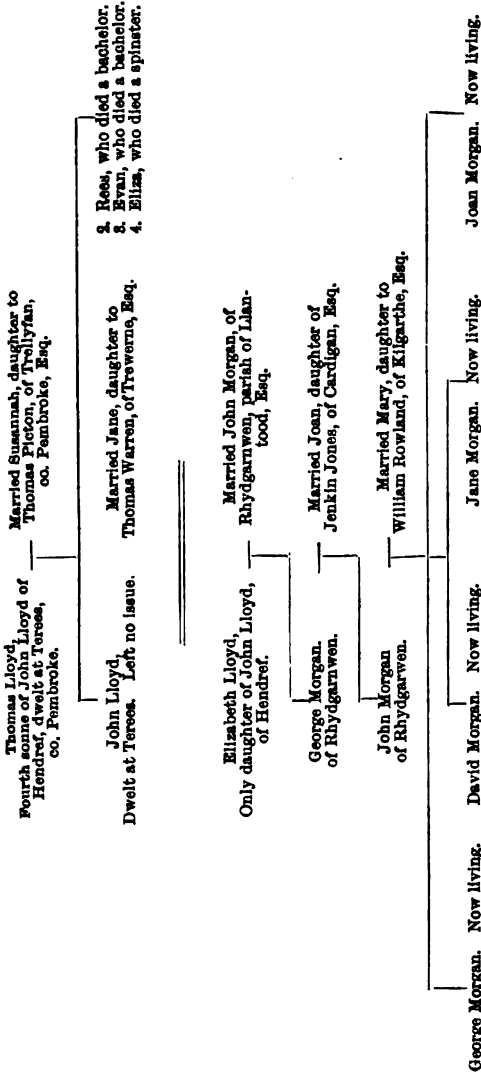
Eliza Lloyd, married to Thomas Warren,
of Treverne, Esq. Had issue.

George Lloyd, died 1696, a bachelor, and
Ann Lloyd, died 1694, a spinster.

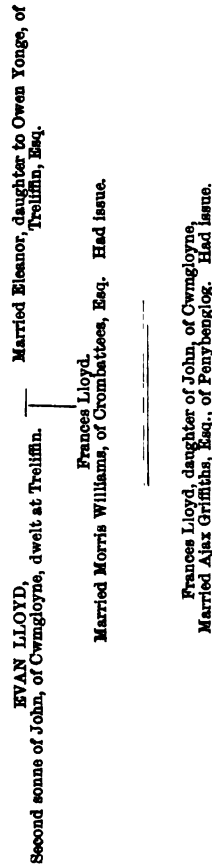
Evan Lloyd and Frances Lloyd.†
† See Collaterale, Section I.

[496] "COLATERALE, SECT. I.





"COLATERALE, SECT. II.



Collected from Parish Registers, Wills, Monumental Inscriptions, Family Records, and History. This account is now presented as correct, and as confirming of the tradition handed down from one generation to another,—to Thomas Lloyd, Esq., of Cwmglwynne, this fourth day of July, anno Dom. 1723, by his loving kinsman, sincere friend, and very devoted servant,—WILL. LLOYD.

[498] and upon which document was the following indorsement—‘A true account of my family and origin. Thomas Lloyd, Cwmgloyne.’ And the said Morrice Williams did further depose and prove that he was related in blood and kin to the family of the Lloyds of Cwmgloyne, and that the Lloyds of Cwmgloyne were connected in blood with the Lloyds of Treviggin, being the family of the Lloyds mentioned in the count of the said demandant; and that, fifty years ago, a certain estate called the Cwmgloyne estate came to him the said Morrice Williams by devise from his kinsman one Thomas Lloyd of Cwmgloyne, the proprietor thereof, being of the said family of the Lloyds of Cwmgloyne; and that together with the said estate he the said Morrice Williams then came into possession of the family pictures and papers; and that, nearly fifty years ago, and after the death of the said Thomas Lloyd, he the said Morrice Williams found the said document among the said papers in a drawer in the mansion-house of Cwmgloyne, with other papers relating to the said family of the Lloyds. And he the said Morrice Williams did further depose and prove that he was well acquainted with the hand-writing of the said Thomas Lloyd, having often seen him write; and that part of the indorsement upon the said document, to wit the words ‘A true account of my family and origin, Thomas Lloyd, Cwmgloyne,’ was in the hand-writing of the said Thomas Lloyd; and that the said indorsement was written on the said document when he so found the same as aforesaid.

“And the said counsel for the said Elizabeth Davies did then call another witness named William Courthope, who, being duly sworn, did depose and prove that he had been accustomed to examine antient writings and documents for many years, and that he believed the writing of the signature of William Lloyd to the said will so produced and proved as aforesaid, was and had [499] been written by the same person who had written the signature William Lloyd to the bottom of the said document so produced by the said Morrice Williams as aforesaid: whereupon the counsel for the said Elizabeth Davies did then propose and offer to put in evidence the said document.

“Whereupon the said counsel for the said William Selby Lowndes interposed, and insisted that the said last-mentioned evidence so offered to be given was not good or admissible in law:

“And the said chief justice and his companions thereupon held, and affirmed to the said grand assise, that the said document was not admissible in evidence.

“Whereupon the said counsel for the said Elizabeth Davies tendered and insisted that, if the said document was not admissible in all its parts, yet, at all events, that portion of the said document which began with and followed the statement of the ‘Colaterale, Section I,’ was admissible in evidence, and ought to be read, for the purpose of shewing so much of the pedigree that followed. But the said counsel for the said William Selby Lowndes objected and insisted that the said portion of the said document was not by law receivable in evidence. Whereupon the said chief justice and his companions held, and affirmed to the said grand assise, that the said portion of the said document was not admissible in evidence for the purpose last aforesaid. Whereupon the said counsel for the said Elizabeth Davies then tendered and insisted that at least that portion of the said document which stated James Lloyd to be the grandfather of the said William Lloyd, was admissible in evidence, and ought to be read, for that purpose. But the said counsel for the said William Selby Lowndes objected and insisted that the said last-mentioned portion of the said document was not by law receivable in evidence: whereupon the said chief justice and his companions held, and affirmed [500] to the said grand assise, that the said last-mentioned portion of the said document was not admissible in evidence for the purpose last aforesaid.

“Whereupon the said counsel for the said Elizabeth Davies then tendered and insisted that at least that portion of the said document which shewed who was the father of the said William Lloyd was admissible in evidence and ought to be read for that purpose. But the said counsel for the said William Selby Lowndes insisted that the said last-mentioned part of the said document was not by law receivable in evidence: and thereupon the said counsel for the said William Selby Lowndes, in answer to a question from the said chief justice, said that he admitted that the said William Lloyd was the son and heir of Evan Lloyd, as in the said demandant’s count mentioned; but that, though he admitted the fact, he objected to the evidence, and the whole of the document in question. Whereupon the said chief justice and his companions held, and affirmed to the said grand assise, that the said last-mentioned

portion of the said document was not admissible in evidence for the purpose last aforesaid.

"Whereupon the said counsel for the said Elizabeth Davies then tendered and insisted that at least that portion of the said document which shewed who were the paternal uncles of the said William Lloyd, and their order in seniority, and also that portion of the said document which shewed who were the first cousins of the said William Lloyd, were, and each of them was, admissible in evidence, and ought to be read for those purposes respectively. But the said counsel for the said William Selby Lowndes objected and insisted that the said last-mentioned portions of the said document were not, nor was either of them, by law receivable in evidence. Whereupon the said chief justice and his companions held, and affirmed to the grand assise, that the said last-mentioned portions of the said document were not, nor [501] was either of them, admissible in evidence for the purposes last aforesaid respectively.

"Whereupon the said counsel for the said Elizabeth Davies then tendered and insisted that that portion of the said document which shewed that the said William Lloyd's paternal uncle John died a bachelor, and also that the portion of the said document which shewed who were the children of the said William Lloyd's third uncle, George, were, and each of them, was admissible in evidence, and ought to be read for those purposes respectively. But the said counsel for the said William Selby Lowndes objected and insisted that the said last-mentioned portions of the said document were not, nor was either of them, by law receivable in evidence. Whereupon the said chief justice and his companions held, and affirmed to the said grand assise, that the said last-mentioned portions of the said document were not, nor was either of them, admissible in evidence for the purpose last aforesaid.

"Whereupon the said counsel for the said Elizabeth Davies then tendered and insisted that so much of the said document as shewed that Henry Lloyd, clerk, therein mentioned, had a sister Ellen Lloyd, who married Marmaduke Ellis, was admissible in evidence, and ought to be read, for the purpose of connecting the said portion of the said document with the statements in the said wills of Judith Odell and Henry Lloyd, theretofore proved and put in evidence as aforesaid, and thereby identifying the family of the said testator, Henry Lloyd, with the family of the ancestors of the said Elizabeth Davies. But the counsel for the said William Selby Lowndes objected and insisted that the said last-mentioned portion of the said document was not by law receivable in evidence, and that no part of the said document ought to be received or receivable in evidence. Whereupon the said chief justice and his companions [502] held, and affirmed to the grand assise, that the said last-mentioned portion of the said document was not admissible in evidence for the purpose last aforesaid; and further held, and affirmed to the grand assise, that no part or portion of the said document could by law be admitted or received in evidence upon the trial of the last-mentioned recognition (sic), and refused to allow the same, or any part or portion thereof whatever, to be proved or shewn or received or read in evidence.

"Whereupon the said counsel for the said Elizabeth Davies made their exceptions to this opinion, and to the said several holdings, affirmances, and decisions of the said chief justice and his companions in respect of the said document and the inadmissibility as evidence of it and the several portions of it respectively as aforesaid on the occasion aforesaid.

"And the said counsel for the said William Selby Lowndes did on the said trial insist before the said chief justice and his companions that the said fine so levied was a bar to the claim of the said demandant. But to this the counsel for the said Elizabeth Davies did insist in answer before the said chief justice and his companions, that the said fine so levied by the said William Lowndes was of no effect, because at the time of levying thereof the said William Lowndes had no sufficient estate in the premises in respect of which the said fine was levied. But the said chief justice did thereupon declare to the said grand assise, the opinion of himself and his said companions, that, if they the said grand assise were satisfied, that, at the time the said fine was levied, the said William Lowndes was in possession of the estate, having entered upon it and claimed the dominion of it, and exercising the right to it as his own, he had such an estate as would make the fine levied by him a fine available at law; and, in that case, that the said fine was a valid answer to the demandant's claim; and that their recognition (sic) in such case ought to be [503] for the tenant, what-

ever their opinion might be as to the demandant's pedigree; and with that declaration and direction did leave the question of recognition (sic) to the said grand assise.

"Whereupon the said counsel for the said Elizabeth Davies, upon the said chief justice declaring the said last-mentioned opinion of himself and his companions to the said grand assise, did then and there, before the finding of the verdict of the said grand assise, on behalf of the said Elizabeth Davies, except to the aforesaid opinion of the said chief justice and his companions; and did insist, among other things, that, as the said William Lowndes claimed through the will of the said testator, his possession of the said premises in the said count mentioned, could not be a disseisin of, or adverse to the claim of, any person claiming through the said testator, or claiming under his said will; and that the possession of the said William Lowndes must be referred to the terms of the said will.

"And, inasmuch as the said several exceptions and matters do not appear by the record of the verdict of the said grand assise, the said counsel for the said Elizabeth Davies did, before the finding of the said verdict, propose their said several exceptions to the said several opinions of the said chief justice and his said companions, and requested them to put their seals to this bill of exceptions, containing the said several matters respecting the trial of the said last-mentioned assise (sic) as aforesaid, according to the form of the statute in such case made and provided: and thereupon the said chief justice and his said companions, at the request of the said counsel for the said Elizabeth Davies, did put their seals to this bill of exceptions, pursuant to the said statute, this 28th of November 1838.

"N. C. TINDAL

"J. B. BOSANQUET.

"THOMAS COLTMAN."

[504] The assignment of errors was as follows:—"Afterwards, &c., &c., comes the said Elizabeth Davies, by D. Davis, her attorney, and says, that, in the record and proceedings thereof, and also in the matters recited and mentioned in the said last-mentioned bill of exceptions, and also in the giving of the judgment last aforesaid, there is manifest error, in this—that the said chief justice and his said companions held and affirmed on the trial of the said assise (sic), as in the last-mentioned bill of exceptions is recited and mentioned, that the said evidence of the said decree so offered to be given by the said counsel for the said William Selby Lowndes as in the said last-mentioned bill of exceptions is mentioned, was good and admissible in law, and allowed the said decree to be given in evidence and proved by the said counsel for the said William Selby Lowndes: whereas, by the law of the land, the said decree ought not to have been given in evidence or proved, but was wholly inadmissible in evidence on the said trial of the said assise (sic). And also that there is error in this—that the said chief justice and his said companions held and affirmed on the said trial of the said assise (sic), as in the said last-mentioned bill of exceptions is recited and mentioned, that the said fine was good evidence and admissible in law on the trial of the said assise (sic) upon the mere mise, although the said fine was not specially pleaded in bar to the said count, and allowed the said fine to be given in evidence and proved by the said counsel for the said William Selby Lowndes: whereas by the law of the land the said fine ought not to have been so given in evidence or proved upon the mere mise without being specially pleaded, but was wholly inadmissible in evidence on the said trial of the said assise. And also there is error in this—that the said chief justice and his companions held and affirmed, on the said trial of the said assise (sic), as in the last-mentioned bill of exceptions is recited and mentioned, that [505] the said document produced by the said witness called Morrice Williams was not admissible in evidence, and also held and affirmed on the said trial of the said assise (sic), as in the last-mentioned bill of exceptions is recited and mentioned, that that portion of the said last-mentioned document which began with and followed the statement of the 'Colaterale, sect. I.,' was not admissible in evidence for the purpose of shewing so much of the pedigree as followed; and also held and affirmed, as in the said last-mentioned bill of exceptions is recited and mentioned, that that portion of the said last-mentioned document which stated James Lloyd to be the grandfather of the said William Lloyd, was not admissible in evidence; and also held and affirmed, as in the said last-mentioned bill of exceptions is recited and mentioned, that the portion of the said last-mentioned document which shewed who was the father of the said William Lloyd was not admissible in evidence for that purpose; and also held and affirmed, as in the

said last-mentioned bill of exceptions is recited and specified, that that portion of the said last-mentioned document which shewed who were the paternal uncles of the said William Lloyd, and their order in seniority, was not admissible in evidence for that purpose; and also held and affirmed, as in the said last-mentioned bill of exceptions is recited and specified, that that portion of the said last-mentioned document which shewed who were the first cousins of the said William Lloyd, was not receivable in evidence for that purpose; and also held and affirmed, as in the said last-mentioned bill of exceptions is recited and mentioned, that that portion of the said last-mentioned document which shewed that the said William Lloyd's paternal uncle John died a bachelor, was not admissible in evidence for that purpose; and also held and affirmed, as in the said last-mentioned bill of exceptions is recited and mentioned, that that portion of the said last-mentioned document which shewed [506] who were the children of the said William Lloyd's third uncle, George, was not admissible in evidence for that purpose; and also held and affirmed, as in the said last-mentioned bill of exceptions is recited and mentioned, that that portion of the said last-mentioned document which shewed that Henry Lloyd, clerk, therein mentioned, had a sister Ellen Lloyd, who married Marmaduke Ellis, was not admissible in evidence for the purpose of connecting the said portion of the said last-mentioned document with the statement in the said wills of Judith Odell and William Lloyd, theretofore proved and put in evidence as in the said last-mentioned bill of exceptions is mentioned, and of thereby identifying the family of the said testator Henry Lloyd with the family ancestors of the said Elizabeth Davies; and also held and affirmed that no part or portion of the said last-mentioned document could by law be admitted or received in evidence upon the trial of the said last-mentioned recognition, and refused to allow the same or any part or portion thereof to be proved or shewn or received or read in evidence, as in the said last-mentioned bill of exceptions is respectively recited and mentioned: whereas, by the law of the land, the said last-mentioned document, and the said several parts and portions thereof, were admissible in evidence, and ought to have been allowed to have been proved and shewn and received and read in evidence upon the trial of the said recognition (sic). And also there is error in this—that the said chief justice did, as in the said last-mentioned bill of exceptions is recited and mentioned, declare to the grand assise the opinion of himself and his said companions, that, if they the said grand assise were satisfied, that, at the time the said fine was levied, the said William Lowndes was in possession of the said estate, having entered upon it and claimed the dominion of it, and exercising the right to it as his own, he had such an estate as would make the fine levied by him a fine [507] available at law; and, in that case, that the said fine was a valid answer to the said demandant's claim; and that their recognition (sic) in such case ought to be for the tenant, whatever their opinion might be as to the demandant's pedigree; and with that direction and declaration, did leave the question of recognition (sic) to the said grand assise: whereas, by the law of the land, even if at the time the said fine was levied the said William Lowndes was in possession of the estate, having entered upon it, and claimed the dominion of it, and exercising the right to it as his own, he had not such an estate under all the circumstances proved upon the said last-mentioned trial as would make the fine levied by him available at law, and the fine was not a valid answer to the demandant's claim," &c. &c.(a)¹.

The case was argued on Monday the 14th of February 1842, before Lord Denman C. J., Parke B., Alderson B., Patteson J., Williams J., Gurney B., and Rolfe B.; and again on Tuesday the 15th.

The argument was resumed on Tuesday the 29th of November 1842, before Lord Denman C. J., Lord Abinger C. B., Parke B., Alderson B., Williams J., and Rolfe B.

Sir W. W. Follett Solicitor-General (with whom was E. V. Williams) for the plaintiff in error. This bill of exceptions raises four distinct questions for the consideration of the court; first, whether the decree of the court of Chancery of the 25th of March 1783, was admissible in evidence, having been pronounced in a suit between strangers; 2dly, whether the fine levied by William Lowndes was admissible on the mise joined on the mere right, or should have been specially pleaded; [508] 3dly (a)², whether the ruling of the court of Common Pleas was correct,—that if, at

(a)¹ See *Cort v. Bishop of St. David's*, Cro. Car. 341.

(a)² This is the fourth error assigned, *supra*, 506.

the time of levying the fine, William Lowndes was in possession of the estate, having entered upon, and claimed dominion over it, and exercising the right to it as his own, then he had such an estate of freehold as would make the fine operate as a bar; and, 4thly (b), whether the pedigree, offered in evidence on the part of the demandant, was not improperly rejected. If any one of these points be decided in favour of the demandant, she will be entitled to a venire de novo.

With respect to the last question, the pedigree was proved to be signed by William Lloyd, No. 8 in the demandant's pedigree (supra, 490). The pedigree to which William Lloyd's signature is attached, is stated to be "Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented, as correct, and as confirming of the tradition handed down from one generation to another, to Thomas Lloyd Esq. of Cwmgloyne, this 4th day of July, anno Dom. 1733, by his loving kinsman, sincere friend, and very devoted servant, William Lloyd." In addition to the part tracing the descent of the family from the princes of Wales, the pedigree comprises the father, uncles, cousins, and other relations of William Lloyd, who were living in his own time, and whose relationship was a matter within his own knowledge. It appeared that William Lloyd was connected in blood with Thomas Lloyd of Cwmgloyne, who was connected with the Lloyds of Treviggin, and the document bears the following indorsement, in the hand-writing of Thomas Lloyd. "A true account of my family and origin. Thomas Lloyd, Cwmgloyne." The pedigree, therefore, [509] is authenticated by two members of the family, so far as relates to those particulars which are within their knowledge. The document being preserved among the papers belonging to the family of the Lloyds, came into the possession of Mr. Morrice Williams, the witness, by whom it was produced, and who was the nephew of Thomas Lloyd, and succeeded to his estate. It is submitted the document was clearly evidence, so far as regards those portions of it which related to facts within the personal knowledge of the two parties by whom it was authenticated. Most of the cases on this subject are collected in Phill. on Ev. vol. i. pp. 211-236 (9th ed.). Speaking of the qualifications with which hearsay evidence in matters of pedigree, is receivable, Mr. Phillipps observes (p. 228), "As to the qualifications, it is obvious, that the value of these declarations, as indeed of all hearsay evidence, must greatly depend on the knowledge which the parties making such declarations possessed of the facts spoken to by him. It was long unsettled whether any and what kind of connection (from which knowledge might be presumed) must have subsisted between the party making the declaration, and those to whom it referred. Formerly there seems to have been no limitation to any particular class of persons; and evidence of the reputation of the country or neighbourhood, and of general tradition, as to the facts of descent or relationship, was, in some cases, admitted. Afterwards it was thought necessary, that the hearsay should proceed from those whose connections with the family afforded them peculiar means of knowledge. 'The doctrine of Lord Mansfield (that tradition is sufficient evidence in point of pedigree, *Goodright v. Moss* (Cowp. 594)), must,' said Lord Eldon, in *Whitelocke v. Baker* (13 Ves. 514), 'be understood as it has been practised and acted upon. The tradition [510] must be from persons having such a connection with the family, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. The nature of this connection was, however, undefined, though it does not appear to have been thought requisite that the declarant should be related to the family by blood or affinity. In several cases, the declarations of servants, physicians, and intimate friends have been admitted at nisi prius, and the practice was countenanced by obiter dicta of Lord Kenyon, Buller, and other judges. But at a later period, Lord Eldon speaks doubtfully upon the point; and afterwards, in the case of *Beer v. Ward* (9 J. B. Moore, 188), Abbott C. J. received the declarations of servants and acquaintances, subject to further discussion, expressing at the same time an opinion against their admissibility. The question remained thus undecided when it came before the court of Common Pleas in *Johnson v. Larson* (2 Bingh. 86, 9 J. B. Moore, 183), upon a motion for a new trial on account of the rejection of the declarations, of a deceased housekeeper, that a certain person under whom the plaintiff claimed, was the heir of her master. The court were unanimous in thinking the evidence properly rejected. Best C. J., in delivering judgment,

(b) Third error assigned.

observed, that the admission of hearsay evidence in these questions must be subjected to some limits; otherwise great uncertainty must ensue, that the limitation to the declarations of relatives or members of the family connected by blood or affinity, afforded a certain and intelligible rule; and if that were passed it might be necessary, on every occasion, to enter into a long and almost endless inquiry as to the degree of intimacy or confidence which subsisted between the family and the party who had made the declaration." In *Doe dem. Johnson v. The Earl of Pem*-[511]-*broke* (11 East, 504) it was held, that a certain paper being found along with other papers, relating to the private concerns of the person last seised, after his death, in a drawer in his house, which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its having ever been acted upon, or probate of it taken out, was yet evidence of its recognition, by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of Thomas to be older than another brother of the name of William,—assuming the jury to be satisfied of the fact, that the paper so found, had been kept there by the person last seised with a knowledge of its contents, and that no imposition had been practised. That is a much stronger case than the present. In *Viner's Abr. Evid.* [T. b. 87], pl. 5, a case is cited of *Zouch v. Waters*, where "a book out of the heralds' office, was allowed, to prove the plaintiff was not descended from one William Zouch of Pilton, as also an old book out of my Lord Oxford's library, mentioning the pedigree of William Zouch of Pilton, which was signed by himself." [Alderson B. There, the pedigree was signed by a party whose declarations would have been evidence.] So here, the document is authenticated and preserved by persons whose declarations would have been evidence. In *Monckton v. The Attorney-General* (2 Russ. & M. 147) a paper in the handwriting of B. found in his repository at his death, purporting to give a genealogical account of his family, of which it represented C. to have been a member, was held to be admissible for the purpose of proving the relationship of C., though never made public in B.'s [512] lifetime, and though erroneous in various particulars, and professing to be founded chiefly on hearsay. In *Slaney v. Waile* (7 Simons, 595, affirmed by the Lord Chancellor, 1 Myl. and Cr. 338), an antient mural inscription, giving an historical account of a family, and placed in a chancel which had been used formerly as the burial-place of the family, and was part of the church belonging to the parish where the family had long been resident proprietors, was held to be admissible evidence on a question of pedigree, for the purpose of proving the facts which were stated in the inscription. In the same case it was also held, that although the inscription had been defaced twenty-four years before, its contents might be proved by copies made when the inscription was entire, two of which were produced from the custody of the Slaney family. The evidence was said to be admissible, as well upon the authority of the cases respecting tombstones, as of those respecting a pedigree hung up in a family mansion. [Alderson B. Suppose a man puts up a monument, declaring that he is your first cousin, what redress have you? Can you take it down? Parke B. The ground on which a monument is admissible is, that it is presumed to have been put up by a member of the family, cognizant of the facts, and not on the ground of recognition (b).] Undoubtedly a great portion of this pedigree was not within the compiler's own knowledge, or that of his father or grandfather; but that must be the case with all pedigrees; for, every pedigree which goes back beyond the reach of living memory, must be derived from parish registers or other similar sources. The compiler could have no object in stating that he had such and such relations; and the pedigree is a declaration, made ante litem motam, as to the connection and blood of families, by both William Lloyd and Thomas [513] Lloyd. The declaration of William Lloyd, that he was the son of Evan Lloyd, would clearly have been evidence of the fact; the pedigree was tendered to prove that, but was rejected. So likewise, William Lloyd's declaration—that he had an uncle named John, who died a bachelor, and another uncle called George, who married a female of the name of Rowland, - would have been evidence; but the pedigree, although offered to prove these facts, was rejected. It was further tendered to shew that Erasmus Lloyd was the son of George Lloyd, and was consequently, was the first cousin of William Lloyd; but it was once more rejected.

(b) Standing therefore on the same ground as entries in a family Bible.

Lastly, it was offered for the purpose of proving the marriage of Ellen Lloyd, the sister of Henry Lloyd with Marmaduke Ellis, and was finally rejected. It is difficult to know on what grounds the declarations of William Lloyd, made to his relation, Thomas Lloyd, of facts concerning the family, which must have been within his own knowledge, are to be held not admissible in evidence. [Parke B. The objection is, that non constat, but all the facts were taken from secondary evidence of parish registers, wills, and monumental inscriptions.] When a person is speaking of his own immediate relations, it is to be presumed that he is speaking of his own knowledge, and not from parish registers. [Alderson B. The pedigree is stated to have been "collected from parish registers, &c., and as confirming of the tradition handed down from one generation to another;" it is therefore derived from both sources.] The pedigree states Erasmus Lloyd to be living; so that the fact of his relationship must be stated by the compiler from his own knowledge, and not from the other sources which are mentioned. Thomas Lloyd, who is a relation, vouches, by his indorsement, for the correctness of the account. [Alderson B. Suppose a person to say, "There is a certain tradition in my family, and I have looked into history, parish registers, [514] &c., and I am satisfied that such tradition is correct. Is not that the same in effect as what is stated here?]

Lord Denman C. J. We all think that this point is so important that it had better be first discussed.

Sir T. Wilde Serjt. (with whom were Kelly and Gray) for the defendant in error. Although, from the necessity of the case, hearsay evidence is admissible in questions of pedigree, it has always been considered that such evidence ought to be received with caution, and that no great reliance can be placed upon it: and here the pedigree is of that character that the court will not feel inclined to extend the rule. Selby, the testator, died in 1772, and a contest immediately arose as to who was his heir. There was no proof that this document was in existence at that time. All that appeared was, that it was found in 1789, about seventeen years after the testator's death. It is true that the pedigree bears date in 1733; but William Lloyd's signature is not evidence of that fact. All that his signature proves is, that the pedigree was made before his death; but when that took place does not appear in the bill of exceptions, except in the demandant's pedigree, which is not evidence. No case has been cited in which such a pedigree as the present has been received. It should be the natural effusion of the party's own mind. If individuals are at liberty to compile a pedigree from any sources they please, the result will be to create a new head of evidence. If William Lloyd had said that a third party had told him that such and such persons were his relations, that clearly would not have been evidence. So, if William Lloyd had stated that he had collected the pedigree from parish registers, &c., that would not have been evidence, which he, when alive, could have been allowed to give. A tradition in a family must be [515] handed down from one generation to another. Here, the mode of preparing the pedigree by William Lloyd, and of its attestation by Thomas Lloyd, impeaches rather than gives credit to it; for it shews that these parties were anxious to get it up for some purpose or another. It was admitted that William Lloyd was the son of Evan Lloyd; consequently the pedigree was not required to establish that fact. With respect to William Lloyd's uncles and cousins, the pedigree, so far as regards them, stands on the same footing as the rest of its contents; for the court will not assume that William Lloyd was personally acquainted with them. If the sources from which the pedigree is stated to have been drawn, are not legitimate sources of information, the court will not speculate upon the chance of some portions of the document being derived from unobjectionable sources. What evidence is there to shew that William Lloyd had any knowledge of the collateral members of his family, who were contemporaneous with himself? The whole pedigree being stated to have been derived from certain specified sources, the court cannot presume, in contradiction to the declaration of William Lloyd, that any part of it had its existence in his own personal knowledge. The case of *Doe d. Johnson v. The Earl of Pembroke* (11 East, 504) is not applicable; for there, the statement of Richard Johnson, in his will, that his brother Thomas was older than his brother William, was not the less admissible as a declaration, by reason of the will being afterwards cancelled. *The Huntingdon Peerage case* (11 Phill. Ev. 224, 9th ed.) does not touch any of the objections which apply to the present case. With respect to the case in Viner's Abr. [T. b. 87], pl. 5 (12 Vin. 244), it does not appear from what

sources the pedigree was compiled, or how [516] far it went back; and the whole might be framed from strictly legitimate sources. In *Monckton v. The Attorney-General* (2 Russ. & M. 147) the portion of the pedigree which the party stated he had heard from members of his family, was clearly admissible; but it may be doubted whether some of the positions laid down in the judgment can be supported; and, after all, there is nothing in that judgment which warrants the admission of this pedigree. *Slaney v. Wade* (7 Simons, 595) rests on general principles, and is a mere instance of the admission of secondary evidence of a monumental inscription which had ceased to exist. [Parke B. The objection here is, that it is giving evidence of the contents of parish registers which might have been produced.] If individuals may frame such documents as the present, and they are held to be evidence, most serious consequences will ensue. [Parke B. What do you say to the recognition of the pedigree by Thomas Lloyd, who was shewn to be connected in blood with the other Lloyds?] All that Thomas Lloyd appears to have done, was to express his belief that the statements made by William Lloyd were true. There is nothing to shew that he meant to authenticate the pedigree from his own knowledge. [Parke B. Is not that rather an argument as to the weight of the evidence?] A decisive objection is, that the document was not shewn to be in existence until post litem motam. [Sir W. Follett. No such objection was taken at the trial. Parke B. If we find that the evidence tendered was inadmissible on any ground, we must affirm the judgment. It would have been different if it had appeared on the bill of exceptions that the document had been rejected on a specific ground, which we considered to be insufficient.] There is no date to the signature of Thomas Lloyd; and the docu-[517]-ment was not discovered until 1789. Shortly after the testator's death, in 1772, disputes arose as to who was the heir, and two claimants appeared to the property, and two ejectments were brought in 1780 and 1781 (a). In order to establish the inadmissibility of declarations made post litem motam, it is not necessary to shew that the party making them was aware that a controversy had arisen on the subject. [Alderson B. I ruled that point in the case of an issue out of Chancery, tried at Stafford in *Walker v. The Countess of Beauchamp* (6 C. & P. 552), and my ruling was upheld by Lord Cottenham C.] The onus lies on the party relying on the declaration to shew that it was made ante litem motam. [Alderson B. It does not appear that the Thomas Lloyd to whom the pedigree was sent, was the Thomas Lloyd who made the indorsement. The latter may have been made by the son of that Thomas Lloyd, who is described in the pedigree to be an infant, and then living.]

Sir W. W. Follett, in reply. There was no lis mota until the bringing of this writ of right; neither was any point of this nature made at the trial; nor does any thing of the kind appear on the bill of exceptions, to which alone the court can look. *Doe d. Fox v. Marston* (8 A. & E. 14). The two actions of ejectment which have been referred to, were brought by different parties claiming under different titles. [Parke B. Does not Mr. Selby's will give rise to a lis mota as to who was his heir?] A devise to the heir of the testator does not necessarily give rise to a controversy. [Rolfe B. The bill of exceptions states that bills and answers in Chancery were given in evidence, "from which bills and answers, or some of them, it appeared that the said Rachael Med-[518]-craft, &c. &c. severally and respectively claimed to be the heir, or heirs, at law of the testator Thomas James Selby, and, as such, to be entitled to all the said testator's manors and real estates so devised by his said will to his right and lawful heir-at-law." The bills and answers were put in to lay the foundation for producing the decree; but the latter was objected to, and was only admitted to shew the character in which William Lowndes took possession of the estate, and, therefore, cannot be used for any other purpose. There is consequently no evidence of any contention at all before the court. But even if there be, it is a controversy of a different kind, and between different parties, which did not and could not render the pedigree of the Lloyds of any importance, as the claimants were in no way connected with them. *Prima facie*, any declaration made by a member of the family is admissible in matters of pedigree. The objection that it was made post litem motam, must be proved by the party opposing the reception of the evidence, on whom the onus lies of establishing the fact. The party tendering the declaration cannot prove a negative. [Parke B. The doctrine of lis mota is obscure, and has only been introduced since *The*

(a) See the reports of these ejectments, 1 New Cases, 620, 622, 2 Scott, 79, 80.

Berkeley Peerage case (4 Campb. 401).] There, the declaration, as to which the question arose, was a deposition as to the very point in controversy. Here, on the contrary, it was utterly unimportant at the time of the former contentions, that Erasmus Lloyd was the cousin of Thomas Lloyd. According to the opinion expressed by Lord Brougham in *Frampton v. The Attorney-General* (2 Russ. & M. 147), the question whether the declaration is made ante litem motam, must depend upon the circumstances of each particular case. [Alderson B. A declaration is often rejected, not because fraud is actually detected, but because it would [519] be dangerous to receive it.] In the absence of evidence to the contrary, the court will presume that this pedigree was drawn up in 1733. There is no evidence that William Lloyd was living at the death of Mr. Selby in 1772. All documents are *prima facie* presumed to have been made at the time they bear date. In *Doe dem. Johnson v. The Earl of Pembroke* (11 East, 504), it was assumed that the document produced had existed from the period at which it bore date. *Prima facie* credit is given to the date of an instrument. The document offered in evidence in this case, was clearly admissible, notwithstanding the tenant chose to admit one of the facts to prove which the evidence was produced. *Serle v. Lord Barrington* (2 Lord Raym. 1370, 2 Stra. 826, 8 Mod. 279), *Hunt v. Massey* (5 B. & Ad. 902, 3 Nev. & M. 109), *Smith v. Battens* (Moo. & Rob. 341), *Sinclair v. Baggaley* (4 M. & W. 312), *Anderson v. Weston* (6 N. C. 296, 8 Scott, 583), *Parr v. Crotchett* (Stark. Evid. 2d ed. 1085, 3d ed. 824).

The court, after taking time to consider this point, desired to hear the argument upon the other points also. Counsel were accordingly heard on Tuesday, the 29th of November 1842; but as the judgment proceeded almost entirely upon the fourth point, the arguments upon the others have been omitted.

Sir W. W. Follett, for the demandant, abandoned the first point. Upon the second he referred to *Tissen v. Clarke* (3 Wils. 419), *Hardman v. Clegg* (Holt, N. P. C. 657), *The Bishop of Meath v. The Marquess of Winchester* (3 N. C. 183, 3 Scott, 561, 4 Clarke & Finn. 445, 1 Alcock & Napier, 508), and *Roscoe on Real Actions*, p. 215. Upon the third, he cited Littleton, [520] s. 279, 396, Co. Litt. 333, *Shields v. Atkins* (3 Atk 560), *Doe dem. Burrell v. Perkins* (3 M. & S. 271), *Taylor dem. Atkyns v. Horde* (1 Barr. 110), *Doe dem. Souter v. Hull* (2 D. & R. 38), *Culley v. Doe dem. Taylerson* (11 Ad. & E. 1008), *Doe dem. Davis v. Davis* (1 C. & P. 130), and *Doe dem. Parker v. Gregory* (2 Ad. & E. 14).

Sir Thomas Wilde, while observing upon these authorities, was stopped by the court; and Sir W. W. Follett was heard in reply upon the third exception.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the court.

In this case, which comes before us a second time on a writ of error, four exceptions have been taken to the ruling of the Lord Chief Justice and the other judges of the court of Common Pleas.

The first was, that a decree of the court of Chancery in 1783, in a suit to establish the will under which the demandant's title arises,—by which decree the court directed that the estates were to be considered as belonging to William Lowndes Selby, the devisee, and that he should be let into possession, and have all the title deeds delivered to him,—was not admissible in evidence. It was admitted, not as proof of any of the facts therein stated, but only for the purpose of explaining in what character the devisee did afterwards take actual possession of the estate; and the court has already intimated its opinion that, in this point of view, there was no doubt of the admissibility of this document.

A second objection was, that a fine levied by the devisee in 1784 with proclamations, ought to have been [521] pleaded specially, and was not admissible on the issue joined on the mere right. Upon this question also the court have expressed an opinion—to which they adhere—that the fine is not simply a bar to a remedy for a right, as collateral warranty is, but has, by virtue of the statute 4 Hen. 7, c. 24, the effect of vesting a right in the party to it, after five years and a non-claim (a).

The third and fourth exceptions require more consideration, and particularly the fourth.

The third exception was, that the ruling of the Lord Chief Justice and judges of the Common Pleas was wrong on the question, whether the devisee had, at the time

(a) Vide *Doe dem. Cooper v. Finch*, 1 N. & M. 130.

of the fine levied, such an estate of freehold as would make it operate as a bar. It was contended that the devisee had not such an estate; that he had it not by right, if the heirship was proved, and that he had it not by wrong, for two reasons—first, because he did not make a wrongful entry, as he was in possession at first as receiver; and a wrongful entry as well as ouster, was necessary to give a freehold by wrong according to Litt. s. 279, and several cases which were cited—secondly, because he claimed under the same will that the demandant claimed under, and was therefore within the principle laid down in Litt. s. 396; and that the law would intend that his entry was for the benefit of the heir-at-law. The answer to the first of these arguments on the facts of the case as stated in the record is, that his possession as receiver, if it could at any time be considered as his own possession, and not that of the court of Chancery, had ceased, and that he entered after the decree in a new character, in his own right; and, to the second it may be answered, that the demandant and tenant do not claim under the same will: the demandant claims as heir-at-law dehors the will; [522] the tenant under the will (a). The law, therefore, does not imply that the devisee entered for the benefit of the heir; and, consequently, it becomes simply a question of fact, whether the devisee entered as being absolutely entitled to the estate, as the owner, or whether he intended really to take possession of, and hold the estate for the benefit of the heir, in case there should be one. On the latter supposition the fine would be no bar; in the former it would, even though he claimed the fee under the idea that he was entitled to it because there was no heir-at-law, not because he meant to oust him if there was. If he entered claiming the freehold, and exercised dominion over it as owner, it was a freehold by wrong, on the assumption that there was an heir-at-law existing who was entitled of right. The only point for our consideration upon this exception is, whether the question was correctly left to the jury or not; and we think it was.

Upon the fourth exception, after much doubt and full consideration, we come to the conclusion that part, if not all, of the document offered in evidence by the demandant was admissible. The document in question was intituled "The Genealogie of the Lloyds of Cwm Gloyne, county of Pembroke, shewing their descent from the princes of Wales, together with some collaterale branches of the same family." The pedigree was traced from the Lord of Rhys, prince of South Wales, who died 1233, to a William Lloyd of Treveggyn, living in 1733. It stated in one of the accounts of one of the collateral branches, the marriage of the sister of William Lloyd's grandfather to a Thomas Selby, from whom the demandant alleged that Thomas James Selby, the testator, was descended; and it also stated that Erasmus Lloyd was his cousin, and the marriage of the daughter of his great grandfather's brother with a person of the name of Ellis; and, as evidence of both these facts, it was material to the demandant's case. At the foot of it was a memorandum in these words:—"Collected from parish registers, wills, monumental inscriptions, family records and history. This account is now presented as correct, and as confirming of the tradition handed down from one generation to another to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, anno domini 1733, by his loving kinsman, &c. William Lloyd." The signature was proved to correspond with that to the will of William Lloyd, one of the ancestors of the demandant named in the count. On the back of the document was an indorsement in these words:—"A true account of my family and origin, Thomas Lloyd, Cwm Gloyne;" and it was proved by a living witness, that this document was found by him fifty years ago amongst the papers of the Cwm Gloyne family, in a drawer in the mansion house of the Cwm Gloyne estate, which had devolved upon him; and the witness proved the indorsement to be in the handwriting of Thomas Lloyd, of Cwm Gloyne.

The document was insisted upon by the counsel for the demandant as being altogether admissible. The court rejected it. It was then offered as admissible in part, viz. as evidence of the pedigree of the first collateral branch, and rejected; then, as evidence to prove who the grandfather of William Lloyd was, and rejected; then as evidence to shew who the father of William Lloyd was, but the counsel for the tenant admitting that fact, that portion of the document was also rejected. Then, it

(a) And this would appear to be so even in the case of a will made since the 1st of January 1838. For though the heir would now take as devisee, yet his title as heir would remain until removed by shewing that he was devisee.

was contended that the portion which stated who the paternal uncles and first cousins of William Lloyd were, was admissible: it was rejected. Then, the demandant's counsel tendered those parts which shewed [524] that William Lloyd's uncle John died a bachelor, and that his uncle George had certain children then living: these also were rejected. Then, lastly, he offered such part as shewed a marriage of Henry Lloyd's sister with Ellis, and the court rejected that also, holding no part to be legally admissible; and the question is, whether that decision was right. It appears to us that it was not.

It does not admit of any doubt that this pedigree, if it had been signed by William Lloyd with the date of 1733, and without any memorandum of his, and had borne the memorandum indorsed by Thomas, would have been altogether admissible, independently of the objection of its having been written post litem motam, which will hereafter be considered. The signature of William Lloyd, one of the family of the demandant, would have been equivalent to a declaration of the relationship of the persons therein mentioned, including the marriage of a Selby with a Lloyd, and would have been evidence to connect the family of the demandant with that of the tenant. See the judgment of Lord Brougham in *Monckton v. The Attorney-General*. And the signature of Thomas Lloyd, of Cwm Gloyne, would have amounted to a similar recognition by another member of the same family. But it is argued that the memorandum of William Lloyd places this pedigree upon a different footing, and renders it altogether inadmissible. If this were so, there would still be a question what the meaning of Thomas Lloyd's indorsement, coupled with the fact of its preservation by him, was. If the words "A true account of my family and origin" were written on the back of the document merely as denoting what its contents were—a sort of index to it—the indorsement would not amount to a recognition by Thomas of its correctness, and would not render it admissible, on the footing of its being equivalent to a declaration by Thomas. If the words intended to [525] convey that the writer had satisfied himself of the correctness of William's statement from independent sources of information, that is, from his own knowledge of the tradition prevailing in his own branch of the family, then the whole pedigree would have been admissible as a declaration by one of the family of Cwm Gloyne. There is some evidence of such a recognition to go to the jury for their consideration; and this would be a ground for a venire de novo: but, passing by that objection, and adverting to the memorandum of William only, the question is, whether that memorandum destroys the effect of his recognition, and renders it wholly inadmissible in evidence, as the Lord Chief Justice and the judges of the Common Pleas have decided.

The ground of that decision appears to have been, that the memorandum bore upon the face of it, a sort of certificate that the statement in the pedigree was merely secondary evidence of existing originals from which it was compiled, and that the absence of those originals was not accounted for; and that if any part of the pedigree was derived from legitimate sources, viz. personal knowledge or family tradition, it did not appear distinctly which was such part, and therefore the whole was inadmissible. We think this view of the case is not correct.

A pedigree, whether in the shape of a genealogical tree or map, or contained in a book or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be, because the simple act of recognition of the document and consequent acknowledgment of the relationship stated in it by a member of the family, is some evidence of that relationship from whatever sources his information may have been derived; because he was likely, from his [526] situation, both to inquire into the truth of such matters, and from his means of knowledge to ascertain it. The opinion of Lord Cottenham in *Slaney v. Wade* (1 Mylne & C. 355), as well as that of Lord Brougham in *Monckton v. The Attorney-General*, are in favour of this view of the case. The former noble and learned lord held that a copy of a mural inscription, marked and adopted by a deceased member of a family, was evidence; apparently not on the ground of its being good secondary evidence in that case, but generally, because it was adopted and described by him as the pedigree of his family; and Lord Brougham, in the latter case, held that a pedigree was evidence,—in part of which the testator referred to a will for his authority, in part, to what he had heard generally, in part, to what he had heard from members of the family; and his lordship observes that a declaration may refer to what a party

knows of his own knowledge, or, as is much more frequently the case, to what he has heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which tradition in a family can be proved, and the subject matter of that tradition can be perpetuated in testimony. The Vice-Chancellor of England seems to intimate a similar opinion in *Slaney v. Wade* (7 Sim. 611). Neither of the above-mentioned cases, however, is a decisive authority in favour of this position; because, in the first place, the document was clearly admissible as secondary evidence, the original being lost; in the latter, the parts of the pedigree which appear to have been copied from originals or introduced upon the credit of general rumour, were separable from the rest, and the rest of the document was admissible without doubt. But the dicta of both the noble and learned lords, and, in some degree, that of the [527] Vice-Chancellor, give great countenance to the opinion that the recognition of a member of a family of a statement of relationship, is evidence of the truth of that statement.

If this be a correct view of the law, the pedigree in question was admissible; because it was certainly acknowledged by W. Lloyd to be correct.

But the reason why a pedigree, when made or recognised by a member of a family, is admissible, may be, that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew or heard from other members who lived before his time. And, if so, it may well be contended that if the facts rebut that presumption, and shew that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also if there be some, but an uncertain and undefined, part derived from improper sources. But where the framer speaks of individuals whom he describes as living, we think the reasonable presumption is, that he knew them and spoke of his own personal knowledge, and not from reference to registers, wills, monumental inscriptions, and family records or history; and, consequently, to that extent the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons.

It was objected, however, on the part of the defendant in error, that supposing the pedigree, or some part of it, to be otherwise admissible, it was rendered inadmissible by having been written, or assented to, post litem motam. To this it was answered that the instrument was dated by William Lloyd in 1733, and that there could not be a *lis mota* before September 1772, when [528] the testator died; that an instrument must be presumed, *prima facie*, to have been written when it bears date—for which the case of *Anderson v. Weston* (6 New C. 296, 8 Scott, 583) and *Smith v. Battens* (1 M. & Rob. 341) were cited as authorities; at all events, that such was the rule with respect to instruments dated thirty years ago or upwards, the custody of which was accounted for. The latter argument appears to be well founded, and as this document falls within that description, we think it clear that the objection of *lis mota* does not apply to it, so far as it rests on the admission of William Lloyd.

It should seem also that the acknowledgment by Thomas Lloyd of Cwm Gloyne, may be most reasonably inferred to have been made before 1772; because the document purports to have been sent to him in the year 1733, and it is most likely that the indorsement would be made within a short time following.

It becomes therefore unnecessary to consider whether the mere existence of those facts on which a claim is grounded, constitutes a *lis mota* within the true meaning of that term, as was laid down by my brother Alderson in the case of *Walker v. The Countess of Beauchamp* (6 Carr. & P. 552), or whether there must not be, not merely facts which may lead to a dispute, but such a *lis mota* or suit, or controversy preparatory to a suit actually commenced or dispute arisen (in the language of Mr. Justice Lawrence in *The Berkeley Peerage case* (4 Campb. 401); and that upon the same question, or on the same pedigree, or subject matter, which is now in litigation. This is a question of considerable importance, which there is no occasion in this case to discuss.

We are therefore of opinion, that the pedigree was admissible, at all events, for the limited purpose of shew-[529]-ing the connection of the persons therein described to be living. As it has been rejected altogether, there must be a *venire de novo*.

Venire de novo.

Between the date of the verdict and the argument on the bill of exceptions, the tenant died.

In Hilary vacation 1843, the demandant, acting upon the old practice of continuing actions by journeys accounts, sued out a fresh writ against the heir. In the following Easter term, an application was made to Lord Lyndhurst C. to set aside the writ so issued, on the ground that by the 3 & 4 W. 4, c. 27, s. 36, writs of right are wholly abolished; that in this case the suit abated by the death of the tenant; and that the proceedings by journeys accounts was inapplicable to such a case, viz., the death of a sole defendant or tenant.

The point was argued, at great length, in the court of Chancery, on the 29th of April and 6th of May, by Sir Thomas Wilde Serjt., Sir John Bayley, and Gray, for the tenant; and by Sir W. W. Follett, E. V. Williams and Willes, for the demandant.

For the tenant, the following authorities were cited. Statutes 32 Hen. 8, c. 2, ss. 7, 10; 21 Jac. 1, c. 16; Year Books, M. 10 E. 3, fo. 16, pl. 5 (*Dionise la Rivere v. Prior of St. John of Jerusalem*); M. 43 E. 3, fo. 16, pl. 17; M. 14 H. 4, fo. 23, pl. 28; M. 9 H. 6, fo. 30, pl. 1; Bro. Abr., title Journeys Accounts, pl. 12; Viner's Abr., title Journeys Accounts; Comyns's Digest, title Abatement (P); Rastall's Entries, 417 a.; Brooke's Reading on the Statutes of Limitations, pp. 154, 155; F. N. B. 32 C.; *Spencer's case* (5 Co. Rep. 6, 6 Co. Rep. 9 b.); *Elstob v. Thorowgood* (1 Lord Raym. 283); *Wilcocks v. Huggins* (2 Str. 907, Fitzgibb. 170, 289); *Foot, Dem. Sheriff*, [530] *Ten.* (2 New Cases, 528, 2 Scott, 806, 813); *Foot v. Collins* (1 Mylne & Cr. 250); *Leigh, Dem. Leigh, Ten.* (2 Scott, 666, 668, 2 N. Cases, 464), *Storr v. Bowles* (4 B. & Ad. 112, 1 Dowl. P. C. 516); *Finnie v. Montagu* (5 B. & Ad. 877, 2 N. & M. 804).

For the demandant, the authorities relied on were, Statutes Westm. 2 (13 Edw. 1), stat. 1, c. 5; 1 R. 2, c. 9; 32 H. 8, c. 2, s. 5; Year Books, M. 10 E. 3, fo. 16, pl. 5; M. 7 H. 6, fo. 16, pl. 25; Bro. Abr. Journeys Accounts, pl. 4, 8; Statham's Abr. Journeys Accounts; Viner's Abr. Journeys Accounts; Com. Dig. Abatement (P); Rast. Entr. 107 b.; F. N. B. 32 C.; Dallison, p. 3; *Berrington's case* (Litt. Rep. 164); *Hayward v. Kinsey* (12 Mod. 229, 568); note to *Gainsford v. Griffith* (1 Wms. Saund. 59); *Wilcocks v. Huggins* (2 Str. 907, Fitzgibb. 170, 289); *Kinnear v. Tarrant* (5 East, 628); *Till-Adam v. The Inhabitants of Bristol* (2 Ad. & E. 389, 4 N. & M. 144).

The Lord Chancellor, having taken time to consider, on the last day of Michaelmas term, delivered his judgment as follows:—

LORD LYNDHURST C. This was a motion to supersede a writ of right, on the ground of its having issued after the 31st of December 1834, the time limited by the 3 & 4 W. 4, c. 27, s. 36. By that statute it is enacted, that no writ of right, and no other action real or mixed, except a writ of right of dower, &c., shall be brought after the 31st of December 1834.

In opposition to this motion it was contended, that the first writ having abated by the death of the tenant, and this writ being sued by journeys accounts against [531] the heir, it was a continuance of the former writ, and did not come within the prohibition of the statute.

Where a writ is sued by journeys accounts, it has the effect, at common law, of giving the plaintiff, in many cases, the benefit of the former suit; as where one of two joint tenants dies, by which the writ abates, the plaintiff is allowed, within a reasonable time, to sue out a new writ, and the defendant will not be allowed to take any advantage but such as he had at the time of the first writ. *Walthall v. Aldrich* (Cro. Jac. 588). It is sometimes called a continuance; as by Treby C. J. in *Kinsey v. Heyward* (1 Ld. Raym. 432), by Chief Baron Comyns in his Digest, and by other authorities; but it is not, I think, strictly a continuance; for it issues where a former suit had abated. Lord Coke appears to have been of this opinion; for in speaking of it in *Spencer's case* (5 Co. Rep. 16), he calls it quodammodo a continuance. It is, in truth, an indulgence allowed by the common law in certain cases; and the time within which it is to be brought, is regulated by the discretion of the judges. It is a new suit, to which in certain cases, and for certain purposes, the benefit of the abated suit is given, and, in some instances, even the costs of the abated suit. The proceedings on the former suit are entered on the roll, and which are followed by the proceedings upon the second writ. The common law, as I have observed, gives this indulgence in certain cases of abatement; but the question is, whether this indulgence can be allowed where the legislature has said "no writ of right," which is the writ in this case, "shall be sued out after a specified day." The words of the act are express and peremptory, "no writ of right, patent, &c., shall be brought after the 31st of December 1834." The enactment extends to every writ of right, with the exceptions

mentioned in [532] the statute, and would, in its terms, comprehend writs sued, as well as by journeys accounts as otherwise. If we refer to the construction put on former statutes of limitation, it will be found, not only to afford no ground for the exception contended for in this case, but to lead to an opposite conclusion.

First, then, as to the act of 32 H. 8, c. 2; it enacts, that no person shall sue or maintain any writ of right for any lands, &c., of the possession of his ancestor, and allege any further seisin of his ancestor, but only a seisin within sixty years next before the teste of the writ. This is followed by a clause by which it is provided, that every person who, at the time of passing the act, had any of the said writs depending, or should thereafter bring any of the said actions at any time before the feast of the Ascension in the year 1546, should allege the seisin, &c., as he might have done before the making of that statute. There is a further proviso, that if any person, before the feast of the Ascension in the year 1546, should sue any of the said writs, &c., and the same should become abated by the death of any of the said parties, then the same persons being then alive, and if not, then the next heir of such persons, might pursue his action in the said matter within one year next after such action or suit abated, and should enjoy all such advantage as he might have had in the former action or suit.

The act provides only for the case of abatement by death; and it has been considered, under this statute, that where the suit became abated for any other cause, the plaintiff or defendant was not entitled, after the expiration of the time limited, to have a new writ by journeys accounts.—Brooke's Reading on the Statute of Limitations, pp. 154, 155. Brooke mentions, as an instance, a præcipe brought upon the antient limitation before the Ascension of 1546; the tenant tendered his law of non-summons, and performed that after the [533] Ascension, &c., by which the writ abated, and the plaintiff brought a new writ within the year by journeys accounts, he shall not have advantage to declare upon the antient limitation, because that has expired, and the statute does not warrant any abatement but by death. Again, a man brought a præcipe upon the antient limitation before the Ascension. The writ is abated by false Latin, after the Ascension, &c. The demandant prayed to have another writ, and taketh it freshly, by journeys accounts, within the year, &c. The tenant pleads non-tenure, the demandant shall not have advantage to aver him tenant the day of the first writ, by journeys accounts, &c., because the first writ did not abate by death; and the averment proves he took the writ upon the antient title, when the antient limitation is determined, and therefore is, without the case of the statute.

If the writ by journeys accounts was merely a continuance of the old writ, and had the effect contended for, the plaintiff would, in those cases, have been protected from the general enactment of the statute. The interpretation put on this act, applies directly to the case now before the court.

In the modern statute of limitations, 21 Jac. 1, c. 16, s. 3, it is provided, that, where the judgment for the plaintiff is reversed by writ of error, and in certain other cases, the plaintiff may bring the new action within one year after the reversal, &c. It has been determined, under this statute, that if a plaintiff, having commenced an action within the time limited for that purpose, shall die before judgment, his executors may bring a fresh action within a year from the death of the testator. The case of death is not provided for by the act, which is confined to error, arrest of judgment, and outlawry; but this has been decided on, what is called, the equity of the statute, from analogy to the cases that [534] are expressly provided for, and falling within the same principle, which is not a case of journeys accounts (1 Lutw. 259), for a writ by journeys accounts cannot be sued after the death of a sole plaintiff, and the doctrine of equitable extension cannot be applied to the present act, for there is nothing on which to found it.

Another objection was made to the writ, that it could not be brought on the death of a sole defendant. There is some conflict between the authorities on this point. It is said in *Spencer's case* that it lies not, but between those that were parties to the first writ; as where one of the plaintiffs, or one of the defendants dies, and as it clearly will not lie on the death of a sole plaintiff, it is not very easy to understand why a different rule should be applied to the case of a sole defendant. In the case of *dower*—Bro. Abr. Journeys Accounts, pl. 13, it was held, that on the death of the tenant the plaintiff could not have the benefit of a writ by journeys accounts. And

in *Kinsey v. Hayward* (ib. 260), it was stated by Girdler, of counsel for the defendant, that the writ brought by journeys' accounts lies only between the parties to the first writ, or some of them, as if one of the plaintiffs, or one of the defendants, dies; but in no case where there is only one plaintiff or one defendant, one or the other dies; and this appears to have been admitted by the court. Chief Baron Comyns, however, seems to be of opinion, that the writ will lie in such case, and, after referring to the passage in Lutwyche, he cites, among other authorities, a case in Leonard, p. 22 (*Dayrell and Thinn's case*, 1 Leon. 22), in which it was brought, apparently without objection, against the heir of the original defendant. I should not, therefore, feel myself justified in ordering the writ to be superseded on this ground, and thereby putting an end to the suit by so summary a mode of proceeding.

[535] With respect to the other and the principal objection, I strongly incline to think the writ cannot be sustained; and if it were necessary to decide the question on this motion, I should so determine. But, as the plaintiff would, in that case, be without remedy, and could not bring the subject under the review of any other tribunal, I think I ought not, having regard to the nature of the question, to interfere in this stage of the proceedings, but leave the defendant to raise the objection on the record in the court in which the suit is now pending.

It was suggested by Sir Thomas Wilde at the time, that that could not be done: but he stated no ground for that opinion; and I see no reason why it cannot be raised upon the record, because it appears to have been raised in the court below in almost all the cases which are reported in Brooke's Abridgment and in other cases, and in almost all the questions on journeys' accounts. If Sir Thomas Wilde could satisfy me it cannot be so raised in that case, I should feel myself bound to decide upon this motion; but I think I ought not to decide it, considering the nature of the question and the obscurity in which these subjects are involved, which have so seldom come before the court in modern times. I think I ought not to decide it if it can be put upon the record, so as to be subject to the review of the ordinary tribunals.

After some remarks by counsel, his lordship concluded by saying: I have felt it my duty, considering the manner in which it was argued, to express my opinion on the subject. I am satisfied this is not properly a continuance;—that was the argument—I am satisfied it is an indulgence permitted by the common law in the nature of a continuance; but not so much a continuance as to make the one suit a continuance of the other, or as to have reference back to the original writ as forming one suit.

Order refused.

[536] RICHARD HENRY TOLSON, *Plaintiff*; WILLIAM KAYE, *Defendant*,
IN ERROR. 1843.

[S. C. 7 Scott, N. R. 222.]

In formedon in the descender, pleas, that the title and cause of action did not first descend or fall by force of the gift, within twenty years next before the suing out of the original writ, were held good, although some of such pleas did not state that the donee, or any of the issues, in tail, had ever been out of possession.—To a plea that the title did not first descend or fall by force of the gift, within twenty years next before the suing out of the original writ, the demandant replied that the title first descended and fell to him the demandant, within twenty years. This replication was held bad on general demurrer in the Common Pleas, and the Exchequer Chamber declined to reverse the judgment (a).—A writ of error, where judgment of *eat inde sine die* had been given for the defendant below, upon demurrers to replications to pleas which went to the whole cause of action, was quashed in the Exchequer Chamber, on the ground that, inasmuch as certain issues of fact raised by other pleas were undisposed of, the judgment was to be considered as incomplete, and the writ of error as prematurely brought.

This was a writ of error, brought upon a judgment for the defendant in an action of formedon in the descender.

(a) See distinction between fee-simple and fee-tail, in respect of property in trees, in *Liford's case*, 11 Co. Rep. 46 b.

The count, after reciting the writ, whereby the now plaintiff in error demanded five messuages, &c., in Warth-upon-Derne, in the county of York, which Richard Tolson, Esquire, of Bridekirke, and Henry Tolson, eldest son of the said Richard Tolson, gave to the said Henry Tolson, and to the heirs male of his body begotten on the body of Frances, his wife, and which after the death of the said Henry Tolson, and of Henry Tolson, son and heir of the said Henry on the body of Frances, his wife, begotten, and of Henry Tolson, son and heir of the said Henry, son of Henry and Frances, and of William Tolson, brother of the said Henry and of Richard Tolson, son and heir of the said William, to the said Richard Henry Tolson, son and heir to the said Richard, according to the form of the gift aforesaid, ought to descend; stated that the first-named Richard Tolson and Henry Tolson were seised of the tenements aforesaid, with the appurtenances, in their demesne, as of fee and right, in the time of peace, in the time of the late Lord Charles the Second, King [537] of England, by taking the esplees thereof to the value of 10l.; and being so seised thereof, the first named Richard Tolson and Henry Tolson on the 18th of June in the twenty-fourth year of the reign of the said late King, at, &c., enfeoffed John Mollineux, Daniel Fleming, Richard Eaglesfield, Wilfred Lawson, Myles Penington, and Andrew Huddleston, of (amongst other things) the tenements aforesaid, with the appurtenances, to hold to them and their heirs, to the use of the first-named Richard Tolson and Anne, his then wife, for and during the term of their natural lives, and the life of the longest liver of them, remainder to the use of the first-named Henry Tolson, and the heirs male of his body begotten, or to be begotten, upon the body of Frances, his then wife, with divers remainders over, with the ultimate remainder to the use of the right heirs of the first-named Richard Tolson; by virtue of which gift, and by force of the statute for transferring uses into possession, the first-named Richard Tolson and Anne, his wife, became and were seised of the said tenements, with the appurtenances, in their demesne as of freehold, to wit, for the term of their natural lives, and the life of the longest liver of them, in the time of peace, in the time of the said late King, by taking the esplees thereof to the value of 10l.; and being so seised thereof, the first-named Richard Tolson afterwards, to wit, on the 2d of July 1689, at, &c., died, leaving the said Anne, his wife, him surviving; and the said Anne afterwards, to wit, on the 27th of March, 1714, at, &c. died, leaving the first-named Henry Tolson her surviving, who thereupon, by virtue of the said gift, and by force of the statute aforesaid, became, and was, seised of the said tenements, with the appurtenances, in his demesne, as of fee-tail, to wit, to him and the heirs male of his body, upon the body of the said Frances, his [538] wife, begotten, in the time of peace, in the time of the Lady Anne, late Queen of England, by taking the esplees thereof to the value of 10l.; and the first-named Henry Tolson, afterwards, to wit, on the 27th of September 1724, at, &c. died, leaving Henry Tolson, his son and heir male of his body on the body of the said Frances, his wife, begotten, him surviving; whereupon the right to the said tenements, with the appurtenances, descended from the said first-named Henry Tolson to the said Henry Tolson, his son, as tenant in tail male, according to the form of the gift aforesaid; and the last named Henry Tolson afterwards, to wit, on the 10th of September 1729, at, &c., died, leaving Henry Tolson, his eldest son, and heir of his body lawfully begotten, and William Tolson, the second son of his body lawfully begotten, him surviving; whereupon the right to the said tenements, with the appurtenances, descended to the last-named Henry Tolson as tenant in tail male, according to the form of the gift aforesaid; and the last-named Henry Tolson afterwards, to wit, on the 2d of February 1763, at, &c., died without issue male of his body lawfully begotten, leaving Richard Tolson son and heir of the said William Tolson lawfully begotten, him surviving (the said William Tolson having died in the lifetime of the last-mentioned Henry Tolson, to wit, on the 30th of September 1748, at, &c.); whereupon the said Richard Tolson, as heir-at-law of the said Henry Tolson, his grandfather, after the death of the said Henry Tolson, his uncle, the right to the said tenements with the appurtenances, descended as tenants in tail male, according to the form of the gift aforesaid; and the said last mentioned Richard Tolson afterwards, to wit, on the 23rd of June 1815, at, &c., died, leaving the said Richard Henry Tolson, the now demandant, his only son and heir of his body lawfully begotten, him surviving: [539] whereupon the right to the said tenements with the appurtenances, descended to, and now remaineth, and ought to remain, in the said Richard Henry Tolson, the demandant, according to the form of the gift aforesaid, for that the said

first-named Henry Tolson died, leaving the said Henry Tolson, the son and heir male of his body on the body of the said Frances, his wife, begotten, him surviving; and for that the last-named Henry Tolson died, leaving the said Henry Tolson, the son and heir of his body lawfully begotten, him surviving; and for that the last-named Henry Tolson died without issue (male) of his body lawfully begotten; and for that the said William Tolson died in the lifetime of the said Henry Tolson, leaving the said Richard Tolson, the son and heir of his body lawfully begotten; and for that the last-named Richard Tolson died, leaving the said Richard Henry Tolson, the now demandant, the son and heir of his body lawfully begotten, him surviving, he brought suit, &c.

The defendant pleaded thirty-two pleas, on the first twenty-four of which, the demandant joined issue.

The twenty-fifth plea alleged that the supposed title and cause of action (*vide infra*, 544, n.), if any, to and for the tenements aforesaid, with the appurtenances above demanded, did not first descend or fall, by force of the supposed gift aforesaid, within twenty years next before the suing out of the said original writ of the said Richard Henry Tolson, the demandant, in this behalf. Verification.

The twenty-sixth plea alleged that the supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenances above demanded, did first descend more than twenty years before the suing out of the said original writ of the demandant, in this behalf, to wit, at, &c. Verification.

[540] The twenty-seventh plea stated that the first-named Henry Tolson more than twenty years before the suing out of the original writ of the said Richard Henry Tolson, the demandant, against the said William Kaye therein, to wit, on the 27th of September 1724, died, to wit, at, &c.; upon whose decease the supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenances above demanded, by force of the supposed gift in the said count mentioned, immediately devolved upon and fell to the said Henry Tolson, his son, in manner and form as the said Richard Henry Tolson, the demandant, had above, in his said count in that behalf, alleged, to wit, at, &c.; that the last mentioned Henry Tolson did not, upon or after the death of the first-named Henry Tolson, ever enter into the tenements aforesaid, with the appurtenances above demanded by force of the supposed gift aforesaid, upon or after the death of the first-named Henry Tolson; that the said supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenances above demanded, did not first fall to the said Henry Tolson, the son of the first-named Henry Tolson, by force of the supposed gift aforesaid, upon or after the death of the first-named Henry Tolson, within twenty years next before the suing out of the said original writ of the said Richard Henry Tolson, the demandant, in this behalf. Verification.

The twenty-eighth plea alleged that the said Henry Tolson, the son of the first-named Henry Tolson, more than twenty years before the suing out of the original writ of the said Richard Henry Tolson, the demandant, against the said William Kaye therein, to wit, on the 10th of September 1729, died, to wit, at, &c., upon whose decease the supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenances above demanded, by force of the supposed gift [541] in the said count mentioned, immediately devolved upon and fell to Henry Tolson, his son, that is to say, Henry Tolson, the son of the said Henry Tolson, the son of the said first-named Henry Tolson, to wit, at, &c., aforesaid; that the said Henry Tolson, the son of the said Henry Tolson, the son of the first-named Henry Tolson, did not, upon or after the death of the said Henry Tolson, the son of the first-named Henry Tolson, ever enter into the tenements aforesaid with the appurtenances, above demanded, by force of the supposed gift aforesaid, upon or after the death of the said Henry Tolson, the son of the said first-named Henry Tolson; that the said supposed title and cause of action, if any, to and for the tenements aforesaid with the appurtenances, above demanded, did not first fall to the said Henry Tolson, the son of the said Henry Tolson, the son of the said first-named Henry Tolson, by force of the supposed gift aforesaid, upon or after the death of the said Henry Tolson, within twenty years next before the suing out of the said original writ of the said Richard Henry Tolson, the demandant, in this behalf. Verification.

Twenty-ninth plea—That the said Henry Tolson, the son of the said Henry Tolson, the son of the said first-named Henry Tolson, more than twenty years before

the suing out of the original writ of the said Richard Henry Tolson, the demandant, against the said William Kaye herein, to wit, on the 2d of February, 1763, died, without any heir male of his body lawfully issuing, to wit, at, &c. ; and that immediately thereupon the supposed title and cause of action, if any, to and for the tenements aforesaid with the appurtenances, above demanded, by force of the supposed gift in the said count mentioned, devolved upon, and fell to, Richard Tolson, the eldest son and heir of the body of William Tolson (then deceased), the second son of Henry Tolson, the son of the first-named Henry Tolson, as heir male of his [542] the said Richard Tolson's grandfather, after the death of his said uncle the said Henry Tolson, the son of the said Henry Tolson, the son of the first-named Henry Tolson, to wit, at, &c. : that the said Richard Tolson, the son and heir of the said William Tolson, the second son of Henry Tolson, the son of the first-named Henry Tolson, did not upon or after the death of the said Henry Tolson, the son of the said Henry Tolson, the son of the first-named Henry Tolson, ever enter into the tenements aforesaid with the appurtenances, above demanded, by force of the supposed gift aforesaid, upon or after the death of the said Henry Tolson, the son of the said Henry Tolson, the son of the said first-named Henry Tolson : and that the said supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenances, above demanded, did not first fall to the said Richard Tolson, the son and heir of the said William Tolson, the second son of the said Henry Tolson, the son of the first-named Henry Tolson, by force of the supposed gift aforesaid, upon or after the death of the said Henry Tolson, the son of the first-named Henry Tolson, within twenty years next before the suing out the said original writ of the said Richard Henry Tolson, the demandant, in this behalf. Verification, &c.

Thirtieth plea—That, though true it was that the right to the said tenements, with the appurtenances, did descend from the first-named Henry Tolson to the said Henry Tolson the son, as tenant in tail-male, in manner and form as the said Richard Henry Tolson, the demandant, had above in his said count in that behalf alleged, nevertheless for plea in that behalf the said William Kaye said that the said last-named Henry Tolson did not become, nor was he, seised of the said tenements, with the appurtenances, in his demesne as of fee-tail, by taking the esplees thereof, within twenty years next after his right to the same first descended. Verification, &c.

[543] Thirty-first plea—that, though true it was that the right to the said tenements, with the appurtenances, did descend from the last-named Henry Tolson to Henry Tolson, his son, as tenant in tail-male, in manner and form as the said Richard Henry Tolson, the demandant, had above in his said count in that behalf alleged, nevertheless for plea in that behalf the said William Kaye said that the said last-named Henry Tolson did not become nor was seised of the said tenements, with the appurtenances, in his demesne as of fee-tail, by taking the esplees thereof, within twenty years next after his said right to the same first descended. Verification, &c.

Thirty-second plea—that, though true it was that the right to the said tenements, with the appurtenances, did descend to the said Richard Tolson, as heir male of the said Henry Tolson, his grandfather, after the death of the said Henry Tolson, his uncle, as tenant in tail-male, modo et formâ, for plea, nevertheless, the said William Kaye said that the last-named Richard Tolson did not become, nor was he seised of the same in his demesne as of fee-tail, by taking the esplees thereof, within twenty years next after his said right to the same first descended. Verification, &c.

To the twenty-fifth plea—protesting that the same, and the matters therein contained, were insufficient in law, and that he was not under any necessity, nor was he bound by the law of the land, to answer the same—the demandant replied that on the 1st of January 1815, to wit, at, &c., the said Richard Tolson, father of the said Richard Henry Tolson, the demandant, died, leaving the said Richard Henry Tolson, the now demandant, his only son, and heir of his body lawfully begotten, him surviving ; whereupon the right to the said tenements with the appurtenances, above demanded, did first descend and fall to him the said Richard Henry by force of the said gift ; and that the said right did so first descend [544] and fall to him as aforesaid within the space of twenty years next before the suing out of the said original writ of him the said Richard Henry in that behalf ; and this he was ready to verify, wherefore he prayed judgment and seisin of the aforesaid tenements, with the appurtenances, to be adjudged to him, &c.

To the twenty-sixth plea, protesting, &c., the demandant replied that, on the 1st

of January 1815, to wit, at, &c. aforesaid, the said Richard Tolson, father of the said Richard Henry Tolson, the demandant, died, leaving the said Richard Henry Tolson, the demandant, his only son, and heir of his body lawfully begotten, him surviving; whereupon the right to the said tenements with the appurtenances, above demanded, did first descend to the said Richard Henry; and that the said right did so first descend to him within the space of twenty years next before the suing out of the said original writ of him the said Richard Henry in this behalf. Verification, and prayer of judgment and seisin, &c.

To the twenty-seventh plea, protesting, &c., the demandant replied, that, after the first-named Henry Tolson died, as in the said plea mentioned, the right to the said tenements aforesaid with the appurtenances, descended and came to the said Richard Henry, the demandant, in manner and form as the said Richard Henry had above in his said count in that behalf alleged; and that, after the death of the first-named Henry Tolson, the right, title, and cause of action (a) to and for the said tenements with the appurtenances, above demanded, did first fall to him the said Richard Henry, the demandant, by force of the said gift, within the space of twenty years before the suing out of the original writ of [545] him the said Richard Henry in this behalf. Verification, and prayer of judgment and seisin, &c.

To the twenty-eighth plea, protesting, &c., the demandant replied, that, after the death of the said Henry Tolson, the son of the first-named Henry Tolson, the right to the said tenements, with the appurtenances, descended and came to the said Richard Henry the demandant, by virtue of the said gift, in manner and form as the said Richard Henry had above, in his said count, in that behalf alleged; and that, after the death of the said Henry Tolson, the son of the first-named Henry Tolson, the right, title, and cause of action (vide infra, 554, 557, 558) to and for the said tenements, with the appurtenances, above demanded, did first fall to him the said Richard Henry, the demandant, by force of the said gift, within the space of twenty years next before the suing out of the said original writ of him the said Richard Henry Tolson, the demandant, in this behalf. Verification, and prayer of judgment and seisin, &c.

To the twenty-ninth plea, protesting, &c., the demandant replied, that, after the said Henry Tolson, the son of the said Henry Tolson, the son of the first-named Henry Tolson, died, as in that plea mentioned, the right to the said tenements with the appurtenances, descended and came to the said Richard Henry, the demandant, in manner and form as the said Richard Henry, had above in his said count, in that behalf alleged; and that, after the death of the said Henry Tolson, the son of the said Henry Tolson, the son of the first-named Henry Tolson, the said right, title, and cause of action to and for the said tenements with the appurtenances, above demanded, did first fall to him the said Richard Henry, the demandant, by force of the said gift, within twenty years next before the suing out of the original writ of him [546] the said Richard Henry in this behalf. Verification, and prayer of judgment and seisin, &c.

To the thirtieth plea, protesting, &c., the demandant replied that the right to the said tenements with the appurtenances, above demanded, descended and came from the first-named Henry Tolson to the said Henry Tolson, his son, and from the said Henry Tolson, the son, to the said Richard Henry, the demandant, in manner and form as he the said Richard Henry had above, in his said count, in that behalf alleged; and that the said right did so first descend and come to him the said Richard Henry, the demandant, within the space of twenty years next before the suing out of the original writ of him the said Richard Henry in this behalf. Verification, and prayer of judgment and seisin, &c.

To the thirty-first plea, protesting, &c., the demandant replied that the right to the said tenements, with the appurtenances, above demanded, did descend and come from the said Henry Tolson in that plea mentioned, to the said Henry Tolson, his son, and from him to the said Richard Henry Tolson, in manner and form as the said Richard Henry had above, in his said count, in that behalf alleged; and that the said right do so first descend and come to him the said Richard Henry within the space

(a) There would be no cause of action until, by some act of forfeiture, the seisin per formam doni had been disturbed, and the right of entry turned into a right of action.

of twenty years next before the suing out of the original writ of him the said Richard Henry in this behalf. Verification, and prayer of judgment and seisin, &c.

To the thirty-second plea, protesting, &c., the demandant replied that the right to the said tenements, with the appurtenances, did descend from the said Henry Tolson, grandfather of the said Richard Tolson, to him the said Richard, as in that plea was mentioned, and from the said Richard to the said Richard Henry, in manner and form as the said Richard Henry had above, in his said count, in that behalf alleged; and that the [547] said right did so first descend and come to him the said Richard Henry within the space of twenty years next before the suing out of the said original writ of him the said Richard Henry in that behalf. Verification, and prayer of judgment and seisin, &c.

The defendant demurred generally to the replications to the twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second pleas; and the demandant joined in demurrer.

After argument, the court of Common Pleas, in Hilary term 1822, gave judgment upon the above demurrers for the defendant—holding that the twenty years within which a formedon in the descender must be brought, under the statute 21 Jac. 1, c. 16, s. 1, begin to run when the title descends to the first heir in tail; and that there is no distinction between the heir of a tenant in fee taking by descent and the heir of a tenant in tail (3 Brod. & B. 217, 6 J. B. Moore, 542).

Upon error brought in the Exchequer Chamber on this judgment, errors were assigned as follows:

“Afterwards, that is to say, on the 26th day of May, 1842, before the Justices of our Lady the Queen assigned to hold pleas in the court of the said Lady the Queen before the Queen herself, and the Barons of the Exchequer of the said Lady the Queen, of the degree of the coif (*b*), in the Exchequer Chamber, at Westminster, comes the said Richard Henry, by Edward Gatty, his attorney, and says that in the record and proceedings aforesaid, and in giving judgment aforesaid, there is manifest error, in this,—that, in and by the said judgment, it is considered by the Court of the said late King [548] George the Fourth, of the Bench, at Westminster, that the pleas of the said Richard Henry, by him pleaded by way of reply to the pleas of the said William by him twenty-fifthly, twenty-sixthly, twenty-seventhly, twenty-eighthly, twenty-ninthly, thirtiethly, thirty-firstly, and thirty-secondly pleaded in bar, were not sufficient in law; whereas it ought to have been considered by the said court that the said several pleas of the said Richard Henry were, and that each of them was, sufficient in law. There is also error in this, to wit, in and by the said judgment, it is considered by the said court that the said Richard Henry take nothing by his writ, but that he be in mercy; whereas, by the law of the land, it ought to have been considered by the said court, that, notwithstanding the matters in the said twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, and thirty-second pleas alleged, the plaintiff ought to recover against the said William the tenements aforesaid, with the appurtenances, demanded by the said Richard Henry against the said William: There is also error in this, to wit, that, in and by the said judgment, it is considered by the said court that the said Richard Henry take nothing by his said writ, but that he be in mercy; whereas, by the law of the land, judgment ought not to have been rendered by the said court until after the trial of the said issues in fact joined between the parties upon the said record (vide post, 588, 589, 590): And the said Richard Henry prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings, may be reversed, annulled, and altogether holden for nought, and that he, the said Richard Henry, may be restored to all things which he has lost on occasion of the said judgment, &c.” Joinder in error.

The case was argued in the Exchequer Chamber on the 30th of November 1842, before Lord Denman, C. J. [549] Lord Abinger C. B., Parke, B., Alderson B., Williams J. and Rolfe B.

Manning Serjt. (with whom was Scott) for the plaintiff in error. The judgment pronounced herein by the court below (3 B. & B. 217, 6 J. B. Moore, 542) proceeded

(*b*) Barons of the Exchequer cannot take assises, and therefore cannot try a cause at nisi prius, unless they be of the degree of the coif. But the 11 G. 4 & 1 W. 4, c. 70, s. 8, does not, (like the 27 Eliz. c. 8), require this qualification for Barons of the Exchequer sitting in the Exchequer Chamber in error.

mainly upon the authority of *Doe dem. George v. Jesson* (6 East, 80), and *Cotterell v. Dutton* (4 Taunt. 826); neither of which cases will, upon examination, be found to apply to the question now to be determined. Before, however, discussing the grounds of the judgment in the court below, it may be more convenient to advert to the statutes and the authorities upon which reliance is placed to shew that that judgment cannot be supported. The statute de donis, 13 Edw. 1, s. 1, c. 1, runs thus—"First, concerning lands that many times are given upon condition, that is to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that, if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir: in case also where one giveth lands in frank-marriage, which gift hath a condition annexed, though it be not expressed in the deed of the gift, which is this, that, if the husband and wife die without heir of their bodies begotten, the land, so given, shall revert to the giver or his heir: in case also where one giveth land to another and the heirs of his body issuing; it seemed very hard, and yet seemeth, to the givers and their heirs, that their will, being expressed in the gift, was not heretofore, nor yet is, observed: In all the cases aforesaid, after issue begotten and born between them (to whom the lands were given under such condition) heretofore such feoffees had power to aliene the land so given, and to disinherit their [550] issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift: And, further, when the issue of such feoffee is failing (deficiente exitu), the land so given ought to return to the giver, or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died: yet by the deed and feoffment of them (to whom the land was so given upon condition) the donors have heretofore been barred of their reversion of the same tenements, which was directly repugnant to the form of the gift: Wherefore (s. 2) our lord the King, perceiving how necessary and expedient it should be, to provide remedy in the aforesaid cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs, if issue fail (in that there is no issue at all), or if any issue be, and fail by death, or heir of the body of such issue failing." By the terms of this enactment the prohibition is imposed upon the donees, not upon the issue or the heirs of donees. But, upon the construction of this statute, it has always been held that the prohibition extends to the issue in tail of the donee; which can only be by holding them to be comprehended under the term "donees." It is true that the issue in tail are called heirs of the donee; but that is not a strictly correct expression; they are not heirs of the donee; they are the issue of the donee specially designated to take by the gift. It frequently happens that the issue in tail is not heir, but takes because he is designated: and that is so clearly the case, that, if land be given to A. and the heirs of his body, and A. dies leaving B. his son and heir, and B. dies leaving a son [551] and daughter by one venter, and a second son by another venter; if the eldest son enter and have actual seisin of the land, and die, the younger son shall take, and not the daughter of the whole blood. There is no *possessio fratris*, because the younger son claims, not as heir of the party last seised, but as heir in tail of A., the original donee—or, to speak more correctly, as issue in tail of A., the original donee, designated to take by the form of the gift. This is distinctly so laid down in Cruise's Digest, 3d edit. vol. iii. p. 439, "Descent by Statute and Custom," tit. 29, c. 5, s. 5:—"The maxim that *seisina facit stipitem* does not take place in the descent of estates-tail; it being only necessary, in deriving a title to an estate of this kind by descent, to deduce the pedigree from the first purchaser, and to shew that the claimant is heir to him; for, the issue in tail claim *per formam doni*, that is, they are as much within the view and intention of the donor, and as personally and precisely described in the gift, as any of their ancestors." In sect. 6 it is said: "The exclusion of the half blood does not take place in the descent of estates-tail; because the descent from the first purchaser, or original donee of the estate, must be strictly proved; and, when the lineage is thus made out, there is no need of this auxiliary evidence. Lord Coke says (*Co Litt.* 15 b.; *Ratcliff's case*, 3 Co. Rep. 41 b.) the issue in tail is ever of the whole blood to the donee. And in a modern case (*Doe dem. Gregory v. Whichelo*, 8 T. R. 211) Lord Kenyon observed, that, in the case of estates-tail, the half-blood, coming within the description

of the entail, may inherit as effectually as the whole [blood]: there the rule of *possessio fratris* does not apply." Authorities are by Mr. Cruise cited in the margin for all these positions except the last, that the rule of *possessio fratris* does not apply to an estate-tail. With regard to that, however, there is a distinct authority [552] occurring shortly after the passing of the statute *de donis*, in Maynard's Edward the Second, folio 147: "Herle.—I give you certain tenements in fee-tail; you have issue a son, and afterwards, by another wife, a daughter: you die, your son enters, and dies without issue: then, no man would say that she ought not to enter as heir to her brother, and yet she is not of the whole blood. Scrope, Justice.—It is no marvel, for she is issue to him to whom the gift was made, and so, party to the entail" (a). This, as well as the dictum of Lord Kenyon in the case before adverted to, is a distinct authority to shew that there is no *possessio fratris* of an estate-tail. Lord Coke lays it down very distinctly, that, "if a man makes a gift to one and his heirs of his body, and he hath issue a son and a daughter by one venter, and a son by another venter, and the father dies, and the elder son enters and dies, the younger son shall inherit *per formam doni*; for he claims as heir of the body of the donee, and not generally as heir to his brother; and this is the reason that Littleton saith (sect. 8) *quod possessio fratris de feodo simplici, facit sororem esse hæredem*; in which rule, every word is to be observed." In *Hinton v. Hinton* (2 Ves. sen. 634) it is said by the court: "It is truly said, that, if a man seized of an estate-tail, with or without remainder over, contracts for sale and receives the purchase money, and dies, in the first case without levying a fine, or without a recovery in the last case, this court would not carry into execution against the issue in tail; as was the case of Mr. Savil of Medley, who, when tenant in tail, chose rather to live in gaol and be served on plate there, than to perform his agreement: but the ground of that is, the issue in tail in the one case, or remainder-man in the other, claim *per formam doni*, from the creator or author of the estate-tail; [553] and, therefore, though in the power of tenant in tail to be barred by a particular conveyance, that not being done, the court cannot take away that right they derive, not from the tenant in tail, but from the author" (of the entail). In *Hinton v. Hinton*, the right of the issue in tail is put upon the same footing as the right of the remainder-man. The donor must be taken to contemplate, and provide for the rights of, the issue of the first donee as much as the issue of the remainder-man. If land be given to A. and the heirs of his body, remainder to B. and the heirs of his body, and A. has a son C., and B. has a son D., the rights of C. are as much within the purview of the gift and the intention of the donor, as the rights of D.; probably more so, because the donor has postponed B. and his issue to A. and his issue. But, according to the other side, although the rights of the issue of B. cannot be defeated without suffering a recovery, and although an act done by B. to bar his issue, or any laches by B., will not have the effect of defeating the gift to his issue, yet the act or the laches of A. will have the effect of defeating the gift to the issue of A. Tenant in tail cannot disclaim, Maynard, 547, 8, 9 (*R. de Broke v. T. le Botiller*, T. 17 E. 2); and in *Ferrer's case* (6 Co. Rep. 7 b.) it is laid down, that "in a formedon in descender, if the demandant be barred by verdict or demurrer, or by a release of errors, yet the issue in tail shall have a new formedon in descender, for he claims not only as heir, but *per formam doni*; and he shall not be barred by the faint or false pleading of his ancestor." Then why is he to be barred by the laches of his ancestor in not asserting his right during twenty years? There is nothing in the statute 21 Jac. 1, c. 16, which, in terms, takes away this right. The first section, "for quieting [554] of men's estates and avoiding of suits," enacts, "that all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments whereunto any person or persons now hath or have any title or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament; and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments: and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, &c. at any time hereafter to be sued or brought, by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended

(a) And see Maynard's Edw. II. p. 628, 629.

or fallen, and at no time after the said twenty years." The argument in support of the judgment of the court below will be founded upon the introduction of the word "first,"—an argument clearly at variance with the grammatical construction of our language, and the usual phraseology of the time at which the act passed. Although it was not contended, in the argument below, that a remainder or reversion expectant upon an estate-tail can be defeated by the laches of the tenant in tail, by his lying by for twenty years; yet the convenience of quieting men's titles, upon which the decision of the court below proceeded, would apply as distinctly to the claims of a remainder-man or of the reversioner, as it would be to the claim of the issue in tail. Because, if a tenant in tail, in a county where there is no register, is enabled to execute a conveyance by lease and release, suppressing some marriage settlement (as was done in *Doe dem. Smith v. Pyke* (3 B. & Ad. 738, 1 N. & M. 385)), the [555] inconvenience to the purchaser is precisely the same whether the claim, in opposition to the conveyance, is set up by the issue in tail, or by a party claiming by way of remainder. The principal ground taken in the court of Common Pleas was, that for the quieting of men's titles, it is expedient that the issue in tail should not, after twenty years' acquiescence by his ancestor, be allowed to set up his title in disturbance of the conveyance of his ancestor. But, what difference can it make to the purchaser whether the adverse claim is set up by the issue of the eldest son, who is said to be barred by his ancestor's acquiescence, or by the second son or his issue, who, it is admitted, are not barred? The inconvenience is the same in either case: and it is not reasonable that the language of the statute should be strained for the purpose of reaching the one case, when it is impossible to strain it so as to reach the other, which stands in precisely the same position: the issue in tail and the remainder-man both taking, not as heirs of the person last named of the estate-tail, nor indeed as heirs of the donee, but as parties entitled *ex provisione donatoris*, by the express limitation of the gift. If this new doctrine can be supported, it follows that any tenant in tail who happens to live for twenty years after his estate-tail comes into possession, may, so far as his issue is concerned, destroy the estate-tail without fine or recovery, by lease and release executed at the time his interest first accrues. [Lord Abinger C. B. According to your argument, the title of a purchaser would not be secure, even though the heirs of the donee had been out of possession 500 years.] The inconvenience is admitted to exist with regard to the remainder-man.—[Rolfe, B.—In the case you put, the tenant in tail creates a base fee, which is good as against him. Upon his death the right to enter would first accrue to his issue.] If a base fee had been acquired, as where tenant in tail levied a fine, [556] the issue in tail was barred absolutely, though the remainder and reversion would continue to exist. A base fee cannot be created by an indenture of bargain and sale, which conveys an estate for a year only, or by an indenture of release, unless the releasee enter during the life of the releasor. But suppose a party entitled to enter as tenant in tail, aliens without having taken possession, actual or legal, according to the view of the case contended for by the defendant, twenty years' possession by the alienee would bar the issue in tail. [Rolfe B. All the evils and inconveniencies you are pointing out, would have arisen in the case of a party living and out of possession at the time of the passing of the 21 Jac. 1, c. 16. You must contend that the legislature intended to pass an act which was to operate differently upon persons living afterwards. Alderson B. That is, that they intended to injure those whom they knew, but not those whom they did not know. Lord Abinger C. B. I see no reason why the statute should not receive the same construction in both cases.] Though the provision relating to rights of action already vested, and that relating to rights of action thereafter to accrue, are distinct, it is not contended that any different construction is to be put upon the two clauses. But with respect to the former clause,—the relating to rights of action already vested,—no hardship could accrue. Particular individuals were in actual possession of rights of action which it was in their power immediately to enforce. These parties were allowed ten years to bring their actions. The first clause of the statute reserves to these parties precisely the same right which, the demandant contends, is reserved to him by the second clause. It is the defendant's case, not the demandant's, which requires that issues in tail whose titles have accrued since the passing of the act, shall be placed in a different position from those [557] whose title accrued before the act. The only difference between the two cases is, that the legislature gave to them whom they may have known, twenty years, in

addition to all the time they had already lain by, but gave to future claimants only twenty years from the death of their predecessors. In a note to Sheppard's Touchstone, by Atherley, p. 336, treating of the statute de donis, it is said: "Amongst other means by which its strictness is relaxed, the above-noticed act of 21 James I. may be regarded as one. To what extent this act interferes with the statute de donis, is the point which forms the subject of our present inquiry. In order to come to a more correct conclusion in this inquiry, it will be proper to observe, that, ever since the passing the statute de donis, it has been held that each and every succeeding tenant in tail has an estate or title distinct from the estate or title of the preceding one, because each succeeding tenant in tail is held to derive his title, not from the preceding tenant in tail, but from the donor; and, although the succeeding tenant in tail may derive his title through the preceding one, still he is held to take no estate or interest from him, but per formam doni." And, after referring to several authorities, the note proceeds:—"In a certain sense, therefore, every tenant in tail is to be regarded as a kind of purchaser. The act of the 21 James I. must be clearly construed with reference to the doctrine just noticed. Each succeeding tenant in tail, therefore, having an estate or title distinct from the estate or title of the preceding one, even though the succeeding one may be the son and issue in tail of the preceding one, it of course follows that a title or cause of action (spoken of by the act) which falls upon the son in respect of his estate-tail, cannot possibly be the same title or cause of action which had previously fallen on his father in respect of his (the father's) estate-tail. As the estates of the father [558] and the son are distinct estates, so the father and the son must necessarily have a distinct cause of action on account of his own estate; and, consequently, when the act says that formedon in descender shall be brought within twenty years after the title or cause of action first descended or fell, it must necessarily mean that every party who brings a formedon must bring it within twenty years next after his (the party's) own title or cause of action first descended or fell, and not within twenty years after the title or cause of action of some other person (and which related to another estate or interest) descended or fell upon such other person. Every person, therefore, who has a distinct estate (as every tenant in tail has), must, if he is disseised of such estate, have a distinct cause of action, and the act of James allows him twenty years in which to bring his formedon, after such cause of action first arises." [Lord Abinger, C. J. The author of that note seems to think that the estate-tail has nothing to do with the inheritance. The issue in tail takes per formam doni; but it is by descent that he claims.] He takes quodammodo by descent, not from the party last seized by virtue of the entail, but by descent from the donee (a), and therefore he takes the estate discharged from the incumbrances of the last preceding entail. So, each surviving heir apparent takes the dukedom of Cornwall discharged from all incumbrances created by his quasi ancestor; yet the estate of the duke of Cornwall is an estate of inheritance. [Lord Abinger, C. B. Not so. The nature of that estate is very fully discussed in *The Prince's case* (8 Co. Rep. 1). The duke's title, which vests before his father's death, rests upon an act of parliament: it is [559] an estate-tail. A remainder-man has no estate at all until failure of the issue in tail; therefore his is not an estate by descent: but the issue in tail takes by virtue of his descent.] 'Not from the party last seized—the party guilty of laches—but from the donee. It was one of the resolutions in *The Prince's case*, that the fee-simple of the duchy is in the duke. "If, therefore," proceeds Mr. Atherley, "a title or cause of action falls or descends upon A. B., and he neglects to bring his formedon within twenty years after it so falls or descends, on what ground can it be contended that the son and issue in tail of A. B., who has a distinct title or cause of action from the one which his father had, shall be barred of his formedon? As to the expression in the act, 'first descended or fallen,' it must be quite clear, that, in whatever sense the term 'first' is to be understood, it must be applied to the title or cause of action which has descended or fallen upon the person having such title or cause of action, and not to the title or cause of action which had previously fallen or descended upon some other person. Another argument in favour of the construction contended for is, that it cannot be supposed that the act meant to entirely take away the right of any one who had himself an original, primary substantive right, and not derived by descent

(a) The descent is not always necessarily traced from the donee; as a gift in tail may be made to A. and his heirs begotten of the body of his father or grandfather.

from another ; because it cannot be supposed that the act meant to deprive man of his right for the laches and neglect of another. It may, therefore, it is conceived, be safely assumed that the act did not intend to entirely take away the right of any man, where his right was a primary, original right, and not a mere derivative one ; but merely meant to narrow or abridge the period in which he might recover his right, where he had been deprived of it. If this is admitted, then it necessarily follows that each succeeding issue in tail (each such issue in tail having an original primary right) has still a [560] right to bring a formedon, provided he brings it within the period prescribed by the act. But is there, it may be asked, anything either in the language or evident meaning of the act which militates against this opinion ? If the construction of the act is to be influenced (as it is conceived it must) by the doctrine above noticed, viz. that each and every succeeding tenant in tail has a distinct estate from that of his ancestor, then it must be tolerably clear that this question may be safely answered in the negative. Construing this act with reference to this doctrine, nothing, either in the preamble to the act, or in the enacting part (even if that part of the enacting clause which applies solely to cases which were in existence at the time of passing the act should be resorted to in order to aid the construction of that part of it which applies to cases which may now arise), or in the proviso, can be fairly considered to oppose the opinion just advanced ; nor is there in the general object which the act had in view, that of quieting titles, any thing that militates against such opinion. But, in order to be the better satisfied of this, let us take a more minute view both of the different or component parts of the act, and of its general object. As to the preamble, which speaks of quieting titles, it cannot, it is conceived, have the slightest influence in the construction of the act : at any rate, to hold that the preamble affords an evidence that it was the intention of the act to make the laches of tenants in tail operate as a bar to the issue in tail, would be absurd, unless it could be contended that it afforded an equal evidence of an intention that his laches should bar the remainder-man and reversioner. But the remainder-man and reversioner, it is admitted, are not barred by the laches of tenant in tail, unless they have become so by the alteration of the law effected in *Tolson v. Kaye*. To have made the act really an act for quieting titles, the laches of tenant in tail [561] should have been made a bar to the formedon of the remainder-man and reversioner, as well as of the issue or heir in tail." The question is, whether the right here sought to be enforced, is the same right that was lost by the laches of the ancestor. If it be, the demandant is out of court. It was formerly not unusual to give lands to B. and the heirs of the body of A., his father ; in which case the issue would take as heirs of the body of B., not as heirs of the person last seized, for the heir of the father might not be the heir of the donee. For instance, suppose A. has two sons, B. and C., by different venters, and an estate is given to B., the eldest son, and the heirs of the body of A., the father ; in that case, C., the second son, though of the half-blood, and consequently not the heir of B., would take by virtue of the limitation. Or, suppose land to be given to A. in tail, remainder to B. in tail, to wit, to him and the heirs of the body of B.'s father, and B. dies before the expiration of the first estate-tail ; if B. leave any issue, such issue will take ; and, upon the extinction of that issue, the issue of B.'s father will take, though of the half-blood to B. [Alderson B. Does the decision of the court below amount to more than this—that, for the purpose of giving effect to the statute *de donis*, the word "heirs" is not to bear its strict legal interpretation ; but for the purpose of giving effect to the statute of limitations, it is ? Is there any thing unreasonable in supposing—the object of the latter statute being, the quieting of men's estates and avoiding of suits—that the first person who was in a situation to make a claim neglecting so to do (a), his acquiescence should bind all those persons who, in any sense, are his heirs, but that it should be otherwise with respect to the statute *de donis* ?] That construction is unnecessary ; and it certainly was never suggested before. The word "heirs" is [562] properly introduced into the statute, because the legislature was providing not only for formedons in the descender, but for formedons in the remainder, and formedons in the reverter. Now the parties entitled in remainder, may, and those entitled in reversion, must, claim in fee-simple. In such cases the heir might well be barred by the laches of his ancestor, the demandant's immediate predecessor in the entail, without interfering

(a) Vide post, 586.

with the provisions of the statute de donis. The note to Sheppard's Touchstone thus proceeds: "But, whilst the remainderman or reversioner may bring his formedon, and that, too, at a more remote period than the issue or heir in tail can possibly bring his, it must be clear that, whilst this can be done, the possession cannot be said to be quieted; and, as the possession would not be quieted by holding the issue in tail to be barred of his formedon by the laches of his ancestor or predecessor, it is evident that no great weight is to be attached to the preamble of the act: at least, it must be obvious that it ought not to be made the reason for putting a construction upon the act to the prejudice of the issue in tail. If, indeed, the preamble could have any weight in the determination of the question now under consideration, every inference to be drawn from the preamble would be in favour of the issue in tail, and not against him. There would appear to be as strong or even stronger reason for making the laches of tenant in tail, a bar to the remainder-man and reversioner, than for making them a bar to the issue in tail, yet, as the act (notwithstanding the preamble) does not make the laches of tenant in tail a bar to the remainder-man and reversioner, it is fair to presume that it did not intend that such laches should operate as a bar to the issue. Upon the whole, it may perhaps be safely decided that there is nothing in the preamble that can at all induce a construction of the act unfavourable to the right of each and every succeeding issue or heir in tail [563] to bring his formedon, provided he brings it within twenty years after his right first accrues." In deriving title to an estate tail, it is quite immaterial whether the party through whom the demandant derives title was seised or not; 1 Prest. Conv. p. 247 (2d ed.). For this position Mr. Preston refers to F. N. B. 212, where it is said, that, "in this writ of formedon the demandant ought to make mention of every man who was seised by force of the tail, and to name himself son and heir in his writ, in this manner—'and which after the death of the aforesaid D. and E., and F., the son and heir of them the said D. and E., ought to descend to the aforesaid B., the son and heir of the same F., &c.' But, if any of the heirs in tail were not seised by force of the tail, but survived their father, and died before they entered into the land or had any seisin thereof; then it is not necessary to name them heirs in the writ, but only in this manner—'and which after the death of the aforesaid D., and of E., the son of the same D., and of F., the son of the aforesaid E., ought to descend to the aforesaid B., the son of the aforesaid F., and cousin and heir of the aforesaid D., &c.' And so the writ ought always to make the demandant cousin and heir or son and heir to him who was last seised of the tail, as the case is; and the surest way for the demandant is, to make every man who is named in the writ, son and heir in the writ, although they were not seised of the lands by force of the tail; for it is not material whether they were seised or not, although he name them heirs in the writ." The authority there referred to is the 11 Hen. 6, fo. 20 (H. 11 H. 6, fo. 20, pl. 16). That is the case of *Richard Earl of Salisbury and Alice his Wife v. W. B., Knt.*, in which the demandants counted upon a gift made by King Edward the Third to Simon Montagu, for the term of his life, so [564] that, after his decease, the lands should remain to William, son of the said Simon, and to the heirs of his body begotten: and the writ was "et quæ, post mortem prædicti Simonis et W. filii prædicti Simonis, et W. filii et hæredis prædicti W. filii Simonis, et Johannis fratris et hæredis prædicti W. filii Simonis, et W. filii et hæredis prædicti Johannis, et Thomæ filii et hæredis prædicti W. prædictæ Aliciæ (the demandant) fil. et hæf, prædict. Thomæ, descendere debet:" then Rolfe, Serjeant, prays judgment of the writ, because Thomas had no estate by force of the entail; and then the argument goes on and establishes the position of Mr. Preston, that, in deriving a title to an estate-tail, it is immaterial whether the party through whom the demandant derives title, was seised or not. That shews that the issue in tail does not claim as heir to the previous tenant in tail; for, if he did, he must shew his seisin; but, inasmuch as the parties through whom he derives title are material only for the purpose of shewing his connection with the original donee, he may state them to have been seised, although they were not so; and that allegation is not traversable. Then, supposing that the defendant had pleaded that Richard Tolson, the father of the demandant, was never seised by virtue of the entail, as alleged in the count; the plea would have been bad, as being a traverse of an immaterial allegation. Now, if it be immaterial to allege the seisin of Richard Tolson the father, how can the demandant be prejudiced by any laches on his part? How can it be said, as against the demandant, that the right first descended at the time it accrued to the father, when the

law so utterly disregards the seisin of the latter, that it need not be pleaded, and, if pleaded, may not be traversed? The other authorities referred to by Mr. Preston are, the 8 Ed. 3, fo. 11 (H. 8 E. 3, fo. 11, pl. 31), 5 Ed. 3, fo. 67 (b), [565] and 26 Hen. 6, fo. 36 (a). In *Collins v. Goodall* (2 Vern. 235), where a bill was brought touching quit-rent unpaid for forty years, and the defendant pleaded the 21 Jac. 1, c. 16, it was held that the statute did not apply. In *Cholmondeley v. Clinton* (2 Meriv. 240), where that case is cited, it is said that "the prevailing opinion, both here and in Ireland, has been, that persons claiming an equity of redemption, have successive rights where they come in under successive limitations. That is a point on which Lord Eldon, in the case of *Pim v. Goodall*, and Lord Mannors, in Ireland, have both expressed strong opinions." [Rolfe B. I do not see the application of the case there put. A mortgagee is not guilty of laches in not foreclosing.] He is guilty of laches if he neither forecloses, nor does any other act to assert his right; and that seems to be all that is there meant. But the case of a rector probably is somewhat more closely analogous; the rights of his successor are not prejudiced by any laches on his part. [Lord Abinger C. B. Nor is a tenant in tail prejudiced by the laches of tenant for life.] The incumbent is something more than a mere tenant for life. It is no doubt a peculiar species of inheritance. [Lord Abinger C. B. It is no inheritance at all: he is a corporation, taking by succession.] In the case of a corporation taking by succession, the inheritance is in the bishop, &c. In the case of a parson, the inheritance is always in abeyance. Still, from the very absence of a party clothed with the in-[566]-heritance, the parson may do acts which a mere tenant for life cannot do, as cut trees, &c. An adverse possession for twenty years is not a bar to a rector, except as against the incumbent who acquiesced in such possession. In *Rumcorn v. Cooper* (5 B. & C. 696, 8 D. & R. 450) it was held that, as the incumbent has no power to charge the living, he cannot, by his laches, prejudice his successor. So here, the statute de donis having prohibited the entailees from charging the estate, they cannot indirectly charge it by their laches. In *Stowel v. Lord Zouch* (Plowd. 353), the question being, whether the issue had five years to avoid a fine, or was bound to assert his claim within the five years which began to run in the time of his ancestor; the judges were divided, Dyer C. J., and Catline J., being of opinion that he was bound to claim within that period, and the other, Southcote J. and Weston J., being of the contrary opinion. But in *The Earl of Derby's case* (Sir T. Jones, 237, note (b), 2 Show. 104, Pollexfen, 491, T. Raym. 260), Sir Thomas Jones J. seems to have approved of the opinion of Southcote and Weston.

In giving the judgment in the court below, Lord Chief Justice Dallas, says: "I am of opinion, in this case, that the statute begins to run from the time the title, or cause of action, first falls or accrues; and I am of this opinion on the words of the statute, on the construction of them, on the reason of the thing, and, if it be necessary, on the authority of decided cases, and of one in particular, which was heard in this court. I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction, with a view to the mischief intended to be remedied; and this is pointed out by the very first words of the statute, which are 'for quieting of men's [567] estates, and avoiding of suits.' It is therefore that this statute, and all others of this description, are termed by Lord Kenyon, 'statutes of repose;' and long before and since the passing of this statute, this has been the principle which has guided the courts in the construction of them. First, then, the words of the statute are, 'All writs of formedon shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years.' And when did the title in this case first descend or fall? It descended first on the tenant in tail, who suffered twenty years to elapse without taking any step to assert his right."

(b) M. 5 E. 3, fo. 67, pl. 61, where the issue (under a somewhat special limitation) took by purchase.

(a) Meaning probably M. 22 H. 6, fo. 36, pl. 60, where it was held that if the demandant count that the title descended from A. the donee, to B. as son and heir, and from B. to C. as son and heir, and from C. to D., the demandant, as son and heir, it is sufficient if either A. or B. or C. was seised: but that if he count that the title descended to B. as son and heir, and from B. to C., and from C. to D. without describing C. or D. as heir, the seisin of C. must be shewn.

It might with equal truth have been said to have descended first on the death of the donee in tail in 1714. His lordship proceeds: "Are, then, his heirs barred by this neglect? For this, it is only necessary to refer to the subsequent words of the statute—'that no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made.' On the construction of this statute, the object of which is to quiet estates, is it falling in with the object of the statute (when it draws a line as to the party who shall claim) to say, that, after one hundred and forty years, or any distance of time, it shall be competent for the issue in tail to set up a claim of this description?" The same remark would equally apply to the case of a remainder, either in tail or in fee, or a reversion in fee, expectant on an estate tail. His lordship continues—"If so, instead of being a statute 'for quieting of men's estates,' it would produce the contrary effect, and unsettle all the titles in the kingdom. Therefore, con-[568]-struing the statute reasonably, and with reference to its object, it is clear the writ must be sued out within twenty years after the title first descends, and that has not been done in the present instance. As to cases, I refer to *Doe d. George v. Jesson* (6 East, 83) for the language of Lord Ellenborough:—"The time allowed by the statute for making an entry might be indefinitely extended, if the construction contended for by the plaintiff were to be admitted. There is no calculating how far it might be carried by parents and children dying under age, or continuing under other disabilities, in succession." And then, applying himself to statutes of this description, he says, "The statute meant that the heir of every person to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor to whom the right first accrued during the period of disability, and who died under such disability." To the doctrine of *Doe d. George v. Jesson* the present demandant has no interest in objecting. Where a party seised in fee, suffers an adverse possession to grow up against him, there is no reason whatever why his heir should not be barred by the act of an ancestor, to whom it was competent to alien, or to charge, at his pleasure; but the same reasoning does not apply to a tenant in tail, who has no such power. Thus his lordship, for the purpose of giving what he considers a beneficial operation to the statute, forces into the service, a decision of Lord Ellenborough upon a totally different subject-matter. His lordship continues—"That language was afterwards adopted by the rest of the court. But it is said that there is a distinction between the heir of one seised in fee, and the heir of a donee in tail, because the former takes clearly by descent, the latter per formam doni. That distinction was taken in *Cotterell v. Dutton* (4 Taunt. 826), but it was re-[569]-pudiated by Heath and Chambre, Justices, and the case is an authority in point to shew that the statute runs from the time when the title first descends or falls." In *Cotterell v. Dutton*, however, the question did not arise. The judgment of Park J. also proceeds entirely upon the expediency of giving such a construction to the statute as would quiet titles and repress litigation. Burrough J. says: "The statute of limitations was intended to quiet possessions, and particularly as to landed property; and we are to carry into effect the object of the statute. Now, if men were permitted to lie by till deeds and evidences were lost, no one could be safe; and they might lie by to any length of time, if they could exceed the time prescribed by the statute. The only question we have to decide here, is, whether the replications to the last seven pleas are good; and I think that all which do not allege a seisin in the demandant, within twenty years, are bad. There is no such allegation here. It is clear, that in formedon, it is not necessary to allege a seisin in the donees, because it is sufficient if a declaration be certain to a certain intent in general; but, in the after pleading, there must be a higher degree of certainty, especially when the very point which would confer a title, is denied." Now this dictum is directly opposed to all those ancient authorities which lay it down that the seisin of the intermediate parties is not material. [Lord Abinger C. B. What Mr. Justice Burrough means, I apprehend, is this: an actual seisin is not necessary to the maintenance of a formedon; for, the very form and nature of the proceeding implies that the immediate ancestor of the demandant was disseised (a). But if the statute of [570] limitations makes the

(a) On the contrary, where an entailed dies seised, and a stranger enters by abate-

non-assertion of the right of entry for twenty years after such right first accrued, a bar to the action, in reply to a plea setting up that bar, the demandant must show that his ancestor did enter, that is, that he was seised, within twenty years.] Here, the plea sets up no such non-assertion, supposing it would be warranted by the statute. "It is clear," proceeds the learned judge, "that, by the demurrer, it must be taken for granted that the demandant was not seised within twenty years: if so, when did the title first descend? Immediately on the death of Henry Tolson; and the formedon should have been brought within twenty years after that event. The formedon being a proceeding under the statute of Westminster 2, if one tenant in tail discontinues, his heirs are put to a mere right, and cannot bring their formedon. *Hunt v. Burn*" (2 Salk. 422. S. C. per nom. *Hunt v. Bourne*, 1 Lutw. 770). The learned judge evidently misapprehended the state of the record, and also the decision, in the case of *Hunt v. Burn*. Of the three Henry Tolsons mentioned in the count, the last died in 1736. The learned judge says that the formedon should have been brought within twenty years after that event, or in other words, not later than 1783. But, consistently with the allegations in the pleas, Richard Tolson, the son of this Henry and the father of the demandant, may have entered, and continued seised, until nearly twenty years before the writ of formedon issued, against whom should Richard Tolson have brought his formedon, or why should he sue at all? In the case of *Hunt v. Burn*, it was held, that the party might bring his ejectment, notwithstanding that as to his original right he was barred of his formedon; but the court say that "the 32 Hen. 8 and the 21 Jac. 1 operate by way of bar to the remedy, and the word *right* there, is right of entry," and the court decline saying [571] whether in that case, which was the case of a discontinuance of an estate-tail by fine, the parties who brought ejectment, and who was held to have brought it rightly, might have supported a formedon in the descender. In conclusion, Burrough J. says: "There is a strong analogy between the cases on the statute of fines and on this statute. But I object to Brooke's Readings as authority; they were no more than lectures; and the case cited from them has no bearing on the subject, because the action was wrong, and the plaintiff therefore out of court." Brooke's Reading has always been considered authority. No one ever doubted the authority of Callis's Reading upon the statutes of sewers: and these are of more recent date, and the author only a barrister, not even an apprentice; whereas Brooke was Chief Justice of the court of Common Pleas (a). Richardson J., in delivering his opinion in the court below, says: "The question on this record is, whether the twenty years under the statute of James begin to run when the title descends to the first heir in tail, or whether each succeeding tenant has a right to sue during twenty years after the decease of his predecessor. In my opinion the words of the statute are a sufficient answer to the present demandant. The first section of the statute is divided into two clauses; the first clause relates to proceedings or rights, in existence at the time of the passing of the statute; the second, to such as should arise afterwards. The first clause enacts that 'all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title or cause to have or pursue any such writ, shall be [572] sued and taken within twenty years next after the end of this present session of parliament.' 'And after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments.' If they do not enter within the time prescribed by the statute, what is the consequence? That 'such persons so not entering shall be utterly excluded and disabled from such entry after to be made.' Upon this branch of the first section, it is clear, on the words of the statute, that, if a person who was entitled at the passing of the statute did not sue within twenty years, he and his heirs were barred. But it is urged, that, in the second clause, the word 'heirs' is not found. True: but it would be extraordinary if we should put a construction on that clause different from the construc-

ment, the remedy of the issue is by formedon in the descender. Where indeed the issue in tail enters, and is disseised, he may resort to his action of trespass or ejectment, but is not entitled to this remedy.

(a) In *Davies v. Lowndes, Heir of Lowndes*, ante, p. 532, Brooke's Reading is treated as authority by Lord Lyndhurst.

tion on the first." Lord Chief Justice Dallas, confounding the first clause, as to writs of formedon, with the second, which refers to rights of entry, treats the latter as if it had the word "heirs"; the absence of which Mr. Justice Richardson, on the other hand, seems to feel the force of. Mr. Justice Richardson continues: "The second clause runs thus—'and that all writs of formedon in descender, &c. of any manors, lands, tenements, or other hereditaments whatsoever at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years.' What is the meaning of the words 'next after the title and cause of action first descended or fallen? We must put on the words of this clause a construction consistent with the words of the first; and whether for a cause of action arising before or after the passing of the statute, persons not suing in time, and their heirs, are barred. [573] The decisions on this statute are not numerous (a)¹; but *Cotterell v. Dutton* is in point, and the distinction between the heir of tenant in fee and the heir of tenant in tail was urged in that case, as it has been in the present, but was overruled (b); and Heath J. stated that no such difference existed. That learned judge put the same construction on this statute as I am bound to do; and, according to that construction, it appears that this title is stale. I think it unnecessary to advert to the statute of fines; but, if I were to do so, I should think it right to put the same construction on all the statutes of limitation, pursuant to the dictum of Abbott C. J., in *Murray v. The East India Company*" (c). Now, all the statutes of limitation are in derogation either of the common law or of some previously existing statutory right, and therefore should receive a strict construction. In Brooke's Reading, p. 133, is the following case: "Heir in tayl which was within age at the time of the statute, brought a writ of right after Ascension (d), &c., upon the antient limitation, and within the six yeers; and he and the tenant joyne the mise upon the meer droyt; and after, the demandant made default, by which, judgment finall is given; and he dies within the six yeeres; there the heir shall have an action within other six yeeres notwithstanding this judgment. For he shall have a formedon; because the default was the act of the father, which shall not prejudice the issue in tayle, by the statute of Westminster 2." [Alderson B. The precise point [574] arose in *Doe dem. Hungate v. Gascoigne*, tried some years ago at York, before Littledale J., who ruled in conformity with the decision in this case.] The mere circumstance of a learned judge having yielded to a decision of the Common Pleas amounts to nothing. Sitting at nisi prius, or even in a court of co-ordinate jurisdiction, he was bound so to do, however at variance with his own better judgment. The present writ of error is brought to question the propriety of that decision. To set up that decision, or any thing founded upon it, as an answer to this writ of error, is exceptio illius cujus petitur dissolutio. [Lord Denman C. J. Surely the acquiescence of the profession for a long series of years is not to be entirely disregarded.] That such was not the opinion of the profession may be inferred from the note read from Atherley's Sheppard, and also from an opinion given, upon this very case, by the late Sir Anthony Hart when at the bar (a)². (This opinion, however, the learned serjeant was not permitted to read.)

Erle (with whom was Carrow), for the defendant. The only doubt arises in this case from the circumstance of the word "heirs," which is found in the first and third clauses of the 21 Jac. 1, c. 16, s. 1, being omitted from the second clause: that clause, however, has general words sufficient to bar the issue in tail after the lapse of twenty

(a)¹ It probably never occurred to any lawyer, before the case of *Tolson v. Kaye*, that the provisions of the statute of 21 Jac. 1, c. 16, could be applied to the barring of an estate tail, or even to the creating of a discontinuance of such an estate.

(b) Obiter.

(c) 5 B. & Ald. 215. "The several statutes of limitation, being all in *pari materia*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same."

(d) The period limited for the commencement of the operation of the 32 H. 8, c. 2. And see *Whitton v. Compton*, Dyer, 278.

(a)² Which was that "The statute of James in no respect repeals or annuls the statute *de donis*. It merely limits the time within which those who claim as issue, or remaindermen, in tail, shall prosecute their rights, after such rights accrue."

years. To hold that the legislature, when dealing with estates-tail, and excluding from a right of entry persons whose right or title should have first descended or accrued more than twenty years before, and their heirs, had not in their view the issue in tail, would be putting upon the statute a most strained and unnatural construction. It will be material in this case to consider what is the nature of an estate-tail, and the effect [575] of the statute *de donis*. Prior to the passing of that statute, the tenant in tail had only a base fee (a), a fee-simple on condition, which became an absolute fee-simple, the condition being performed by the birth of an heir. The statute has not in any degree altered the condition of the tenant in tail: it merely affects his power of alienation (b). The question is what is meant by "the title or cause of action first descended or fallen?" A title or cause of action descends upon the issue in tail immediately upon the death of the ancestor by whose act the possession has been severed. In *Machell v. Clarke* (2 Lord. Raym. 778), tenant in tail covenanted, in consideration of natural love and affection, to stand seised of lands, to the use of himself for life, remainder to John his eldest son, in tail, remainder to Matthew, his second son, in tail. He afterwards suffered a common recovery with single voucher, in which he was tenant to the præcipe; which recovery was suffered to other uses: and the question was whether the tenant in tail had made any alteration of the estate tail by this covenant to stand seised, &c.; for, if he had made any alteration of the estate tail, then he was become tenant for life, with remainder over, ut supra, and, of consequence, the recovery suffered by him was a forfeiture of the estate for life, and the new uses, limited upon the recovery, could not arise. In delivering the judgment of the court, Lord Holt said: "It has been made a question, if tenant in tail bargains and sells, or leases and releases, or covenants to stand seised of, the lands intailed, to another in fee, whether the [576] estates conveyed by the said conveyances, determines by the death of the tenant in tail, or whether it continues until the actual entry of the issue in tail." And he held that such estate continued until the actual entry of the issue in tail, for these reasons—"First, because tenant in tail himself has an estate of inheritance in him; and before the statute *de donis*, it was held that such estate was a fee-simple conditional: then the statute made no alteration to the tenant in tail himself, but only makes provision that the issue in tail shall not be disinherited by the alienation of his ancestor. And by Co. Litt. 18 a. it appears that a base fee may be created out of an estate-tail; where it is said, that, if a gift in tail be made to a villein, and the lord enters, he hath a base fee. Then, if a base fee may be created out of an estate-tail, there is great reason that the bargainee, &c. of the tenant in tail should have it. Secondly, the tenant in tail has the whole estate in him; and, therefore, there is no reason why he cannot divest himself of it by grant, bargain, and sale, &c., since the power of disposition is incident to the property of every one. Thirdly, it is no prejudice to the issue in tail; and, therefore, no breach of the statute *de donis*. Indeed there are strong words in the act for restraining alienations to the prejudice of the issue in tail, where it says—*quod finis, ipso jure, sit nullus*, &c. yet, the construction of the said words hath always been that the entry of the issue is tolled by such fine, and he is driven to his formedon; therefore, if an act which drives the issue in tail to his formedon, will not be a breach of the statute, much less will it be a breach of the statute to drive the issue in tail to enter, to avoid a bargain and sale by his ancestor." His lordship then cites *Seymour's case* (10 Co. Rep. 95), and proceeds—"In 3 Co. 84, in the case of *Fines*, the case of Litt. § 613, is put and considered; and there it is held that the words ought [577] not to be literally understood, but in another sense. The words of Littleton are,—'that, if tenant in tail grants totum statum suum to J. S. and his heirs, and makes livery of seisin to J. S., yet the estate of J. S. is determined by the death of the tenant in tail.' But this ought to be understood, that it is no discontinuance; but will drive the issue in tail to enter to avoid it." Lord Holt then proceeds: "If tenant

(a) This application of the term appears to be one of the novelties to which the case of *Tolson v. Kaye* has given rise.

(b) Sed vide post, 591. Since the statute *de donis*, the donee necessarily holds of the donor, unless a remainder in fee is limited by the same conveyance; whereas a fee-simple conditional, at common law, might have been held of the donor's chief (i.e. immediate) lord, the donor having no reversion, (nor, except in the case of a subinfeudation, any right of reverter,) but merely a right of entry for condition broken.

in tail makes a lease for years not warranted by 32 H. 8, c. 28, the issue in tail must enter to avoid it; and, if he accepts rent become due afterwards, that will make the lease good as to him (a)¹; which could not be, if the lease was actually determined by the death of tenant in tail. In cases of exchange, the estates exchanged must be equal in quality; and yet tenant in tail may exchange his lands with tenant in fee of other lands; and it will be a good exchange till it be avoided by the issue in tail: Co. Litt. 51 a. And in the said case, the tenant in tail passes a fee by the word exchange, without livery of seisin, and it does not amount to a discontinuance: Co. Litt. 332 a.: but it passes only a base fee; and, if the heir in tail will avoid it, he must wave the lands given in exchange; for, if he occupies them, he will be bound for his life (b): for, if he had not a fee, the exchange had not been good, because the estates had not been equal" (vide post, 585, 586, n.). In Cruise's Digest, vol. i. p. 74, treating of the incidents to an estate-tail, it is said: "The first of these is, that, as tenant in tail has an estate of inheritance, he has a right to commit every kind of waste, by felling timber, pulling down houses, opening and working mines, &c. But this power must be exercised during the life of the tenant in tail; for at the instant of his death it ceases. If, there-[578]-fore, a tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the vendor, otherwise they will descend to the heir as parcel of the inheritance. It is said by Clark J., in 27 Eliz. if a tenant in tail grants away all his estate, the grantee is punishable for waste. So, if the grantee grants it over, his grantee is also punishable. Estates-tail are subject to curtesy and dower, which are incidents inseparably annexed to them (a)². Tenant in tail, having an estate of inheritance, has a right to all deeds and muniments belonging to the lands; which the court of Chancery will order to be given up to him." [Parke B.—Supposing there is no discontinuance of the estate-tail, and the heir is put to his action, the ancestor being out of possession for twenty years, is the heir barred?] *Doe dem. Smith v. Pike* (3 B. & Ad. 738, 1 N. & M. 385, supra, 554) seems to shew that he would not, unless the possession were adverse. [Parke B.—The same inconvenience exists in that case as that which you urge here.] It may well be that the statute, which had in view the remedying of a particular inconvenience, has left others untouched. [Parke B.—Is there any case in which it has been held that the heir in tail is barred of his entry by twenty years' adverse possession against his ancestor?] In *Doe dem. Smith v. Pike* that appears to have been assumed. The first clause of the 21 Jac. 1, c. 16, s. 1, enacts "that all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title or cause to have or pursue any such writ, shall be sued and taken within twenty years [579] next after the end of this present session of parliament; and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments." That relates to titles in existence at the time of the passing of the statute. The next clause, which relates to titles or causes of action subsequently accruing, is—"and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years." The third clause, which relates to rights of entry, enacts, "that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; and that no person or persons shall, at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and,

(a)¹ Not, however, against his issue, or other the next succeeding entail.

(b) But not the next entail, or those in remainder or in reversion.

(a)² That is true only with respect to estates-tail general. There neither curtesy nor dower contravenes the will of the donor; which is all that the statute seeks to protect.

in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding." [Parke B.—If there had been any distinct decision upon the last clause, shewing the heir in tail to be barred of his entry, by twenty years' adverse possession as against the ancestor, that would go far to shew that the same construction must be put upon the first clause.] In *Doe dem. Smith v. Pike*, the court [580] of King's Bench assume that twenty years' adverse possession against the ancestor would bar the issue in tail. [Alderson B.—If they had not been of that opinion, there was no necessity for sending down the cause to a new trial. Parke B.—If it were settled that the heir in tail had a right of entry notwithstanding there had been twenty years' adverse possession against the father, it would go very far to decide the present question against you. Alderson B.—If the heir could maintain ejectment, there is no reason why he should not maintain formedon.] Whatever be the true construction of the first section of the statute (21 Jac. 1, c. 16, s. 2), taken by itself, the second section is perfectly decisive. It enacts, "that, if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall, within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth, the same, and at no time after the said ten years." Supposing a tenant in tail to have aliened, and the issue in tail to be a person under some one of the disabilities mentioned in this section,—a feme covert, for instance,—and the disability to continue for twenty years; the party and her heirs would have ten years, and ten years only, from the cesser of the disability, for bringing a formedon. In two cases, therefore,—in that provided for in the first clause of s. 1, and in that put in a 2—[581] the heir is expressly barred by the laches of the ancestor; and the same construction should be given to the rest of the statute. The statute of fines, 4 Hen. 7, c. 24, is somewhat analogous. After providing for the mode of proclaiming fines, it proceeds: "And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, except women covert (other than been parties to the said fine), and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind at the time of the said fine levied, not parties to such fine; and saving to every person or persons, and to their heirs, other than the parties in the said fine, such right, title, claim, and interest as they have to or in the said lands, tenements, or other hereditaments, the time of such fine engrossed; so that they pursue their title, claim, or interest, by way of action, or lawful entry, within five years next after the said proclamations had and made: and also saving to all other persons, such action, right, title, claim, and interest in or to the said lands, tenements, or other hereditaments, as first shall grow, remain, or descend, or come to them after the said fine engrossed and proclamation made, by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied; so that they take their action or pursue their said right and title according to law, within five years next after such action, right, title, claim, or interest to them accrued, descended, remained, fallen, or come." Unless the entry be made, or action brought, within the five years, the parties, and their heirs, are conclusively barred. In *Stonell v. Lord Zouch* (Plowd. 374), it was held, that, if a person to whom a right of entry first accrues, dies before the expiration of the five years, and such right descends to his son or heir, who is then under age or labours under [582] any of the other disabilities mentioned in this statute, such son or heir must pursue his title within the five years which began to run in the time of his ancestor. "And as to the word *descend*," Dyer there said, "if tenant in tail discontinues, and the discontinuance levies a fine with proclamations, and five years pass, and tenant in tail dies, the issue shall have other five years; for, he is the first to whom the land descended after the proclamations, by force of the gift in tail made before the fine levied. But, if tenant in tail be disseised, and afterwards the disseisor levies a fine with proclamations, and five years pass without claim, and afterwards the tenant

in tail dies, in this case he, and Catlyn also, said that the issue in tail is bound for ever; for, there the tenant in tail had the present right at the time of the fine levied, and the first saving comprised him and his heirs in tail, and, inasmuch as they did not pursue their right within the five years according to the condition of the first saving, the tail is bound for ever. But Southcot (Justice of B. R.) and Weston (Justice of C. P.) were of a contrary opinion; for they said that every issue in tail shall have five years, for a new right is come to every one of them per formam doni, which right (as they took it) the makers of the act intended to preserve, and to this purpose the words 'by force of any gift in tail' were put in the second saving. But this opinion of theirs was utterly disallowed by the said chief justices (Catlyn C. J. of B. R., and Dyer C. J. of C. P.), who said that the word 'first,' which ought to be added to the word 'descend,' and then it will be 'shall first descend' (Justice of B. R.), will not suffer every descent to have five years. And Catlyn said that a right or title may be said to be descended where he who has a right to a reversion or remainder in tail dependant upon an estate for life dies, and this descends to his issue, and after [583] wards the tenant for life dies, he shall have five years by this second saving: and thus the words 'first descend' shall be fully satisfied." *Cotterell v. Dutton*, though short, is also a distinct authority. The marginal note is—"Tenant in tail dies leaving issue in tail a granddaughter, a feme covert; the granddaughter dies covert, leaving issue in tail two sons, infants; the elder attains the age of twenty-one and dies; the younger attains his age of twenty-one, and fourteen years after issues out a writ of formedon in the descender: held, that he is barred by the statute 21 Jac. 1, c. 16." Sir James Mansfield there said: "The daughter and infant heir of a feme covert has ten years after the disability ceases, not from the death of her mother. In the case of fines, it has been determined, that, when the time once begins to run, it continues to do so, notwithstanding any subsequent disability; as Lord Kenyon decided in the case of *Doe dem. Duroure v. Jones*" (4 T. R. 300). Heath J. agreed, "that, in the case put, the infant heir of a feme covert would have ten years from the cesser of the disability, not from the death of her mother. There is no such difference between the issue in tail and other heirs, as is supposed (b): formedon in the descender is expressly mentioned in the first clause of the statute." Chambre J. said: "The ten years do not run at all while there is a continuance of disabilities; but they run without intermission from the time that the disabilities first cease." And Gibbs J. added: "When once the statute begins to run nothing stops it." In *Doe d. Duroure v. Jones* Lord Kenyon says (4 T. R. 310): "I confess, I never heard it doubted, till the discussion of this case, whether, when any of the statutes of limitations had begun to run, [584] a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion, on the words of the statute of fines, on the uniform construction of all the statutes of limitations down to the present moment, and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and to make nice distinctions between the cases of voluntary and involuntary disabilities." *Murray v. The East India Company* (5 B. & Ald. 215) may be adverted to as shewing that the same construction is to be put as to all the statutes of limitations. In Chitty's Statutes (vol. i. p. 700, n.), citing this case of *Tolson v. Kaye* (Co. Litt. 15 b.), it is said: "The twenty years commence when the title descends to the first heir in tail, unless he lie under a disability; and the heirs of such person who suffers the twenty years to elapse without commencing the formedon, are utterly excluded, and the right of entry is for ever lost; and there is no distinction between tenant in fee taking by descent, and heir of tenant in tail." The passage cited from Co. Litt. as to the possessio fratris, can have no application. Speaking of the half-blood, Lord Coke says (Co. Litt. 15 b.), "Half-blood is not respected in estates-tail because that the issue do claim by descent per formam doni, and the issue in tail is ever of the whole blood to the donee" (d).

Upon the whole, therefore,—looking at the words of the statute, and regard being

(b) The learned judge here refers to a point reported to have been feebly taken, or rather hinted at, by Lens Serjt. in these words:—"If not so, the only distinction that can be made is, between the nature of an estate tail and of another estate."

(d) Not de facto, supra, 561.

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had to the cases decided as well upon the statute of fines as on the several statutes of limitations, and to the convenience of the rule laid down by the court of Common Pleas, sanctioned, as it has been, by a very learned judge (Mr. Justice Lit-[585]-lledale), and acquiesced in and adopted by all the text-writers, with the single exception of Mr. Atherley (in the note to Sheppard's Touchstone),—this court will pause before they adopt a different construction, and thereby endanger many titles that now rest upon a solemn decision, which, after so great a lapse of time, it is now sought to overturn.

Manning Serjt., in reply. The acquiescence of Mr. J. Littledale and the statements of the text-writers, rest solely upon this very decision in *Tolson v. Kaye*, *cujus petitur dissolutio*. In treating of the estate of the Duke of Cornwall, Lord Coke says (8 Co. Rep. 27 a.)—"That this was an estate of inheritance, is proved by the said record of 50 Ed. 3, by which it appears that the wife of the Black Prince was endowed. And it appears by the book of 21 Ed. 3, 41 (M. 21 E. 3, fo. 41, pl. 46), that the Prince, in the said manor of Berkhamstead (parcel of the said Duchy of Cornwall), had fee. And the said judgments in 5 & 6 Hen. 4 prove it; for, there judgment generally is given that the letters patent should be revoked and made void, &c., which judgment could not have been given, if any estate or reversion or possibility did remain in the patentee, for then the letters patent should not be made void, but the judgment should be that the letters patent should be made void and annulled as to the estate of the Prince" (c)¹. So that, notwithstanding the peculiarity of the duke's estate, it is clear that it is an estate of inheritance, and that the successive dukes of Cornwall take by descent (3 Mann. & R. 474). With regard to exchanges, a fee is an estate which may endure for ever, whether it be fee-simple or fee-tail,—determinable, indeed, in one case, upon a total failure of heirs, in the other, upon a special failure of the heirs [586] appointed by the donor (a). By the statute of fines, all who take under the same limitation,—as all entailees under the same entail do,—are bound as privies. It is quite clear that the right of the issue in tail could not be defeated by the laches of the original donee. Upon what principle then, can he be affected by the laches of his immediate predecessor? The only reasonable construction of the statute is, to hold that the right to bring a formedon enures for twenty years after the right or title first descends or falls to the party suing. In *Stowel v. Lord Zouch* it is said (Plowd. 365), "the words of Westminster 2, c. 11, are general,—that all bailiffs and receivers, who in passing their account before creditors assigned, shall be found in arrear, may be committed to the next gaol; yet if an infant bailiff or receiver be found in arrear he shall not be committed; for he is not, by reason of his want of discretion, within the equity of the statute." Here, the language used is not so strong. The 21 Jac. 1, c. 16, has not the words "all heirs," but the word "heirs." There is less difficulty in contending that the heirs meant are the heirs of remaindermen and of reversioners. *Stowel v. Lord Zouch* was the case, not of an estate-tail, but of a descent of a title in fee simple, from a disservice. It has been repeatedly held (c)² that the felony of tenant in tail shall not affect the rights of the issue in tail; and that, because the issue in tail claims, not as heir to his predecessor, but as the person designated per formam doni (d). It would be strange if the issue was protected against the crime, but not against the carelessness, of [587] his predecessor. The pleas merely state that the title did not first descend or fall, by force of the gift, within twenty years next before the issuing of the writ of formedon. The first descent was upon the death of the first Henry, the husband of Anna, who died in 1714. But, for any thing which appears on the face of this record, the subsequent entailees may have successively entered and held possession, and the demandant's father may have continued in possession until the day before that on which his writ of formedon bears date. With respect to the case of *Cotterell v. Dutton*, it is sufficient to say that the objection now taken was not there raised. In *Hunt v.*

(c)¹ And see 5 Rot. Parl. 293, 356.

(a) So, in exchange between a mulier and a bastard is good, although the latter, like donee in tail, can have no heirs but of his body; so, an exchange between A. seized absolutely, and B. whose estate is defeasible on the tender of a rose.

(c)² See the cases collected in *Earl Ferrers's case*, 2 Eden, 373.

(d) See the opinion of Newton C. J., ante, 380 (b); *Rex v. Braybrok and Uz*, post, 591.

Burn (2 Salk. 422) it is said that the effect of the statute is to take away the remedy, but not any right except the right of entry. A hope has been expressed, on the part of the defendant, that the court will lend its aid to the desirable object of quieting men's titles. How that is to be effected is not very clear. It is not pretended now—whatever may be contended for hereafter when this first inroad upon protected interests has been successful—that the reversioner is bound by the laches of the present or of any former entailee. Absolute title, therefore, the defendant can have none; and if the court shall determine that he has acquired any title at all, it will be difficult to say what that title is to be. It will perhaps be said that he has acquired a wrongful fee-simple until the extinction of issue in tail; in other words, a base fee. But it may be no easy matter to fix what shall be the character and the incidents of this new kind of base fee. The decision of the court below proceeded chiefly on the construction put upon the words “first descended or fallen,” by Mr. Serjt. Hullock; which, he contended, must refer to the first descent from the donee in tail to the next taker by virtue of the entail. Neither Mr. Serjt. Vaughan, who argued [588] for the demandant, nor any of the judges, made any remark upon the absurdity of referring the commencement of the period of limitation to an event which might, and which in this case did, take place fifty years before any cause of action or adverse possession. It seems probable that when the words “first descended” were used in the statute of fines, and the words “first descended or fallen” in the statute of limitations; the words “first” was employed in the same, almost redundant, sense in which it is frequently used in acts of parliament, to avoid its being supposed that because the cause of action was, in its nature, continuing, the period of limitation was not to be calculated from the time of the commencement of the existence of such continuing right.

The learned serjeant then suggested, that, inasmuch as the issues in fact remained untried, the judgment of the court below “that the demandant take nothing by his writ, but that he be in mercy, &c., and that the defendant do go thereof without day, &c.,” was premature, and ought therefore to be reversed. [Parke B. Has not the demandant improperly sued out his writ of error in this imperfect state of the record?] The demandant was clearly entitled to his writ of error upon the judgment as entered. Should the circumstance of there being other issues for trial, render it incumbent on the defendant to remain in court for the purpose of trying those immaterial issues, and disentitle him to have judgment quod eat inde sine die, the judgment would be erroneous, and ought, for that cause, to be reversed.

Erle, contra. The judgment is correct in point of form. In *Robins v. Crutchley* (2 Wils. 118), in dower, the defendants pleaded ne unques accouple and ne unques seisie que dower. There was an issue in fact, and an issue in law; and the defendant having succeeded upon the demurrer, [589] the judgment was that the plaintiff should take nothing by his writ, but that he should be in mercy, &c., without noticing the issue of fact. He also referred to *Hawkey v. Borwick* (a), and *Powell v. Sonnett* (b).

LORD DENMAN C. J. As the argument has proceeded on both sides without any reference to this point, it ought not now to be started. If there are any authorities to be cited either way, they may be handed up, and we will look at them.

Cur. adv. vult.

Jan. 24.—LORD DENMAN C. J. now said. In the case of *Tolson v. Kaye*, which was argued before us at our last sitting, we are of opinion that the judgment of the court of Common Pleas must stand; and we found that opinion upon the statute of fines, 4 Hen. 7, c. 24, the authority of *Stowel v. Lord Zouch*, and the statute of limitations, 21 Jac. 1, c. 16. It is unnecessary to say more. Probably some application may be made to the court below touching the state of the record. We give our opinion only.

PARKE B. We cannot give any judgment, as the record is incomplete.

May 15.—On a subsequent day Manning Serjt. stated that a difficulty was felt at the office as to what really was the decision of the court.

PARKE B. There could be no final judgment in the court below until all the issues were disposed of. What we did was, to quash the writ of error.

(a) 1 Y. & J. 376. And see *Cook v. Caldecott*, 4 C. & P. 315; *Drewett v. Sheard*, 7 C. & P. 465.

(b) 1 Bligh, N. S. 555; 1 Dow. — And see ante, vol. iii. 675, n.

[590] Manning Serjt. To quash the writ would be a fearful thing for the demandant; he is too late (a) to bring a second writ of error in this court.

PARKE B. Twenty years having elapsed, it is too late to sue out a second writ of error. Upon the record now before us we can give no judgment.

Erls. With a view of making a marketable title, it is desirable that the case should be definitely disposed of in some way.

PARKE B. I am not clear that this is the proper court in which to move to quash the writ. Ought not the application to be made to the court below?

Manning Serjt. The only courts which can exercise any controul or jurisdiction over a writ of error, are, the court of Chancery, out of which the writ emanates, and the court of error, into which it is returnable; which latter court is seised of the cause as soon as the writ of error is returned there (b).

PARKE B. said,—We quash the writ of error (c).

(a) Vide 10 & 11 W. 3, c. 14.

(b) In *Roberts v. Tucker*, Style, Rep. 191, 219; *Dawkes v. Payton*, ib. 218; *Shedlock v. La Pere*, ib. 265; *Porter v. Sweetnam*, ib. 406; *Conye v. Lawes*, ib. 472, the writs of error were abated or quashed by the court in which they were returnable, quia improvidè emanaverant.

(c) A judgment of quod cassetur breve was afterwards entered, for the purpose of founding a writ of error in parliament, on the ground that the judgment in C. P. was erroneous in substance, and that in the Exchequer Chamber in form, the defendant having obtained judgment of eat inde sine die; and being, it would seem, entitled to that judgment on its being decided that the replication to a plea pleaded in bar of the whole action, was bad.

Soon after the enacting of the statute de donis an attempt was made to evade its provisions [591] upon a ground not dissimilar in principle to that which was set up, with better success, in *Tolson v. Kaye*.

"T. 6 Edw. 2, London. The lord the king demands against William de Braybrok and Gunnora, his wife, one messuage and ten shops in the streets of Distafflane and Fish Street, as escheats, by the forfeiture of Thomas of Bromlee, convicted and hanged in the 34th year of King Edward, the father, &c.

"They say that the tenements were in the seisin of John, son of Henry Kingessone, who gave them to the said Thomas and the heirs of his body lawfully begotten, and for default should revert to the said John and his heirs. Wherefore they say that by reason of the reversion belonging to the said John, the tenements aforesaid will not be the escheats of any one by reason of the said forfeiture. And they produce the charter of the said John, which they here recite, &c. And, moreover, they say that in the last statute of Westminster it is contained that the will of the donor, in gifts of this kind, be observed; wherefore it is plain that a feoffee, under the condition aforesaid, could not, in his lifetime, alien, or by his act, in any manner forfeit, (or displace—aliquo modo forisfacere) the right of reversion which belongs to his feoffor. And so it appears manifestly that the said tenements neither ought, nor can, by the reasons aforesaid, be the escheats of the lord the king, or of any other, in such case.

"And Nicholas Renty, who sues, &c., says that according to the antient law used before the said statute, those to whom tenements were so conditionally given, might alien those tenements according to their will, and also forfeit them and disinherit their issue of them, contrary to the form of gift of the feoffors expressed in their gift. Nor are such feoffees excluded by the said statute, in any thing except only in making alienation. (Vide supra, 575.)

"Whereupon the record and process aforesaid being seen and inspected, &c., and diligent discussion (tractatu) being had upon them often with the justices of the lord the king of each bench, the barons of the exchequer and others of the council of the lord the king, it appeared to them (visum est eisdem) that the said Thomas being so enfeoffed of the said tenements, to hold to him and the heirs of his body begotten, so that if he should die without heir of his body begotten, those tenements should revert to the said John and his heirs, he could not, by any act of his, alien or forfeit against the will of the feoffor; and inasmuch as the said Thomas was convicted and hanged for the said felony a long time after the statute aforesaid, de donis conditionalibus, passed; as manifestly appears to the court by the record of the rolls of the pleas of the crown of the time of the lord Edward the father, &c. in the city of London, in the

[593] *STARTUP AND ANOTHER v. MACDONALD (IN ERROR)*. June 19, 1843.

[S. C. 7 Scott, N. R. 269; 12 L. J. Ex. 477. See *Coddington v. Paleologo*, 1867, L. R. 2 Ex. 197; *Biddell v. Clemens Horst Company*, [1911] 1 K. B. 949; [1912] A. C. 18.]

The defendant contracted to buy of the plaintiffs ten tuns of linseed oil, at a certain price, "to be free delivered by the plaintiffs to the defendant within the last fourteen days of March, and paid for at the expiration of that time in cash." In assumpsit for not receiving the oil pursuant to the contract, the declaration stated, that, although the plaintiffs, "within the last fourteen days of March 1838, to wit, on the 31st of March 1838, were ready and willing, and then tendered and offered to deliver to the defendant the said oil, and then requested the defendant to accept the same," &c., yet the defendant refused to accept or pay.—The defendant pleaded—first, that the tender was made on the last of the said fourteen days, at a late time of that day, to wit, at nine o'clock in the night time of that day, the same time being, by reason of such lateness thereof, an unreasonable and improper time in that behalf, for the tender and delivery of the said oil; and that the plaintiffs

34th year of his reign—since the same tenements could not, at one and the same time (simul et semel), be revertible to the said John, according to the form of the feoffment aforesaid, and also escheats, by the act of [592] the said Thomas, who held the same tenements conditionally as aforesaid; therefore it is considered that the said William and Gunnora go thereof at present without day,—salvo semper jure regis, cum aliis inde loqui voluerit." Abbrev. Placit. 317 a.

Suppose lands to be limited to A. for thirty years, remainder to the right heirs of A. in tail. A. enters, and is ousted by C. and dies, after remaining out of possession twenty years, leaving B. his son and heir. The time expires. It could not be contended that B., though claiming as heir of A., would be barred by the 21 Jac. 1, c. 16. B., though his title was as heir of A., would take not by descent but by purchase. Ante, 380 b.

In *Galche's case*, 1 Rot. Parl. 411 a. in 1321, that is, only thirty-six years after the passing of the statute de donis, even a donee in tail is styled, "tenaunt a terme de vie par la talye." It is true that in *Galche's case* Margaret Galche, the surviving donee in tail, may have become tenant in tail after possibility of issue extinct; but it is not so stated; nor is it shewn how many months after the death of her first husband, who was her co-donoree in tail, the second marriage took place.

A bishop is seised in fee, and has the whole inheritance in him, yet, as he cannot do acts to bind his successor without the assent of the dean and chapter, the successor is not bound by the laches of the predecessor. *Croft v. Howel*, Plowd. 538.

Here, the tenant in tail could not, by his acts, bind the issue in tail, beyond what he was authorized to do per formam doni, and by the 32 H. 8, c. 28.

"The issue in tail claims not under his ancestor, but paramount," per Lord Cowper C. in *Lord Fairfax v. Lord Derby*, 2 Vern. 612, upon the 32 H. 8, c. 37, where the words are, "claiming the said lands, tenements or hereditaments only by or from the same tenant, by purchase, gift or descent."

By the 3 & 4 W. 4, c. 27, s. 22, it is enacted, "that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period, hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action, to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action."

The above section does not declare, but it enacts, that the issue in tail shall be barred by the laches of his ancestor, to the same extent to which the judgment in the principal case declares he was already barred by the provisions of the 21 Jac. 1, c. 16, a statute passed two hundred years before.

And see 2 Leon. 57, 1 P. Wms. 673; *The Countess of Shrewsbury v. The Earl of Shrewsbury*, 1 Ves. jun. 227, 234; *The Earl of Belfast v. Chichester*, 2 Jac. & W. 439; *Burges v. Maubery*, Turner & Russ. 167; *Hume v. Barter*, 1 Ridgw. Parl. Cases, 207; *Leighton v. Leighton*, 1 P. Wms. 671, 673.

were not until a late, and for the delivery to and acceptance by the defendant of the said oil an unreasonable and improper, time of the last-mentioned day, to wit, the hour aforesaid, ready and willing to deliver the said oil to the defendant, modo et forma—secondly, a traverse of the averment that the plaintiffs were ready and willing to deliver.—The plaintiffs replied de injuria to the first plea, and joined issue on the second.—By a special verdict, it was found that the plaintiffs, on the 31st of March, at half-past eight in the night of the said day (being a Saturday), did tender and offer to deliver the oil to the defendant; that, from the said hour when the oil was so tendered and offered to the defendant, there was full and sufficient time before twelve o'clock of the said 31st of March, for the plaintiffs to deliver and for the defendant to examine and weigh and to receive into his possession, the whole of the oil; that, at the time when the said oil was so tendered and offered, the defendant refused to receive the same, alleging that the hour of the said tender was a late, and, by reason thereof, an unreasonable hour in that behalf. The jury also found, "that the said hour of half-past eight of the night of Saturday, the 31st of March, when the said oil was so tendered and offered to be delivered to the defendant as first aforesaid, was a late, and, by reason of its lateness, an unreasonable and improper time of that day for the tender and delivery of the said oil; and that the plaintiffs did not tender or offer, nor were they ready to deliver the said oil, to the defendant until a late, and for the delivery to, and acceptance by the defendant of, the said oil, an unreasonable and improper time of the last-mentioned day, namely, the said hour of half-past eight in the night:—"—Held (dissentiente Lord Denman), that the tender having been made to the defendant at an hour which left time enough for completing the delivery before twelve o'clock of the night of the 31st of March, was sufficient.—Secus, if by reason of the lateness of the hour, the defendant had left his warehouse before the oil arrived.

Assumpsit for not accepting certain oil.

The declaration stated that, on the 20th of October 1837, the defendant bought of the plaintiffs, and the [594] plaintiffs then sold to the defendant, a large quantity, to wit, ten tuns of merchantable linseed oil, at the rate or price of 31s. 6d. for each and every cwt. thereof, usual allowances, to be free delivered by the plaintiffs to the defendant within the last fourteen days of March, 1838, and paid for at the expiration of that time in cash, deducting $2\frac{1}{2}$ per cent. discount; that thereupon, in consideration thereof, and that the plaintiffs, at the request of the defendant, had then promised the defendant to deliver the said linseed oil to him the defendant at the time and in manner aforesaid, he the defendant then promised the plaintiffs to accept the said linseed oil of and from the plaintiffs, and to pay them for the same at the time and rate aforesaid; and although the plaintiffs afterwards, and within the last fourteen days of March, 1838, to wit, on the 31st of March, 1838, aforesaid, were ready and willing, and then tendered and offered, to deliver to the defendant the said ten tuns of merchantable linseed oil, and then requested the defendant to accept the same; and although the price for the said ten tuns of linseed oil, at the rate in that behalf aforesaid, amounted in the whole to a large sum of money, to wit, the sum of 315l., and the said time for payment for the said linseed oil had long elapsed; yet the defendant did not nor would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, accept the said linseed oil of or from the plaintiffs, or any part thereof, and had not, although often requested so to do, paid them for the same, or any part thereof, but had wholly neglected and refused so to do: by reason whereof the plaintiffs had lost and been deprived of divers great gains and profits which [595] they might and would have derived from the said sale of the said linseed oil, and had also suffered divers great losses from the decreased value of the same: whereupon they said that they were injured, &c.

The defendant pleaded—first, that the tender by the plaintiffs, and their offer to deliver to the defendant the said ten tuns of linseed oil in the declaration respectively mentioned, and the said request by the plaintiffs to the defendant to accept the same, were, and each of them was respectively, made on the last of the said last fourteen days of March, 1838, at a late time of that day, to wit, at nine o'clock in the night time of that day, the same time being, by reason of such lateness thereof, an unreasonable and improper time in that behalf for the said tender and delivery of the said oil; and that the plaintiffs were not, until a late, and for the delivery to and acceptance

by the defendant of the said oil an unreasonable and improper, time of the last-mentioned day, to wit, the hour aforesaid, ready and willing to deliver the said oil to the defendant, *modo et forma* :—verification.

Second plea—that the plaintiffs were not ready and willing, nor did they, within the last fourteen days of March, tender and offer, to deliver to the defendant the said linseed oil, *modo et forma* :—concluding to the country.

Third plea—*non assumpsit*.

The plaintiffs replied *de injuriâ* to the first plea, and joined issue on the second and third.

After argument and judgment for the defendant on the finding of the jury upon these issues (a)¹, the parties agreed that the finding should be turned into a special verdict. By this it was found, "that the plaintiffs, on the 31st of March 1838, at the hour of half-past eight in the night of the said day, the said 31st of March being a Saturday, did tender and offer to deliver to the de-[596]-fendant in the city of London the ten tuns of oil in the declaration mentioned; that, from the said hour when the said ten tuns of oil were so tendered and offered to the defendant, there was full and sufficient time before twelve o'clock of the said 31st of March for the plaintiffs to deliver and for the defendant to examine and weigh and to receive into his possession the whole of the said ten tuns of oil; that, at the said time when the said oil was so tendered and offered by the plaintiffs to the defendant, he the defendant refused to receive the same, alleging that the said hour of the said tender was a late, and, by reason thereof, an unreasonable hour in that behalf; that thereupon the plaintiffs kept the said oil in their possession from the said time when the same was so tendered and offered until the hour of seven o'clock in the morning of Monday the 2d of April in the year aforesaid, and at the said hour of seven o'clock on Monday the 2d of April, the same being the first proper and reasonable hour in that behalf after the said oil had been so refused by the defendant, they the plaintiffs again tendered and offered to deliver the said oil to the defendant in London aforesaid, and that the defendant then refused to accept the same; that the said hour of half-past eight of the night of Saturday the 31st of March, when the said oil was so tendered and offered to be delivered to the defendant as first aforesaid, was a late, and, by reason of its lateness, an unreasonable and improper, time of that day for the tender and delivery of the said oil; and that the plaintiffs did not tender or offer, nor were they ready to deliver, the said oil, to the defendant until a late, and for the delivery to and acceptance by the defendant of the said oil an unreasonable and improper time of the said last-mentioned day, namely, the said hour of half-past eight in the night." But, whether, &c.

Judgment having been entered for the defendant, on this special verdict, in the court of Common Pleas, a writ of [597] error was brought, and argued in the Exchequer Chamber on the 15th of February and 29th of November 1842, the judges present on the first occasion being Lord Denman C. J., Parke B., Patteson J., Gurney B., and Rolfe B.; and on the second, Lord Denman C. J., Lord Abinger C. B., Parke B., Alderson B., Williams J., and Rolfe B.

Cleasby, for the plaintiffs. The special verdict contains no finding as to the usage of the trade, but a mere expression of opinion on the part of the jury that the tender was, by reason of the lateness of the hour at which it was made, an unreasonable one. [Parke B. It does not appear upon what precise ground the jury find that the time was unreasonable and improper. Lord Denman C. J. Can the tender be said to have been insufficient, when the jury find that there was full and sufficient time before twelve o'clock at night of the last day named in the contract, for the plaintiffs to deliver, and for the defendant to examine and weigh and receive into his possession, the whole of the oil?] The jury find that the hour of the tender was late; and they choose to infer that it was unreasonable and improper. [Parke B. In Shepp. Toucha. 378, it is said that, "If the condition be, to come at a day to such a place to do a thing (a)², and the thing cannot be done without the concurrence of the other party; in this case the obligor must stay until the very last instant of the day for his coming; and it seems also he must stay at the place all the day long. If the condition be, to pay a rent at Michaelmas, or within twenty days after, the obligation

(a)¹ Which see ante, vol. ii. 395, 2 Scott, N. R. 485.

(a)² Mr. Preston adds, "and the hour be not fixed."

is not forfeited before the twenty days be past. If one be to do a thing on a day certain, he may do it any part of the day whilst the light doth last; and, if the condition be to do a thing by or before a day, it may be done the last instant of the day before, and it is sufficient. [598] Unless the plaintiffs were entitled to maintain this action, they would be liable to an action for not delivering the oil. But could such an action be maintained? Lord Denman C. J. In the court below the lord chief justice appears to have put the unreasonableness of the tender, on the ground of there being no person ready to receive the oil at the warehouse.] The real question is, whether the buyer could have received the goods within the period stipulated by the contract: if he could, the tender is sufficient. [Parke B. The question is, what is the common-law duty of the vendors under such a contract, without reference to any usage of trade. In Comyns's Digest, Temps (D), (E), (F), it is laid down: "What shall be reasonable time, the justices are to determine." "Summons in a real action ought not to be after the setting of the sun: nor a demand of rent." "But an arbitrament made in the night is good: so, livery of seisin upon a feoffment."] In *Leigh v. Paterson* (8 Taunt. 540, 2 J. B. Moore, 588), where the contract was for a certain quantity of tallow, "to be delivered in all December, Dallas C. J. said: "The defendant had a right to deliver the tallow at any time before twelve at night on the 31st of December; he had all that month to deliver it in, and the plaintiff was bound to receive the tallow at any moment until after the 31st." It is true that is a mere dictum; but it sufficiently shews the impression of the court. *Greaves v. Ashlin* (3 Campb. 426) has no bearing whatever upon the present case. There, no time was stipulated for the delivery of the oats. Here, the only question is, whether the tender was capable of being acted upon. The jury have found that a bona fide tender was made at such a time that the defendant might have examined, weighed, and received the whole into his possession before twelve o'clock at night on the last of the fourteen days. They have therefore virtually [599] found that the plaintiffs performed their contract; and that the defendant broke the contract on his part by refusing to receive the oil.

S. Martin (with whom was Willes) for the defendant. The question is, whether there has been such a performance of the condition precedent on the plaintiffs' part as to cast upon the defendant a duty to receive the goods. A party who seeks to enforce a contract makes the performance of his part of it a condition precedent. In a note to *Peeters v. Opie* (2 Wms. Saund. 352), the principle is stated to be, that, "where the plaintiff himself is to do an act to entitle himself to the action, he must either shew the act done, or, if it be not done, at least that he has performed every thing that was in his power to do;" citing *Lancashire v. Kellinworth* (1 Comyns's Rep. 116). The same doctrine is laid down in *Pickford v. The Grand Junction Railway Company* (8 M. & W. 372). If a tender of the oil at any time that would have enabled the delivery of the whole before twelve o'clock at night on the last of the fourteen days mentioned in the contract, would have been a legal tender, it would equally have been so if made at any hour of the night of any one of those fourteen days, or if made in the street or on the highway; and this absurdity must result unless the law imports into the contract a delivery at a reasonable and convenient time and place. In *Ellis v. Thompson* (3 M. & W. 445), the proprietor of a lead mine called the Bog Mine, situate near Shrewsbury, sold to B., a lead merchant in London, by a written contract, "200 tons of Bog Mine lead, at 22l. per ton, deliverable in the river Thames." The broker stated at the time, in answer to a question by B., that the lead was ready for shipment. A few days afterwards B. applied to the [600] broker to know whether A. would allow the freight or insurance from Gloucester or Liverpool, to which A. agreed, but B. subsequently required the lead to be delivered in London. It appeared that Gloucester and Liverpool were the usual ports of shipment for London; but the Bog Mine lead was first brought by barges down the Severn from Shrewsbury to Gloucester. The lead was delayed a considerable time in this part of its transit by the lowness of the water; and when it arrived in London, B. refused to receive it, the price having fallen considerably. In an action by A. against B. for not accepting the lead, B. pleaded that the plaintiff was not ready to deliver it within a reasonable time; on which issue was joined. The broker stated (in addition to the above facts) that he had understood from A. that the lead was at Shrewsbury. The learned judge stated to the jury that it might be taken for granted that the understanding of the parties was, that the lead was ready for shipment at Gloucester or Liverpool; that

this was confirmed by the defendant's application as to the freight and insurance (a); and that, if they thought it ought to have arrived in a shorter time, if ready for shipment at Gloucester or Liverpool, the defendant was entitled to a verdict. Upon a motion for a new trial, it was held, that the parol representation that the lead was ready for shipment, was admissible, not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined; and that the direction of the learned judge was warranted by the evidence. "The question," said Lord Abinger, "of reasonable or not reasonable time is collateral to the contract. If the contract itself had disclosed any thing about time, it might have explained all the circumstances: or, if the contract had contained any [601] specification of the particulars from which the time could necessarily be inferred, in like manner it would exclude all parol communication that could alter such necessary inference. But, where the contract is entirely silent, how are you to judge of the reasonableness of the time, if you are to exclude all evidence whatever by which it is to be computed? Suppose a man contracts to sell certain goods, and the parties agree that the goods shall be conveyed to London, and nothing is said about the time of delivery, would it not be essential to ascertain what the parties were contracting about, and whether any thing was said at the time, and whether, the reasonable time not being shewn by the contract itself, you could derive it from other sources? Therefore, in every contract of this sort, the circumstances from which the reasonableness of the time is to be inferred, must be collected from the parol evidence." And Alderson B., said: "There is no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time; and it is a question for the jury at the trial,—and this was the question put to them,—how the reasonable time, which is an implied part of the contract, is to be ascertained? It seems to me the correct mode of ascertaining what reasonable time in such a case as this, is, by placing the court and jury in the same situation as the contracting parties themselves were in at the time they made the contract: that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made, and under which the contract itself took place. By so doing, you enable the court and jury to form a safer conclusion as to what is the reasonable time, which the law implies, and within which the contract is to be performed." In *Greaves v. Ashlin*, which was an action for not delivering certain oats according to contract, the seller [602] having re-sold them because the purchaser neglected to fetch them away, Lord Ellenborough said: "If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room, or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. When a farmer sets out his tithes, and gives the parson notice to take them away, he may bring his action if the latter does not do so within a reasonable time; but the parson's neglect does not revest in the farmer the property in the articles set out." [Parke B. In the case of a bill of exchange, the acceptor has the whole of the last day until twelve o'clock at night, to pay it.] In *Wilkins v. Jadis* (2 B. & Ad. 188, 1 M. & Rob. 41) a presentment at the house where the bill was made payable, at eight o'clock in the evening, the house being shut up, and no person there to pay the bill, was held sufficient. Lord Tenterden there takes a distinction between the case of a bill made payable at the banking house, and one accepted generally. "As to bankers," he says, "it is established, with reference to a well-known rule of trade, that a presentment out of the hours of business is not sufficient; but, in other cases, the rule of law is that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time." And Patteson J., said: "The question to be considered is, whether the bill was presented at the place appointed within a reasonable time, not whether any person was there to receive it." *Parker v. Gordon* (7 East, 385, 3 T. P. Smith, 358), and *Barclay v. Bailey* (2 Camp. 527) [603] are to the same effect. In *Bac. Abr. Tender* (D), it is said, "Where money is to be paid, or goods are to be delivered, at a place certain, upon or before a day certain,

(a) If the lead had already reached either port, the application would not have been in the alternative.

the tender must not only be made upon the last day limited for the payment or delivery, but it must also be made at the uttermost convenient time of that day; for, as one party has until the uttermost convenient time of that day, to pay the money, or deliver the goods, it would be unreasonable that the other should be obliged to attend for the receiving of the money or goods before that time. But although the party who ought to pay the money or deliver the goods has until the uttermost convenient time of the last day limited for the payment or delivery to pay the money or deliver the goods, a tender is not good unless there be, after it is made, time enough, before the sun sets, to examine and tell the money, or to examine and take account of the goods: for if a man should be compelled to receive either money or goods in the dark, there would be great danger of his being imposed upon." In Sheppard's Touchstone, p. 135, it is said: "When a time is set, in certain, for the payment of money or the doing of any other thing, generally, neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certain, but no hour of the day is set down wherein the same shall be done; in this case they must attend such a distance of time before the sunset as may be convenient to do that work in; consequently the last part of the day is the time to attend for performing conditions. So, in conditions for re-entry for non-payment of rent, &c., the rent must be demanded at sunset on the last day. *Duppa v. Mayo*" (1 Saund. 282). In Viner's Abridgment, Night, the following cases are put: "Debt upon an obligation to stand to [604] as award, so as it be made before the 9th day of October, &c., and it was made the 8th day of October, at ten of the clock in the night; and ruled good; for, dies naturalis comprehends the day and night. Cro. El. 43, in case of *Greene v. Ardena*, cites it to be so adjudged between Franklin and Davies, intratur Mich. 13 & 13 Eliz. Rot. 1330, B. R." "If, in a præcipe quod reddat, the sheriff summoned the defendant upon the land in the night time, such summons is merely void—per Rhodes: La. 57" (qu. this reference). "So, in a formedon in remainder—Cro. El. 42, *Greene v. Ardena*. Livery made in the night by virtue of a letter of attorney to deliver seisin, was said per Fleetwood to have been adjudged good. Cro. El. 43, Mich. 27 & 28 Eliz. B. R. in case of *Greene v. Ardena*." *Hill v. Grange* (Plowd. 164), and *Wade's case* (5 Co. Rep. 114 b.) shew that sunset is the legal time for the demand or tender of rent, to take advantage of a condition of re-entry, or to save a forfeiture. And the case of *Tinkler v. Prentice* (4 Taunt. 549) applies the same doctrine to contracts. There is no warrant for the dictum in *Leigh v. Patterson* (8 Taunt. 540, 2 J. B. Moore, 588). If reasonable time be a question of law, it is fixed at the uttermost convenient time to allow of those operations being performed before sunset which are necessary to a complete and full delivery and acceptance; if it be a question of fact, it is concluded by the finding that the time of the tender was unreasonable and improper. From the highly inflammable nature of the commodity, it was essential that the delivery should be by daylight.

Cleasby, in reply. No question arises here as to any usage of trade; which, if it instead, might form part of the special contract; none is stated in the special verdict. It is expressly found that a tender was made on [605] the last of the fourteen days "at half-past eight in the night, and that there was full and sufficient time, before twelve of the night, for the plaintiffs to deliver, and for the defendant to examine and weigh, and to receive into his possession the whole of the ten tuns of oil." The further finding that "the hour was a late, and, by reason of its lateness, an unreasonable and improper time of that day for the tender and delivery of the oil," may be rejected as being altogether immaterial. The contract is precise and unambiguous. It would be a dangerous thing, by the introduction of the word "reasonable," to refer the construction of the contract to the jury. [Lord Abinger C. B. Would a delivery of the oil by gallons be within the contract?] The argument on the other side must be that at the time of the tender the contract was determined, but if the goods had been delivered after that hour, the delivery would have taken place under the contract. [Alderson B. When was the contract broken?] At midnight. A writ could not have been sued out at ten o'clock. Even if the lateness of the hour so far justified the defendant as to prevent his refusal from being a breach of the contract, he was not warranted in his subsequent refusal to receive the goods on the Monday morning. *Greaves v. Ashlin*, *Wilkins v. Judis*, and the other cases relative to bills of exchange, which have been cited on the other side, are distinguishable from the present case. [Lord Abinger C. B. If I am called upon as a judge to decide the point, I think that half-past eight at night is an unreasonable time for the delivery of ten tuns of oil.

A payment of money may very well be made at midnight; but that is a very different thing from accepting that quantity of oil.] It is not enough that some inconvenience may arise from the act being done at an unreasonable hour. The presentment of a bill of exchange at any time before twelve at night would be sufficient, [606] even at a banking-house, provided there was some person there to give an answer; *Garnett v. Woodcock* (a)¹. [Lord Abinger C. B. The law implies that the act shall be done at some reasonable time. It never entered into the contemplation of these parties that the oil should be deliverable at any hour of the twenty-four in each of the last fourteen days in March.] The legal consequences of a contract are not affected by the expectations of the parties, but are governed by the legal meaning of the language they have adopted. [Lord Abinger C. B. All questions of reasonableness—reasonable cause, reasonable time, and the like—are, strictly speaking, matters of fact. The court does not decide them as abstract propositions, but upon the facts of the particular case.] In Co. Litt. 56 b. (1 Tho. Co. Litt. 644) it is said, "This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs and services, upon the true state of the case depending before them; for reasonableness in these cases, belongeth to the knowledge of the law, and therefore to be decided by the justices. Quam longum esse debet, non definitur in jure, sed pendet ex discretione justiariorum (citing (but incorrectly), Bracton, lib. 2, cap. 52 b.). And this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing that is contrary to reason is consonant to law." *Bell v. Wardell* (Willes, 202), in some respects, resembles the present case. The language of Lord Kenyon in *Leffley v. Mills* (4 T. R. 172, 174) is strong to shew that here the plaintiffs had till twelve o'clock at night to make the tender of the oil. In *Leffley v. Mills* a question arose as to [607] the time at which a bill should be paid. Lord Kenyon said: "According to the nature of the contract, the acceptance was an undertaking to pay the bill on the last of the three days of grace. Now, unless there be something in this case to distinguish it from other contracts, it must be governed by the same rules. In the case of mortgages, bonds, and a variety of other instruments, whereby parties oblige themselves to the performance of certain duties, as, to pay money within a certain time, we find the rule to be, without any exception, that the party bound has till the last moment of the day to deliver himself from the obligation by paying. The first case in point of time is that of *Hudson v. Barton*, 1 Rol. Rep. 189, where Lord Coke said that a debtor is not bound to pay till the last hour of the day; and though Haughton J. seemed to differ from Lord Coke, that difference was applicable to another part of the case. Lord Hale also, in *Kabel v. Vaughan*, 1 Saund. 287 (a)², was of this opinion, and said that rent was not due till the last instant of the day. Moore, 122, pl. 266, and Salk. 578, are to the same effect. And I find no authority to the contrary; therefore the law must be the same here as in other cases." So, in *William Clun's case* (10 Co. Rep. 127 b.), it is said that "legal time (for payment of rent) is a convenient time before the last instant of the day, which is the most extreme time; for, till the end of the day, no remedy is given by the law, 21 Hen. 6, 40 a." (c). What is there in this case [608] to shew that the plaintiffs have broken their contract by not delivering the goods? They clearly had until twelve at night for the performance of the act.

(a)¹ 1 Stark. N. P. C. 475. There, in an action against the acceptor of a bill, accepted payable at a banking house, presentment after banking hours to a person there who returned for answer, "no orders," was held by Lord Ellenborough to be a sufficient presentment; and the court of K. B. refused a rule for a new trial.

(a)² The case in 1 Saund. 287 is not *Kabel v. Vaughan*, but *Duppa v. Mayo*, which is evidently the case meant to be referred to.

(c) *Aske v. Sir Henry Brounfeld*, P. 21 H. 6, fo. 39, pl. 8. That was a case of distress for suit at a court-baron. What is said about distress for rent is merely by way of illustration. "Newton (C. J.) and Paston (J.) thought that the traverse ought to be as Markham had said; and yet in replevin the day is traversable; as if I have a rent-service or rent-charge, payable every year on Midsummer-day, I cannot distrain the same day; for all time during the day he has space to pay me the rent; but after that day I can distrain; and if I distrain after the day and another brings replevin, and supposes his beasts to be taken on Midsummer-day, I can well shew the matter, and take traverse upon the day."

It is unnecessary to refer to the authorities which have been cited as to sunset; for it appears, by many cases, that commercial transactions often take place after that time; and those authorities, therefore, are not applicable. [Parke B. You contend that the first issue is found for the plaintiffs, and the second for the defendants; but that the facts found with respect to that issue are not material, and, consequently, that the plaintiffs are upon the latter issue entitled to judgment non obstante veredicto.]

Cur. adv. vult.

The judges, differing in opinion, now delivered judgment seriatim.

ROLFE B. This was an action brought to recover the price of certain oil, which had been sold by the plaintiffs to the defendant, and which the defendant had refused to accept. The declaration states that the defendant bought of the plaintiffs ten tuns of linseed oil, at 31s. 6d. per cwt., to be free delivered by the plaintiffs to the defendant, within the last fourteen days of March 1838, and to be paid for, at the expiration of that time, in cash. It then goes on to state that the plaintiffs were ready and willing, and tendered and offered, to deliver to the defendant, the said ten tuns of oil, within the said fourteen days; yet the defendant would not accept the same, or pay to the plaintiffs the price thereof.

[609] To this declaration the defendant pleaded—first, that the tender of the oil was made on the last of the fourteen days at a late hour of the night, that is to say, at nine o'clock at night, being, by reason of its lateness, an unreasonable hour for such tender; secondly, a traverse of the averment, that the plaintiffs were ready and willing to deliver the oil.

To the first plea there is the replication *de injuriâ*. Issue being joined on the replication, and on the second plea, the cause came on to be tried before my brother Erskine, when the jury found a special verdict, that the plaintiffs, at half-past eight o'clock on the evening of Saturday the 31st of March 1838, being the last of the fourteen days, tendered, and offered to deliver, the oil to the defendant. They further found, that there was full and sufficient time before midnight, and after the tender, for the plaintiffs to deliver, and for the defendant to examine, weigh, and receive into his possession, the said oil, but that the defendant refused to receive it by reason of the lateness of the hour; and that the plaintiffs thereupon kept the oil, and again tendered it at seven o'clock on the following Monday morning, but that the defendant still refused to accept it. They further found, that the hour of half-past eight in the evening on the 31st of March was a late, and by reason of its lateness, an unreasonable and improper, time of that day for the tender and delivery of the oil, and that the plaintiffs were not ready and willing, and did not tender, or offer to deliver the said oil, until the said unreasonable and improper hour of half-past eight in the evening.

Upon this verdict the court of Common Pleas gave judgment for the defendant; and the question for our decision is, whether that judgment is right. The case was very fully argued before us, and its decision must, as it seems to me, turn entirely on the question,—what [610] is the true meaning of the contract stated in the declaration? Does that contract impliedly contain in it, beyond the express stipulation to deliver within the fourteen days, a further provision that the delivery shall be made at an hour not unreasonably late? If it does, then the judgment of the court of Common Pleas was right; if it does not, then their judgment was wrong.

Now, it may be observed, that in every contract by which a party binds himself to deliver goods, or pay money, to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or to pay, can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another, as having, substantially, performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made, has had a reasonable opportunity of examining the goods, or the money, tendered, in order to ascertain that the thing tendered really was what it purported to be. Indeed, without such an opportunity an offer to delivery or pay does not amount to a tender. Now, to apply this principle to the present case. The contract was to deliver the oil before the end of March. The plaintiffs did, in pursu-

ance of that contract, tender the oil to the defendant at a time which, according to the express finding of the jury, left him full opportunity to examine, weigh and receive it, before the end of March. If he had then accepted it, there can be no doubt but that the contract would have been literally performed; and the neglect of the defendant to perform his part of the con-[611]-tract when he had the opportunity of doing so within the stipulated time, cannot, in my opinion, in any manner affect the rights of the plaintiffs. All they stipulated for was, to deliver the oil before the end of March, that is, to tender it to the defendant at such a time as should enable him to examine, weigh, and receive it before the end of March. This they did, and thereby, in my opinion, they fulfilled all they had contracted to do.

In the course of the argument we were referred to many authorities, antient and modern, which, it was alleged, established the proposition, that where money is to be paid, or goods are to be delivered, or any other act is to be done, and no time is mentioned for the purpose, the law implies that it is to be done at a reasonable time. The counsel for the defendant relied on *Wade's case* (5 Co. Rep. 114 b.), Sheppard's Touchstone, 136, 7 Bac. Abr. Tender, 529 (7th edition); and these authorities, it was contended, warranted the judgment of the Common Pleas in the present case; for here, it is said, no hour was fixed at which the oil should be delivered, and the jury have expressly found that the tender was, in fact, made at an hour unreasonable by reason of its lateness. I do not however think that the authorities referred to have any bearing upon the point now under discussion. The act of delivering goods, or paying money, being an act requiring the concurrence of both the contracting parties—of him who is to receive as well as of him who is to deliver—and not only their concurrence, but their concurrences at the same time and place—the question necessarily arises, in the absence of express stipulation, when and where it is to be the duty of the parties to meet for the purpose of joining in that common act, which can only be effected by the co-operation of both—at what hour of the day is the one [612] party to attend to deliver or pay, and the other to receive? Necessity has, in these cases, given rise to the law on the subject. As the parties have, by the hypothesis, been silent on the subject, the law has, to some extent, stepped in to supply the deficiency, and has said that the party who is to receive is bound to attend at a reasonable place, and wait till a reasonable hour, for the purpose of receiving what the other party is bound to deliver. If the party bound to deliver or pay does not come and make the tender, then, when the reasonable hour is past, the party who is to receive is no longer bound to attend; he is not bound to expect that the other party will come at an unreasonable hour, and he will be guilty of no default by departing. If the party who is bound to make the tender afterwards comes to the place where it ought to be made, and is then prevented from making a tender by reason of the absence of the other contracting party, he cannot allege that absence as an excuse for not performing his contract. Having neglected to attend at a reasonable time, he has, by his own act, rendered it impossible that he should make a tender, unless he afterwards, and before the expiration of the period limited by the contract, actually finds the other contracting party; but if he does find him, and actually makes a tender of the goods in time to enable him to examine, weigh, and receive, what is tendered, the contract is then performed so far as relates to the party who is to deliver, and no question of reasonable time arises.

It was pressed in argument, on the part of the defendant, that the doctrine contended for goes the length of establishing that a tender in the middle of the night would be good. And undoubtedly that is so. But I see no absurdity in this conclusion. The person who is to receive the goods certainly would not be bound to get up at an unreasonable hour to enable the other [613] party to make a tender of them. But if he were to choose to do so, and a tender were to be actually made within the period comprised in the contract, I think it would be a sufficient tender.

In like manner it was said that the doctrine contended for would prove that a tender of the oil in the street or on the highway, would be a sufficient compliance with the contract. And so I think it would, if the circumstances were such that the jury could properly find that a tender was in fact made. But it must be borne in mind that it is not every offer to deliver that amounts to a tender. The offer must be made under circumstances which give to the other party the opportunity of examining and receiving the thing tendered; and these circumstances clearly would not exist in the case of an offer to deliver a large quantity of oil to a person in the highway. In such

a case as that supposed, it would be improper to say, that which the jury have said here, that a tender had been made at all. There would, indeed, have been an offer to deliver, but an offer under circumstances which made acceptance impossible. Such an offer would be altogether nugatory and delusive, and, certainly, would not amount to a tender. In the present case none of these supposed absurdities exist. The plaintiffs, according to the finding of the jury, have, within the stipulated time, tendered the oil to the defendant under circumstances which gave him full opportunity to weigh, examine, and receive it. This is all the plaintiffs were bound to do; and I am therefore of opinion that they are entitled to our judgment, and, consequently, that the judgment of the court of Common Pleas ought to be reversed.

GURNEY B., by whom the above opinion was read in the absence of Mr. Baron Rolfe, stated that he had not come prepared to deliver his own opinion at large, [614] not being aware that the case was in the paper for judgment on this day, but that he entirely concurred in the opinion he had just read.

WILLIAMS J. This was an action brought against the defendant for not accepting a certain quantity of oil, the plaintiffs, by the terms of the contract, having stipulated to deliver the same to the defendant within the last fourteen days of the month of March 1838: and the question for our opinion is, whether, upon the form of the pleadings, the issues joined, and the finding of the jury thereon, such stipulation has been complied with; or, in other words, whether the contract has been so far performed on the part of the plaintiffs as to enable them to maintain an action thereon. To the allegation in the declaration that the plaintiffs, within the time specified, "were ready and willing, and tendered and offered, to deliver the said oil, but that the defendant refused to accept and receive the same," the defendant pleaded two pleas—first, "that the said tender and offer of the plaintiffs were made on the last of the said last fourteen days of March 1838, at a late time of that day, to wit, at nine o'clock in the night of that day, the said time being, by reason of such lateness, an unreasonable and improper time in that behalf for the said tender and delivery of the said oil;" secondly, "that the plaintiffs were not ready and willing, nor did they within the last fourteen days of March tender the said oil, *modo et forma*." And the finding of the jury upon the issues joined thereon, is as follows: "That the plaintiffs on the 31st day of March 1838, at the hour of half-past eight in the night of the said day, being a Saturday, did tender and offer to deliver to the defendant the said ten tuns of oil in the declaration mentioned, and that from the said hour when the said oil was so tendered, there was full and sufficient time before [615] twelve o'clock at night for the plaintiffs to deliver, and for the defendant to examine, weigh, and receive into his possession, the whole of the said oil; that the defendants refused to receive the said oil, alleging that the said hour was a late, and, by reason thereof, an unreasonable hour for the said tender." The finding then states a tender and refusal on the Monday morning following, and then proceeds thus: "that the said hour of half-past eight of the said night of Saturday the 31st of March was a late, and, by reason of its lateness, an unreasonable and improper time of that day for the tender and delivery of the said oil, and that the plaintiffs did not tender the said oil until a late, and for the delivery to, and acceptance by, the defendant, of the said oil, an unreasonable and improper time of the day, to wit, half-past eight in the night."

Upon these findings it is impossible not to perceive that they are in a great degree, if not wholly, inconsistent with, and destructive of, each other; inasmuch as it seems that "the unreasonableness and impropriety" of the tender, under the circumstances, must depend upon no opportunity having been afforded to complete the transaction, i.e. to unload the oil, on the one hand, and to examine it and warehouse it, on the other; whereas, it is expressly found, that there was time to finish the business before midnight of the 31st. If the first plea had stated (and there had been a finding in conformity) that the tender was made so late that it was impossible, for want of time, that those steps could be mutually taken during that (for which, however, the jury have found that there was) time, the question would, in my opinion, have been very different; and it might have been very difficult to maintain, that such a tender as has lastly been supposed, would have been sufficient. As it is, the whole of the fourteen days were open to the plaintiffs; and on whichever of those days [616] (for whether it took place on the last or on any other seems, in this respect, to make no difference), the tender might be made, every part of that day was, by the terms of the contract, also open to the plaintiffs, unless they were prohibited by some rule of law, or estab-

lished usage of trade, from making such tender after some certain hour. Nothing of the latter sort is stated or found; and with respect to the law, the analogy derived from other cases seems to be in favour rather of an extended, than a limited, construction. In the case of a covenant for the payment of rent, for instance, the tenant has the whole of the day to pay the rent; and if he tender it on the land, even in the absence of the lessor, a convenient time before sunset, he is not liable to an action or distress; and if he can meet with the lessor at any time on the last day, on or off the land, and made the tender, a forfeiture is avoided.

Upon the whole, it seems to me that the facts found by the jury fall short of making the intended defence available, and that it could not be made so without the addition of something else. The statement in the first plea introduced a rule for construing the contract, arbitrary and uncertain, and resting upon no fixed or definite principle; and, accordingly, the allegation of the time of the tender being unreasonable and improper by reason of the lateness of the hour, without applying the test before suggested, viz. that the business could not, by reason thereof, be completed in the course of the day, in my opinion, is therefore imperfect, and furnishes no answer to the action; and I think that there should be judgment for the plaintiffs, notwithstanding the finding of the jury in support of that plea.

The result is, that, in my opinion, the judgment of the court of Common Pleas is wrong, and must be reversed.

[617] PATTERSON J. The declaration in this case states the contract to be for ten tuns of oil, "to be delivered by the plaintiffs to the defendant within the last fourteen days of March:" it then avers that within the last fourteen days of March, the plaintiffs were ready and willing, and tendered and offered, to deliver the oil to the defendant, and requested him to accept it. The plea states that those things were done on the last of the fourteen days, "at a late time of the day, to wit, at nine o'clock in the night time of that day, the same time being, by reason of such lateness thereof, an unreasonable and improper time in that behalf for the said tender and delivery of the said oil." The plaintiffs replied *de injuria*; upon which issue was joined. There was a second plea traversing the allegation of tender in the declaration; on which also issue was joined.

It is to be observed that the special plea does not allege any custom or usage of the particular trade and place where this contract was to be performed, the existence of which, if denied, would clearly have been a question of fact for the jury; but,—admitting that the tender was made within the time specified in the contract, namely, within the last fourteen days of March,—it alleges that it was made at a late, unreasonable, and improper hour of the last day. The words used in the plea are very loose and general, and their meaning not very plain; on which account I feel considerable difficulty in dealing with them, and with the special verdict which the jury have found in this case.

That special verdict,—which applies to both issues,—finds that "the tender was made on the last day at half-past eight in the night, and that there was full and sufficient time, before twelve of the night, for the plaintiffs to deliver, and for the defendant to examine and weigh, and to receive into his possession, the whole of the ten tuns of oil." It further finds that "the hour [618] was a late, and, by reason of its lateness, an unreasonable and improper time of that day for the tender and delivery of the oil."

The verdict is couched in the very terms of the special plea; and therefore whatever may be done as to the second issue, it seems to me to be impossible for the court to say that the verdict is to be entered for the plaintiffs on the first issue, without rejecting that part of the verdict which finds the time to have been unreasonable and improper.

Now, if these words in the plea "unreasonable and improper time" be taken to mean that there was not a sufficient interval of time between the tender and twelve at night to have completed the delivery, the question would, doubtless, be for the jury; and if they had found that there was not, the tender would have been, as I apprehend, at an unreasonable and improper time. The plaintiffs' contract was to deliver within the last fourteen days of March; and if they tendered at so late an hour that there was not time to deliver before the end of the fourteen days, they were not in a condition to perform their contract—they were not ready to deliver within the time specified. The jury, however, have found the fact directly the other way; and there-

fore their subsequent finding that the time was unreasonable and improper, taking those words in the sense just mentioned, is repugnant, and must be rejected.

On the other hand, if the words "unreasonable and improper time" be taken in a general and unlimited sense, as I think they must, there being no qualification or restriction of them in the plea, then I do not see how the latter part of the finding of the jury can be rejected, since there is no repugnancy between that part, so understood, and the former part of the verdict; and the defendant will be entitled to have the verdict entered for him.

[619] A question, however, will still remain,—and which I apprehend to be the real question in the cause,—whether the plea, as framed, is good in law. If it be, a similar answer would be equally good in all cases of tender; and the question, on account of its universality, becomes one of some importance.

I apprehend the general rule of law to be, that where a thing is to be done on a certain day, it may be done at any time before twelve o'clock at night, unless there be any particular usage,—as in the case of presentment of bills of exchange, and many other instances which may be put,—and it follows, that wherever that general rule applies, a tender or offer to do the thing at such an hour as that it can be completely done before twelve at night, will be good. If the tender be actually made by that time, it is utterly immaterial whether it is late in the day or early; and whether the time is unreasonable or improper, in a popular sense,—for the words have no legal meaning,—and the delivery, if made before twelve at night, will be good, and the tender to deliver, if actually made, must be equally good. If, indeed, in this case the plaintiffs, when they went to tender the oil at the late hour of half-past eight, had found the premises of the defendants closed, and neither himself, nor any one entrusted by him to receive goods, there, I apprehend that no tender could have been actually made, and the second issue must have been found for the defendants; and this would have been the plaintiffs' own fault for not coming at a time when the defendant could be found, he not being bound to wait on his premises till twelve at night. But, here, the defendant was found, and the tender was made, and made within the fourteen days.

The case was likened, upon the argument, to the case of rent, which, it was said, must be demanded or tendered before sunset, in order to create or avoid a forfeiture. [620] No doubt a demand or tender of rent on the land, that is, where the other party does not attend, must be so made; which is a rule of convenience adopted by the law to prevent the necessity of one party waiting for the other till midnight. But if the tenant meet the lessor either on or off the land, at any time of the last day of payment, and tender the rent, it is sufficient to save a forfeiture. See 1 Wms. Saunders, 287 a., and the cases there cited. Other instances of a similar kind, where something is to be done at a particular place, might easily be adduced. So here, it may be conceded that the defendant was not bound to be on his premises ready to receive the oil, after the usual hours of business; and if he had gone away, and the plaintiffs had afterwards come, and been unable to make a personal tender, they must have suffered for their delay; but as the defendant did wait, and as the tender was made in time to complete the delivery within the time specified, the unreasonableness and impropriety of the time, whatever those words mean, form no answer to the action for not accepting the oil.

Upon the whole, therefore, I am of opinion that the judgment of the court below must be reversed, and that the verdict ought to be entered for the plaintiffs on the second issue, viz. that they were ready and willing, and did tender and offer to deliver the oil, in manner and form as in the declaration mentioned; and that the verdict must be entered for the defendant on the first issue; but that judgment must be given for the plaintiffs notwithstanding the verdict.

ALDERSON B. I am also of opinion that the judgment of the court of Common Pleas is erroneous, and ought to be reversed.

By the contract stated in the declaration, the defendant has undertaken to accept the ten tuns of linseed oil [621] at a fixed price, to be delivered by the plaintiffs within the last fourteen days of March 1838; and the only question is, whether the circumstances stated on the record, are sufficient to excuse him from fulfilling this obligation. It is no doubt necessary that the plaintiffs should have tendered to the defendant the goods within the time specified. This they have done, if the time include the whole of the last day of March 1838. But it is stated in the defendant's

plea, as the fact was, that though the plaintiffs did make the tender to him, and on the last day of March, yet they made it at an hour unreasonably late for him to receive it. This is the only ground of the defence. It is not stated on the record, or found by the jury, that it was not possible for the defendant properly to examine the quality and ascertain the quantity, of the goods tendered, or that the tender was made so late that he could not receive them, being bulky articles, into his warehouses within the time limited by the contract—which I apprehend would have been competent defences under a mere denial of the tender,—but it is stated, and found by the jury, that the hour, though sufficiently early for both those purposes, was unreasonably late—being, in fact, after the usual hours of mercantile business. It appears to me that if we were to hold this to be a sufficient defence, we should really introduce a new term into the agreement. Here, the tender is admitted to have been made to the defendant himself, and at an hour when he could have examined and received the goods; and this is within the period specified.

I quite agree that the defendant was not bound to be at his warehouse at an unreasonably late hour; and if the plaintiffs had come and found the warehouse closed and the defendant absent, and this at the hour mentioned on this record, the plaintiffs would have failed to prove their tender of the goods. But the defendant was [622] there, and the goods were actually tendered to him, and in time for him to have received them. In the case of rent it is indeed necessary for a tenant, seeking to establish a tender of the rent, to be on the land—in the most notorious place of it, and also at a convenient time before sunset, sufficient to enable the lessor, if there to count the money to be tendered to him. But in these cases, although this reasonable time and place are prescribed in order that the tender may be good, even though the lessor be absent, yet if the parties do actually meet at any time of the last day, and the tender of the rent is then actually made, it will be sufficient (a); for the rent is not due till the last minute of the natural day, and there is an actual tender before that time.

The general rule, I conceive, is, that wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day, to perform their obligation. The only qualification, that I am aware of, to this rule is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act, at such a period before the end of the last day, as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed. The party, therefore, who does not make his tender at that usual place, or during those usual hours, runs a great risk of not being able to make it at all. In this case the plaintiffs have had the good fortune to meet [623] with the defendant, and to make a tender to him in sufficient time. And I think, under these circumstances, that the defendant was bound to accept the goods, and is liable in damages for not accepting them.

I think, for these reasons, that the judgment of the court of Common Pleas is erroneous, and ought to be reversed.

PARKE B. Upon the facts found by the special verdict, I am of opinion that the judgment of the court of Common Pleas is erroneous, and that the plaintiffs are entitled to succeed. The question in this case may be very shortly stated. It is merely, what is the proper time of the day for a tender of goods under a contract to sell and deliver to another within a certain number of days—the mode of tender being in other respects reasonable and proper (for it is found to be unreasonable only in respect of the lateness), the tender being made to the vendee personally, and there being no usage of trade as to the time for delivery, to qualify, or explain, the contract.

The special verdict, as I understand it, is framed so as to raise no other question than that of time; and the point to be decided is, whether, according to law, the tender is to be made at a reasonable time of the day to be determined by the jury under all the circumstances, or whether the time is fixed by law, and, if so, what the rule of law is.

(a) I.e., supposing there be time to count the moneys tendered before midnight.

Upon a reference to the authorities, and due consideration of them, it appears to me that there is no doubt upon this question. It is not to be left to a jury, to be determined as a question of practical convenience or reasonableness in each case; but the law appears to have fixed the rule; and it is this, that a party who is, by contract, to pay money, or to do a thing transitory, to another, anywhere, on a certain day, has the whole [624] of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case the party bound must find the other, at his peril, *Kidwelly v. Brand* (Plowden, 71), and within the time limited, if the other be within the four seas, Shepp. 136 (edit. 1651); and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that, at a convenient time before midnight, such time varying according to the quantum of the payment, or nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made, to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and it is by the fault of the other only, that the payment or delivery is not complete.

But where the thing to be done is to be performed at a certain place, on or before a certain day, to another party to a contract, there the tender must be to the other party at that place; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain; and, therefore, it fixes a particular part of the day for his presence; and it is enough if he be at the place at such a convenient time before sunset on the last day as that the act may be completed by daylight; and if the party [625] bound tender to the party there, if present, or, if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient; and if the tender be made to the other party at the place at any time of the day, the contract is performed; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited, and a tender is made, the tender is good. See Bacon's Abr. tit. Tender. (D.) (citing 1 Inst. (Co. Litt.) 202, 211, 5 Co. Rep. 114, Cro. Eliz. 14), Co. Litt. 202 a. This is the distinction which prevails in all the cases—where a thing is to be done any where, a tender a convenient time before midnight is sufficient; where a thing is to be done at a particular place, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time before sunset. This is the meaning of the distinction in *Withers v. Drew* (Cro. Eliz. 676) referred to in Viner's Abr. Night (15 Vin. Abr. 554), and cited on the argument,—that things done in the night, where personal attendance of another is not necessary, are good; as an award made in the night before twelve, was held to be valid. The case of a reservation of rent with a covenant to pay it, affords a clear illustration of the principle above laid down. The tenant has until the last moment of the day to pay rent; and if he tender it to the lessor personally on the land, if he can find him, a convenient time before midnight, he is not liable to an action, *Keating v. Irish* (1 Lutw. 593); or to a distress, if he tender any time before it takes place. But as the rent issues out of the land, it is competent for [626] the tenant to protect himself by being ready on the land at the door of the mansion-house, or the place most notorious, a convenient time, before sunset, for the rent to be counted over and received, and remaining there during that time, though the lessor be not there to receive it. *Tinckler v. Prentice* (4 Taunt. 549); Bro. Abr. tit. Tender, pl. 41; *Hill v. Grange* (Plowd. 173). And, on the other hand, if the lessor wishes to enforce a clause of re-entry for non-payment of rent, he must be on the land at the place and time before mentioned, and there demand it. But if the parties meet at any time whatever on the last day, on or off the land, *Cropp v. Hambleton* (Cro. Eliz. 48), and the tender is made, the forfeiture (d) is saved.

(d) Co. Litt. 202, 211, 1 Wms. Saund. 287, n.

If, in this case, the goods had been deliverable at a particular place, the vendor would have been bound to deliver, and the vendee to accept, at that place; and the vendee need not have been there except a convenient time before sunset; but a tender to the vendee at the place at any other time of the day, there being convenient time to receive, examine, and weigh before the termination of that day, would have been good.

I therefore think that the tender was good in this case in point of time, and, consequently, that the plaintiffs having been able to meet with the defendant, and actually to tender the oil to him a sufficient time before midnight to enable the defendant to receive, examine, and weigh the oil, performed, as far as they could, their part of the contract, and were entitled to recover for the breach of it by the defendant.

The judgment of the court of Common Pleas must be reversed, and our judgment must be, on the facts found, that the plaintiffs tendered, and that the first plea, though supported in fact, was bad in law, and that [627] the plaintiffs are entitled to judgment non obstante veredicto.

LORD DENMAN C. J. I cannot give my opinion on this case without expressing my distrust of its correctness, since all my learned brethren now present have arrived at the opposite conclusion. It is, however, some consolation that I agree with the court of Common Pleas, and with the first impression made during the argument on several members of this court. My own certainly remains unaltered by what I have heard. The train of authorities cited rather tended to confirm me in it, all applying to a tender of money contracted to be paid on a day certain; and they establish the principle that a tender on that day is not sufficient, but the tender must be made at a convenient time on that day. It may indeed be the uttermost convenient time; but in requiring that the time should be convenient, the law qualifies the obligation to accept money on a particular day from a regard to the ordinary wants, and understood expectations, of mankind. I cannot see why the same qualification should not be introduced in reference to the delivery of goods. Indeed, I should rather say that that consistency as well as reason exact it, and that a greater variety of circumstances may affect the question of convenience.

Suppose a plea of tender of a sum of money on a day named, and a replication that it was not tendered in reasonable time. If issue were taken thereon, and the jury found, in general terms, that the tender was not reasonable on account of the lateness of the hour, I apprehend the plaintiff must succeed. But if the jury had further found that though the time was unreasonable by the lateness of the hour, there was full time for the plaintiff to have counted and weighed the money, an argument might have been raised, whether this finding [628] did not involve a contradiction, as the law seems to regard no other circumstances as making the time of a tender of money, reasonable.

But where the question is as to the delivery of bulky goods in a great commercial community, notoriously conducting its operations by certain rules known among all merchants, it seems to me obvious that the lateness of the hour may make a tender unreasonable, though the time may be sufficient for weighing, measuring, and warehousing. There ought to be opportunity as well as time. The known habits of the contracting parties may be taken into that account. Supposing it to be clear that such delivery cannot be made without a certain force of labourers to receive and stow away goods, and notorious that all labourers employed in that trade left their work at an earlier hour than that of the tender, I think a tender after that period would be unreasonable, and that the lateness of the hour might be truly stated as the cause. I cannot understand why this may not have been present to the mind of both parties when they joined issue, and of the jury when they found their verdict (a).

Suppose this declaration had alleged a contract to deliver within fourteen days, and had added that "the plaintiffs delivered on the fourteenth day, but true it is that they delivered at an unreasonable time by reason of the lateness of the hour." True, the particular facts which would thus, with the lateness of the hour, shew the tender unreasonable, might have been specially pleaded; e.g. the want of time to deliver the

(a) Quære, whether the jury could truly find that there was sufficient time to weigh, measure and warehouse the oil; if there were not sufficient time to collect the labourers, without whose assistance such weighing, &c. could not be effected.

article, from its being contained in vessels of unusual form—the absence of all the servants, according to custom, from the warehouse [629] at the time of the tender—some particular usage of the trade with respect to the time for delivering such goods—the want of daylight, involving the necessity for using candles, and thus producing danger of fire to the stock in trade; these, or similar, facts might have been specially pleaded, and either contradicted or explained, and the opinion of the jury taken on the facts, whereupon ultimately the issue might depend. But if the party choose to take an issue, in general terms, on the entire state of facts, may he not do so? I apprehend that he may, and that he must be bound by a verdict found by the jury on the very question which he agrees to submit to their consideration, unless the law distinctly sees that there can be no ground for pronouncing the tender unreasonable. I can discover no such impossibility; on the contrary, I can easily conceive cases in which, notwithstanding the sufficiency of time for all the particulars that appear in the finding of the jury, other circumstances may render it unreasonable and naught. My individual opinion, therefore, is that the judgment of the Common Pleas ought to be affirmed.

Judgment reversed.

The court of Error being bound, upon reversing the judgment of the court below, to pronounce the judgment which that court ought to have given, a discussion arose as to the form in which the judgment should be entered. It was ultimately ordered that judgment should be entered for the plaintiffs, as upon a verdict for them, on the second issue; and also for the plaintiffs non obstante veredicto, on the first issue.

[630] BARNETT AND OTHERS v. BRANDAO, IN ERROR. June 19, 1843.

[Reversed in House of Lords, 12 Cl. & F. 787; 3 C. B. 519.]

Judicial notice was taken of the general lien of bankers on the securities of their customers in their custody.—C. bought on account of A., who had remitted money to C. for that purpose, certain exchequer bills, which C. deposited in a box, which he kept at his banker's, B.'s, the key being retained by C. As often as the time came for receiving the contents and exchanging the bills for new ones, C. took them out of the box and gave them to B. for that purpose (such being the usual course of business); the new bills were handed over to C., and were by him locked up in the box, the interest received being passed to the credit of C.'s account with B. The bills themselves were never entered to C.'s account, nor had B. any notice or knowledge that they were not the property of C. On the 1st of December 1836, C. took the bills out of the box, and delivered them to B. to be exchanged. The new bills (C. being absent on account of illness) remained in the possession of B. down to the time of C.'s failure, his account in the meantime having been overdrawn:—Held (in reversal of the judgment of the court below), that B. had a lien on the bills for the general balance due from C., as being securities which passed by delivery, and which came to their hands as bankers in the way of their business; and that the bills received in exchange were equally in B.'s possession in the course of business, whether they were intended to remain in B.'s custody until it should suit the convenience of C. to call for them, or until C. should choose to sell them or to have them again exchanged.

In trover brought by José Alexandro Ferreira Brandão, the plaintiff below, against Messrs. Barnett, Hoare, & Co., bankers, the defendants below, to recover the value of certain instruments or securities for the payment of money, called exchequer bills, the defendants below pleaded, first, not guilty; secondly, that the plaintiff was not lawfully possessed of the said instruments or securities, or of any of them, *modo et forma*; thirdly, that, before and at the said time when, &c., they were bankers, and carried on business as bankers, in copartnership together, in London, and that certain persons carrying on trade and business under the firm and style of James Burn & Co. kept cash and an account with the defendants as such bankers; that the said instruments or securities were certain instruments or securities called exchequer bills, issued and granted under and by virtue of an act of parliament, [631] &c. (6 & 7 W. 4, c. 113), intituled, &c.; that one of the said instruments or securities was and is a certain bill for 1000*l.*, bearing date the 19th of December, 1836, and was and is in form as follows; that is to say, "No. 8551, 1000*l.* By virtue of an act, 6th et 7th Gulielmi 4^{ti} Regis, for

raising the sum of 14,007,950*l.*, by exchequer bills, for the service of the year 1836-7. This bill entitles ——— or order to one thousand pounds, with interest after the rate of twopence halfpenny per centum per diem, payable out of the first aids or supplies to be granted in the next session of parliament; and this bill is to be current, and pass in any of the public revenues, aids, taxes, or supplies, or to the account of His Majesty's Exchequer at the Bank of England, after the 5th day of April, 1837. Dated, at the Exchequer, the 19th day of December, 1836. J. Newport. If the blank is not filled up, this bill will be paid to bearer; the cheques must not be cut off." That the residue of the instruments or securities in the declaration mentioned, were and are respectively exchequer bills, that is to say, six exchequer bills for the payment of 1000*l.* each, in the same terms and form as the said exchequer bill, the form whereof was in that plea set forth, except that instead of being numbered 8551, they were respectively numbered 8552, 8553, 8554, 8555, 8556, 8557; four exchequer bills for the payment of 500*l.* each, in the same terms and form as the said exchequer bill, the form whereof was in that plea set forth, except that, instead of being numbered as aforesaid, they were respectively numbered 2467, &c., and that, instead of being for the payment of 1000*l.* each, they were respectively for the payment of 500*l.* each; one exchequer bill for the payment of 200*l.* in the same terms and form as the said exchequer bill, the form whereof was in that plea set forth, except that, instead [632] of being numbered as aforesaid, it was numbered 1213, and that, instead of being for the payment of 1000*l.*, it was for the payment of 200*l.*; nine exchequer bills for the payment of 100*l.* each, in the same identical terms and form as the exchequer bill, the form whereof was in that plea set forth, except that, instead of being numbered as aforesaid, they were respectively numbered 5012, &c., and that, instead of being for the payment of 1000*l.* each, they were respectively for the payment of 100*l.* each: that, before and at the said time when, &c., the said blanks in the said bills, or the blank in any or either of them, had not been filled up, and the said bills were securities payable to the bearer thereof respectively, and transferable by delivery; that, before the said time when, &c., the defendants had received, as such bankers as aforesaid, the said several exchequer bills, with the assent and by the order and direction of the said James Burn & Co., and as their property, and held and retained the same under such receipt and as such bankers until the conversion in the said declaration mentioned, and without any notice to the defendants, until after the payments thereafter mentioned, that any other person, than the said James Burn & Co. had any claim or interest whatsoever in or to the said exchequer bills, or any of them; and that the defendants received and held, and retained the same, without such notice, by and through the omission and neglect and want of due care on the part of the plaintiff: and that, whilst the said exchequer bills remained and continued so lodged and deposited with the defendants, the defendants, as such bankers as aforesaid, made divers payments for and on account of the said James Burn & Co., exceeding the sums of money in the hands of the defendants on account of the said James Burn & Co., to a large amount, to wit, to the amount of 4000*l.*, and the said James Burn & Co. thereby then became and were [633] and still are indebted to the defendants in the said sum of money, which sum remaining wholly unpaid and unsatisfied and not tendered to the defendants, the defendants when so requested as in the declaration mentioned, refused to deliver the said exchequer bills to the plaintiff, as in the declaration mentioned, and did, at the said time when, &c. retain and keep the same under and by virtue of the lien and right before mentioned, and as they lawfully might for the cause aforesaid; which keeping and detaining were and are the conversion and disposing of the said exchequer bills in the declaration mentioned. Verification.

Upon a case stated for the opinion of the court of Common Pleas, the plaintiff below had judgment, in Michaelmas term 1840 (ante, vol. i. 908, 2 Scott, N. R. 96).

The special case being afterwards turned into a special verdict, a writ of error was brought, returnable in the Exchequer Chamber.

The special verdict was in substance as follows:—

The plaintiff is a Portuguese merchant, who, up to the year 1834, resided at Rio de Janeiro, but in that year returned to Portugal, and has since resided at Lisbon and other towns in that country.

Edward Burn, for many years before, and down to, his bankruptcy hereinafter mentioned, resided in London, and carried on business as a merchant, under the firm

of James Burn & Co. He was the correspondent of the plaintiff, who from time to time remitted bills of exchange and money to him, and employed him, upon commission, to invest the proceeds in exchequer bills. Burn was also employed by other correspondents to purchase exchequer bills for them.

The defendants are bankers in London, in co-partnership, and for many years before and since the year 1833, acted as such for Edward Burn, who kept cash and [634] an account with them, under the firm of James Burn and Co.

The action is brought to recover (the value of) twenty-one exchequer bills, amounting in value to 10,100*l.* and interest.

The bills were received by the defendants in exchange for the same number of bills which had been purchased by Burn for the plaintiff, in manner above-mentioned, and which came into the possession of the defendants as hereinafter stated; and the defendants claimed a right to hold the bills in question in respect of a debt due from Burn to them, hereinafter particularly mentioned.

The government pay the interest upon exchequer bills at certain periods, announced by advertisement; and, when such interest is paid, the bills in respect of which it is paid, are delivered up, and, unless their amount be applied for in money, new exchequer bills are issued to the holder in exchange.

Burn received the interest payable upon the exchequer bills, and exchanged the old bills for new ones when necessary, having orders so to do from the plaintiff. The defendants never received information from Burn of any transaction between him and the plaintiff. Burn from time to time, from May, 1832, and subsequently, received from the plaintiff, then abroad, as agent for the plaintiff, orders to purchase exchequer bills with the monies of the plaintiff in the hands of Burn. Burn, on occasion of purchasing exchequer bills for the plaintiff, communicated that fact to the plaintiff.

In the course of the correspondence, in a letter from the plaintiff to Burn, dated the 12th of April, 1834, written from Rio de Janeiro, at the time when the plaintiff was about to quit that place for Lisbon, and received by Burn, there is contained as follows: "I hope you will inform my attorney" (meaning his brother, whom he had appointed his attorney at Rio de Janeiro) "of the names of the bankers in whose house the exchequer [635] bills on my account have been deposited." To which Burn, by a letter dated the 2nd of July, addressed and sent to and received by the plaintiff, replied as follows: "All the exchequer bills which we have bought by your order and for your account, you judge right, are deposited for greater security in the hands of our bankers, as we advised you. They are entirely at our order, which is necessary for the purpose of exchanging them for others every time it is advertised to the public that the interest is to be paid; which payment cannot be received without delivering up the bills upon which the interest is due, when you receive other bills for the same amount; for which reason it cannot be of any service to you knowing the names to our bankers" (a). The name of Burn's bankers never was communicated to the plaintiff.

Between May, 1832, and December, 1836, Burn, in pursuance of orders to that effect given to Burn by the plaintiff, with funds supplied by the plaintiff and obtained by payment of the interest on the bills, purchased, by the order of the plaintiff, in manner above-mentioned, exchequer bills to the amount of 30,400*l.* The bills were purchased by Burn through a broker, the broker dealing with Burn as a principal, and not knowing on whose account they were bought. The following was the form of the bought-notes furnished by the broker to Burn:—

Bought, for Messrs. James Burn and Co.

1073 } 2	100 Exchequer Bills, 29th Sept.	£200	0	0
1076 }	153 days, 2½d.	6	7	6
	Premium, 63s.	6	6	0
	Commission, 1s.	0	2	0
		<hr/> £212 15 6 <hr/>		

(a) The acquiescence of the plaintiff in this withholding of the bankers' names, was perhaps the ground of the finding of "omission, neglect, and want of due care," *supra*, 632.

[636] The following are the dates and times at which Burn purchased such exchequer bills for the plaintiff, and the numbers of the same:—

1833.	July 4th	Nos. 637	2	1000	
		8	2	1000	
		4409	2	1000	
		10	2	1000	
		5831	2	1000	£6300, dated 20th June.
		2	2	1000	
		4780	2	100	
		1	2	100	
		5772	1	100	
	Dec. 5th	93	1	100	
		757	1	500	£2600, dated 30th Sept.
		2549	2	1000	
		2792	2	1000	
1834.	Jan. 3d	8922	1	1000	
		2786	1	500	£1600, dated 17th Dec.
		3423	1	100	
1834.	Feb. 8th	8723	4	1000	£4500, dated 17th Dec.
		4	4	1000	
		8964	5	1000	
		2733	1	500	
	March 3d	764	2	1000	£2000, dated 30th Sept.
		3809	2	1000	
		8929	1	1000	£1000, dated 17th Dec.
	March 11th	4272	3	1000	
		4804	3	1000	
		2348	1	500	£1800, dated 17th Dec.
		9065	1	1000	
	April 1st	3940	1	1000	
		1892	1	1000	
		3175	1	1000	
		6	1	1000	
		8	9	100	£1900, dated, 30th Sept.
		119	9	100	
		750	9	100	
		3	9	100	
	April 23d	2664	2	1000	
		3802	2	1000	
		1122	1	100	£2900, dated 30th Sept.
		2356	1	500	
		4750	1	500	
		1	3	100	
		2	3	100	
[637]	July 5th	105	1	1000	£1000, dated 17th June.
	Dec. 4th	331	1	100	
		5297	3	1000	£3600, dated 17th June.
		8	3	1000	
		9	3	1000	
		1950	1	500	
	Dec. 26th	6115	1	100	£100, dated 16th Dec.
1835.	June 29th	4248	2	100	£200, dated 22d June.
		9	2	100	
	Oct. 1st	213	2	100	£200, dated 29th Sept.
		2134	2	100	
	Dec. 23d	1439	1	200	£300, dated 17th Dec.
		6200	1	100	

Carry forward, £30,000

		Brought forward, .		£30,000	
1836.	June 30th	2521	} 2	100	£200, dated 22d June.
		3254			
	Nov. 8	1513	} 2	100	£200, dated 29th Sept.
		3113			
<hr/>					
£30,400					

The defendants were Burn's bankers; and Burn kept several tin boxes at their banking-house, in which he deposited the securities which he had purchased for his different correspondents. Among those boxes was one in which he deposited the exchequer bills purchased for the plaintiff. Burn kept the keys of these boxes; and no other securities, except some exchequer bills, were kept in the box in which they were kept.

It is the custom of bankers, in the course of their trade as such, to receive the interest upon exchequer bills for their customers, and to exchange the exchequer bills when such interest is paid. Burn had, on various occasions prior to December, 1836, requested the defendants to receive the interest upon the exchequer bills so purchased as aforesaid, and also to receive the new bills issued in exchange for the former. Upon such occasions, Burn went to the banking-house with the key of the tin box, took out of the box such of the bills as were wanted for that purpose, and delivered them to the defendants, requesting them to receive the interest [638] and to exchange the bills. Burn generally received from the defendants the new exchequer bills within a week or a fortnight after they were so exchanged; having, on one occasion only, left them in their hands for a considerable time: but Burn was not particular as to the time. Burn then deposited the new exchequer bills in the tin box.

The defendants gave credit to Burn, in his account with them, for the interest received by them on the exchequer bills; and such interest formed part of the cash balance to Burn's credit with the defendants.

On one occasion before December, 1836 (but at what particular time cannot be ascertained), Burn delivered a number of exchequer bills to the defendants for the purpose of receiving the interest and exchanging the bills as usual, but did not ask the defendants for the exchanged bills for one or two months; but afterwards, having occasion for part of such bills, he applied for them, and the defendants said they had rather Burn would take the whole of them; which Burn accordingly did, and he locked them up.

In November, 1836, Burn held exchequer bills, so purchased with the money of the plaintiff, to the amount of 30,400*l.* and which were locked up in the tin box at the defendants', along with two others belonging to another correspondent of Burn, named Abreu; and, in pursuance of an order from the plaintiff, Burn, in his own name, as principal, sold part of those exchequer bills, through a broker who knew him only in the transaction, to the amount of 10,800*l.* The proceeds of the exchequer bills, when sold, were paid by the broker to Burn, in cheques payable to Burn, who paid them to the defendants, as his bankers, to his account, as his own money; and they there formed a part of his cash balance to his credit with the defendants; and Burn, in [639] pursuance of an order from the plaintiff, remitted the amount of the proceeds by bills to the brother of the plaintiff in Lisbon.

By the execution of the above order, the amount of exchequer bills, so purchased with the plaintiff's funds, was reduced to 19,600*l.* Of these bills 9500*l.* were delivered by Burn to Offley & Co.; and there were then left in Burn's hands exchequer bills, so purchased with the money of the plaintiff, to the value of 10,100*l.*, the renewals of which are the exchequer bills (the value of which is) sought to be recovered in this action.

In December, 1826, an advertisement appeared, announcing that the interest would be paid upon a certain class of exchequer bills, including all those in the tin box; and the bills were changed for new ones, on the fifteenth of that month.

On the 1st of the said month of December, Burn went to the banking-house of the defendants, and, whilst alone, took from the box the exchequer bills, and brought and delivered them to one of the defendants, saying, "Will you have the kindness to get these exchequer bills exchanged for me?"

The defendants obtained the exchequer bills to be exchanged, for, and at the instance of, Burn.

One of the exchequer bills so delivered in exchange to the defendants was in the following form, and was issued under an act of parliament made and passed in the 6 & 7 W. 4, c. 113, intituled, &c. :—

"No. 8551. 1000l. By virtue of an act, 6^o et 7^o Gulielmi 4^{ti} Regis, for raising the sum of 14,007,950l. by exchequer bills, for the service of the year 1836-7, this bill entitles ———, or order, to one thousand pounds and interest after the rate of twopence halfpenny per centum per diem, payable out of the first aids or supplies to be granted in the next session of parlia-[640]-ment; and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or to the account of His Majesty's Exchequer at the Bank of England, after the fifth day of April, 1837. Dated, at the Exchequer, this 19th day of December, 1836. "J. NEWPORT.

"If the blank is not filled up, this bill will be paid to bearer.
"The cheques must not be cut off."

The others were in the same form, six of them being for 1000l. each, and numbered 8552, &c.; four for 500l. each, &c.; one for 200l.; and nine for 100l. each, &c.

The blanks in the exchequer bills had not been filled up, and they were securities payable to bearer, and transferable by delivery.

The defendants counted the bills, and repeated the numbers to Burn, who said "right"; and no further conversation passed upon the occasion.

The defendants, on the 20th of December, delivered up the bills so received from Burn, and received the interest due upon them and the new bills in exchange; which they have ever since held in their possession.

These new exchequer bills are sought to be recovered in this action (a).

The particulars of the bills delivered up, and of those received in lieu of them, are as follows:—

[641]

Date of bills delivered up in 1836.	No.	Date of bills received in exchange in 1836.	No.	Amount of bill.	Amount then purchased.
1835. Dec. 18.	9116	1836. Dec. 19.	8551	£ 1000	£
... .. 2445 2467	...	500	1600
... .. 5046 5012	...	100	
... .. 9117 8552	...	1000	
... .. 9118 8553	...	1000	
... .. 9119 8554	...	1000	4500
... .. 9120 8555	...	1000	
... .. 2456 2468	...	500	
... .. 9121 8556	...	1000	1000
... .. 9122 8557	...	1000	(Part of the £3000)
... .. 2457 2469	...	500	
... .. 5047 5013	...	100	1800
... .. 5048 5014	...	100	
... .. 5049 5015	...	100	
... .. 2458 2470	...	500	
... .. 5050 5016	...	100	800
... .. 5051 5017	...	100	(Part of £2900)
... .. 5052 5018	...	100	
... .. 5053 5019	...	100	100
... .. 1439 1213	...	200	300
... .. 6200 5020	...	100	
					£10,100

(a) I.e. their value. By judgment for the plaintiff in trespass de bonis conversis or in trover, the property in the goods converted is vested in the defendant, as against the plaintiff. P. 19 H. 6, fo. 65, pl. 5; M. 6 H. 7, fo. 8, 9, pl. 4; *Bishop v. Lady Montague*, Cro. El. 824; 18 Vin. Abr. 69, and that, it would seem, from the period of the conversion. Secus, by recovery in replevin. Secus also, by recovery in detinue, unless the plaintiff elects to abandon his property in the goods by issuing execution for the value, instead of resorting to his distringas ad deliberandum, in which case it would appear that the property could not vest in the defendant until such election had been made.

At the time Burn delivered the exchequer bills to the defendants, he was unwell; and within a few days afterwards he became worse. On account of his illness, he was absent from his counting-house three or four weeks, at his house in the country, at Roehampton; and he was not, during that period, in town above three times until his subsequent failure in business, which took place on the 23rd of January, 1837. Burn, during this period, was unable to attend to his business, except on particular occasions; but he communicated with his clerks when any thing was wanted. He was informed of the state of his cash at his bankers', and he signed cheques and accepted bills, when necessary; and letters were from time [642] to time brought to him to read and sign; and he was informed of the payments made to the defendants on his account, and by the defendants for him. Burn was in town upon one or two occasions between the time of the delivery of the exchequer bills to the defendants and his stopping payment. One time was two or three days before the 14th of January; and he never (a) was at the banking-house of the defendants, nor had any communication whatever with them, except that, during the interval, Burn desired his clerks to procure from the defendants the particulars of all the exchequer bills received in exchange for those given by him to be exchanged; and the defendants furnished to the clerk a paper containing the particulars, as follows:—

8.	£1000	.	.	.	£8000	.	.	.	8550 to 8557
4.	500	.	.	.	2000	.	.	.	2467 to 2470
2.	200	.	.	.	400	.	.	.	1212 and 1213
9.	100	.	.	.	900	.	.	.	5012 to 5020

£11,300

Two of those exchequer bills were received in exchange for the two bills which belonged to Mr. Abreu. The remainder were received in exchange for those purchased, as aforesaid, [with the moneys of the plaintiff. The defendants were not aware of any distinction between them, or that they did not belong to Burn.

Burn never overdraw his bankers' account but once. That occurred a considerable time before 1837, by mistake, and was to the extent of about 100l.; and at that time the defendants had not any exchequer bills in their hands so purchased by Burn for his correspondents.

The daily state of Burn's account with the defendants, from the 26th of November till he stopped payment on the 23rd of January, 1837, was as follows:—

[643] State of Burn's bankers' book, from the 26th of November 1836; the result of each page being given.

Drs.		Bankers.		Crs.	
1836.	£	s.	d.	£	s. d.
Nov.	119,129	5	8	118,811	1 9
				Balance	318 3 11
					<u>£119,129 5 8</u>
Dec. 2.	132,489	9	7	125,861	16 9
				Balance	6,627 12 10
					<u>£132,489 9 7</u>
— 7.	135,889	9	7	129,027	18 9
				Balance	6,861 10 10
					<u>£135,889 9 7</u>
— 16.	138,593	19	4	137,072	16 5
				Balance	1,521 2 11
					<u>£138,593 19 4</u>

(a) In what manner the generality of this statement is to be qualified, does not distinctly appear.

Dra. 1836.	Bankers.						Crs.		
	£	s.	d.				£	s.	d.
— 31.	143,494	15	10	.	.	.	142,399	12	8
					Balance	.	1,095	3	2
							<u>£143,494</u>	<u>15</u>	<u>10</u>
1837.									
Jan. 9.	10,205	17	6	.	.	.	3,877	9	2
					Balance	.	6,328	8	4
							<u>£10,205</u>	<u>17</u>	<u>6</u>
— 2.	13,148	3	9	.	.	.	6,079	17	10
					Balance	.	7,068	5	11
							<u>£13,148</u>	<u>3</u>	<u>9</u>
— 18.	13,507	10	7	.	.	.	10,856	19	10
					Balance	.	2,650	10	9
							<u>£13,507</u>	<u>10</u>	<u>7</u>
— 9.	13,507	10	7	.	.	.	11,634	4	6
					Balance	.	1,873	6	1
							<u>£13,507</u>	<u>10</u>	<u>7</u>
[644] Jan. 20.	13,507	10	7	.	.	.	11,910	19	7
					Balance	.	1,596	11	0
							<u>£13,507</u>	<u>10</u>	<u>7</u>
— 21.	1,596	11	0						
	3,211	19	7	{ Balance due to					
				{ defendants.					
	4,808	10	7	.	.	.	4,808	10	7
					Balance due to	.	3,211	19	7
					defendants }	.			
					Paid on the 23d	.	292	4	7
							<u>£3,504</u>	<u>4</u>	<u>2</u>
					Overpaid by bankers	.			

Burn occasionally resorted to the tin boxes which he kept at the defendants', and in which he deposited the securities of his foreign correspondents; and the defendants have sometimes been present, and general conversation has passed between the defendants and Burn; but the only conversation that ever occurred respecting the foreign securities, took place some time before the delivery of the exchequer bills in question, when, being then engaged in looking over the foreign securities in some of the boxes, and the defendants or some of them being present, Burn observed to one of the defendants that the foreign securities were very troublesome, and that it was troublesome to have charge of so many foreign securities. The foreign securities referred to were Brazilian bonds, Portuguese bonds, Dutch bonds, and the like. There were no foreign securities in the box in which the exchequer bills were deposited.

It was Burn's course of business to make his bills payable at the defendants', who had been his bankers for many years, which the defendants paid at maturity, having always had funds of Burn's in their hands for that purpose, except as hereinafter mentioned. Burn also drew cheques upon the defendants, as his bankers, [645] in the usual way; which they paid according to the usual course of business.

Upon the 21st of January, there were bills of exchange outstanding, accepted by Burn, and made payable, according to the usual course of business, at the defendants'

banking-house, to the amount of 4808l. 10s. 7d., and which became due on that day. The particulars of such bills of exchange are as follows:—

Particulars of bills of exchange accepted by Messrs. Burn and Co., payable at the defendants' banking-house, on the 21st of January 1837:—

	£	s.	d.
Acceptance. (Barbacena) 60 days' sight, accepted 19th November, due 21st of January	372	0	0
Do. (Picoas) 60 days' date, (due do.)	348	12	3
Do. (Terceira) 60 days' sight, accepted 19th November, due do.	300	0	0
Do. (Farrobo) 90 days' sight, due do., accepted 26th October	2,600	0	0
Do. (Farrobo) 90 days' sight, accepted 21st October, last day being Sunday, due 21st January	400	0	0
Do (Farrier and Co.) 60 days' sight, accepted 19th November, due do.	787	18	4
	<u>£4,808</u>	<u>10</u>	<u>7</u>
Acceptances, at date	348	12	3
Do. at sight	4,459	18	4
	<u>£4,808</u>	<u>10</u>	<u>7</u>

The said bills of exchange were presented for payment at the defendants', and were paid by them, in the usual course of banking business.

The balance upon Burn's account, on the morning of that day, viz. the 21st of January, amounted to 1596l. 11s. ; but, by the payment of the said bills, that balance was absorbed, and the balance was turned against him, and in favour of the defendants, to the amount of 3211l. [646] 19s. 7d. ; and Burn, upon that day was, and still is, indebted to the defendants in the said sum of 3211l. 19s. 7d. on his banking account, for which sum the defendants insist upon their right to hold possession of the exchequer bills (the value of which) sought to be recovered by the plaintiff in this action.

The plaintiff, before the commencement of this action, demanded the said exchequer bills, the subject of this action, from the defendants, without paying or tendering to them the said sum of 3211l. 19s. 7d., and requested them to deliver them up. The defendants, at the time of that demand, had the said exchequer bills, and did refuse to deliver them up, and detained them, and still do detain them, asserting a right so to do for and in respect of the said balance due from Burn ; and they then insisted, and do insist, that they had and have a lien on the said exchequer bills for that balance.

The special verdict concluded by finding the several issues for the plaintiff or for the defendants, in the usual form, according as the court should determine.

The errors assigned were argued on Monday, the 15th May 1843, before Lord Denman C. J., Parke B., Alderson B., Patteson J., Gurney B., Williams J., and Coleridge J.

F. Kelly, for the plaintiffs in error (with whom were R. V. Richards and S. Martin). Many of the facts stated in this special verdict, will be found to be immaterial to the real question in this cause. The correspondence between Brandão and Burn, and the statement which follows, merely shew, that, as between Brandão and Burn, the exchequer bills in question were to be the property of the former. This, the plaintiffs in error admit. The question is, what right the plaintiffs in error acquired in them, as Burn's bankers, having no notice of Brandão's interest—whether ex-[647]-chequer bills are not transferable by delivery, like bank notes, or bills of exchange and promissory notes, indorsed in blank. They are negotiable securities, and, with respect to lien, they are of the same nature as bills and notes. A banker has a lien upon all securities of that description, deposited by a customer. Here, the bankers had a lien upon these exchequer bills to the extent of their claim against Burn. They had a

right to treat Burn as the true owner at the time he deposited these bills. [Sir T. Wilde. It will not be disputed that exchequer bills are transferable by delivery.] Notwithstanding this admission, it will be proper to cite cases to shew that the judgment of the court of Common Pleas has proceeded upon an entirely erroneous principle. In *Wookey v. Pole* (4 B. & Ald. 1) the exchequer bills were deposited with the banker, in fraud, and in violation, of the purposes for which they had been intended, to the party who made the deposit. There, as here, the plaintiff remained owner, as against the broker. So, with respect to a Prussian bond, in *Gorgier v. Miéville* (b). The defendant [648] in error will rely upon the circumstance of no entry being made of these exchequer bills in the bankers' books, giving Burn credit for the amount. In *Wookey v. Pole* it is expressly stated in the special case, that the defendant did not place the exchequer bills to the credit of Pawsey and Eaton, the brokers. That circumstance is explained both by the nature of exchequer bills, and by the course of dealing of bankers. Bills of exchange or promissory notes are entered to the credit of the customer for a specific amount; exchequer bills, though drawn for a specific amount, vary in value from day to day. The circumstance of these bills belonging to Brandao is perfectly immaterial. If the bills had been feloniously stolen, the property would have passed to the bankers, upon the customer by whom they were deposited overdrawing his account. This case shews that the bankers had a right to hold. Burn purchased the bills in his own name; he placed them in the bankers' hands as his own. The words which passed were an assertion of interest on his part, "Exchange them for me." The argument in the Common Pleas proceeds upon the ground that it was incumbent on the bankers to shew that specific advances were made on the credit of these exchequer bills; and the court appear to have adopted that view of the case. It cannot now be disputed that bankers have a general lien for the balance of their account, on the negotiable securities deposited with them. As an attorney has a lien for his bill upon all papers deposited with him, no matter for what purpose delivered, so has a banker. The transaction here is the same as if Burn had said to the bankers, "Will you hold in deposit exchequer bills for me, and receive the interest and place it to my account?" Much was said in the argument below about the tin boxes in which these bills were kept. It is not found that the bankers had notice that the bills were in these boxes. It is the [649] custom of bankers to exchange exchequer bills for their customers, and to place the interest to their credit. The jury have found in effect that Burn said to the bankers, when he handed the old exchequer bills to them,—“I wish these bills to be renewed at the proper time: you will receive the interest and place it to my credit, and hold the renewed bills in your hands for safe custody until further orders.” This is agreeable as well to what is the usual course of dealing with bankers, as to what is found to have been done in the present case. In *Collins v. Martin* (1 B. & P. 648) it was held, that, if A. deposit bills indorsed in blank, with B., his banker, to be received when due, and the latter raises money upon them by pledging them with C. another banker, and afterwards becomes bankrupt, A. cannot maintain trover against C. for the bills. In delivering the judgment of the court, Eyre C. J. said: “The counsel for the plaintiff admitted that the bankers might have sold these bills; but it was argued that they could not pledge them; and the case of a factor pledging the

(b) 3 B. & C. 45, 4 D. & R. 645. In *Wookey v. Pole* it was held that exchequer bills pass by delivery, because they are negotiable securities, and because, like bills of exchange and promissory notes, they represent money. Exchequer bills are made negotiable by the 48 G. 3, c. 1, which directs them to be circulated; and, in this respect, they are placed upon the same footing as bills of exchange, which are choses in action assignable by the custom of merchants, and as promissory notes, which are choses in action assignable by statute. It may be doubted whether securities of a fluctuating money value, as exchequer bills are, can be truly said to represent money, the great object of which is to present a permanent standard of exchangeable value. In *Gorgier v. Miéville*, neither of these requisites appear to have existed. The bonds of the King of Prussia were still more fluctuating in value than exchequer bills, and they were choses in action,—no otherwise assignable than as being so according to the laws of a foreign state; upon which ground, without any custom of merchants or statute, they were held to be assignable, as resembling bills or notes, which are assignable only by the custom of merchants and by statute.

be kept for safe custody. But, I am of opinion that the right of the plaintiffs to recover, rests on other, and independent, grounds. It appears, that, at this time, the bankrupts had discounted bills for Tavernier to a large amount, which were still unpaid; that they had also accepted a bill for his accommodation to a large amount, not then due: and I think that a banker who stands in this relation to a customer, has a lien upon any securities of that customer which may, for any purpose, be placed in his hands; and he has a right to retain them to countervail the liabilities he has so incurred on his behalf, till those liabilities have ceased." [Lord Denman C. J. Some of the cases arising out of Marsh's bankruptcy are not correctly reported. Parke B. The whole of that case depends upon what is meant by depositing for [655] safe custody. It is probable, that the bill would there be left for the purpose of being received when due. If so, the lien would clearly attach. Lord Denman C. J. Suppose the banker to say, I receive the bill for the safe custody only.] There is no distinction in the books between securities paid in, for the purpose of being received, and securities delivered for safe custody. A bill may be sent to a banker to obtain acceptance. In that case, there is no money purpose at all; yet the lien would attach. [Parke B. In such a case I should say, there was a lien, on the ground, that it is part of the business of bankers, as money factors, to obtain the acceptance of bills of exchange.] Here, it is found, that it was part of the business of these bankers to get exchequer bills exchanged. The words of the special verdict are, "It is the custom of bankers, in their trade, as such, to receive the interest upon exchange bills for their customers, and to exchange the exchequer bills when such interest is paid." That implies a custom to hold for safe custody. For some time they must hold for safe custody. When the bill is left for the purpose of getting it accepted, and is accepted, the customer may take it away; but if he leaves it in the bankers' hands the lien attaches. The general lien may be defeated by a particular agreement; as where a bill is deposited, to be called for on a particular day. The customer may be pressed for money, and draw upon the bankers beyond the balance in their hands. As soon as he does so, and the bankers accept his draft, the lien attaches, unless there has been some special agreement. The lien of bankers is analogous to that of attorneys. Attorneys have a lien upon the muniments of their clients, which come into their hands for safe custody, whether placed there for a specific purpose or not. It will be necessary to make a few observations upon the judgment pronounced by the [656] court of Common Pleas. It is there said, "The general lien of a banker arises, like other general liens, out of a contract,—either express, or which is evidenced by the usage of the trade,—to which both parties, the banker and the customer, must be considered as having intended to conform, in the absence of any thing to shew a contrary intention. This contract, however, being made between the banker and the customer only, cannot bind the rights of other parties. It is competent to the banker and his customer, to agree that the banker shall have a lien on all property on which the customer can lawfully give it, which may come to the hands of the banker; and this agreement may be expressed in words or may be inferred from the course of trade: but it is not competent for them to agree, expressly, or in any other manner, that the banker shall have a lien on the property of other persons, on which the customer had no authority to give one. In like manner as a carrier may agree with his customer that he shall have a general lien on all goods of the customer which come to his hands, for any debt due from the customer: but they cannot, by such an agreement, subject to the payment of a debt due to the carrier from his customer, goods of a third person consigned by him to the customer as his agent." It is impossible that any reasoning can be more fallacious, or unfounded in law, than this. It overturns the whole doctrine of lien. It is perfectly well established, that a lien may be gained upon bills of exchange deposited by a customer, though belonging to a third person. But in the court below the decision appears to have proceeded on the ground that a lien, being grounded on a contract, cannot prevail against the rights of third persons, not parties to such contract. [Alderson B. The Court of Common Pleas appear to have meant, the known rights of third persons; and that, you are not interested [657] in disputing.] Great reliance was placed by Erskine J. on the case of *Vanderzee v. Willes* (3 Brown, C. C. 21). There an attorney having deposited securities with his bankers as a pledge for 1000l., afterwards prepared a security for 1000l. by bond and deed-poll, he being then indebted to the bankers in 400l. in addition to 1000l. due upon his banking account

After the execution of the bond and deed-poll, he further overdrew his account, and became indebted to the bankers in 541l. beyond the 1000l. It was held by Lord Thurlow, that the bankers had no lien for more than the 1000l. That was not a deposit of negotiable securities. [Alderson B. Besides, the general lien does not attach where there is a specific bargain (b).] *Queiroz v. Trueman* (3 B. & C. 342, 5 Dowl. & R. 192), which was also referred to, is to the like effect. There foreign merchants consigned "goods to this country for sale, only writing to the factor, we expect that you will send us some remittances on account of the proceeds of the goods consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignment." The agent pledged the goods for money advanced to himself: the letter was held not to amount to an authority to pledge the goods. That was not a case of negotiable securities transferable by delivery. The court there said, in effect, "we are of opinion, that there is nothing in this case to shew an intention to authorize the agent to pledge the goods."

The decision in the court of Common Pleas did not proceed upon the same point as that now under discussion. The result to be drawn from the special case may be different from that presented by the special verdict. The only point here is, whether Burn could have recovered the possession of these exchequer bills [658] from the defendants without paying them the balance of his account. The case might be discussed as if Burn was now suing the defendants. The plaintiff and Burn are identified. If it should be determined that bankers have no lien, it would not only unsettle the law, but would introduce the greatest uncertainty into the most important commercial transactions.

W. H. Watson (with whom was Montague Smith), for the defendant in error. The general property in those exchequer bills was in Brandão. It is not disputed, that exchequer bills pass by delivery; neither will it be contended that Burn might not have pledged the bills in question. This relieves the case from the necessity of considering two authorities which have been cited, *Wookey v. Poole* and *Collins v. Martin*; in both which cases the property was pledged for a valuable consideration. It is not denied that if Burn had deposited the exchequer bills in question with his bankers for a specific advance, the lien would have attached. [Patteson J. Or for a general advance.] But it does not appear that any money was so advanced. The only lien known to the common law was a particular lien for the value of the work (a) done upon an article belonging to the employer: all other liens arise out of contracts either expressed, or implied from some custom of trade. The existence of such customs is a ground for presuming that parties in the particular trade, contracting in the place where such customs prevail, meant [659] to adopt them as part of their contract. To entitle a party to the benefit of such an agreement, the fact of the agreement must be stated on the plea, and, if traversed, be found by the verdict. Here, there is no finding of any general custom of the city of London, with regard to the deposit of securities. In *Rushforth v. Hadfield* (a)², it was said by Le Blanc J. that "all these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionably amongst all the creditors, and they ought not to be encouraged. But I do not mean to say, that a usage in trade may not be so generally and well established as to induce a jury to believe that the parties acted upon it in their particular agreement" (6 East, 528). So with respect to the lien of a wharfinger, *Holderness v. Collinson* (c), and the lien of

(b) And see post, 658 (a).

(a)¹ The right to redemand the thing bailed, and the right to recover payment for the work done upon it, being contemporaneous, the conductor operis faciendi,—the employer of the artisan—has no right to redemand possession from the locator operis without paying or tendering the amount due for the work. This appears to be the real character of that which, for the sake of brevity, is called a lien at common law; and, therefore, where there is a specific agreement fixing the time of payment to a particular period, the lien does not attach. See *Norris v. Williams*, 1 Cro. & M. 842.

(a)² 6 East, 519, 2 Smith, 634, 7 East, 224, 3 Smith, 221.

(c) 7 B. & C. 212, 1 Mann. & Ryl. 55. In that case *Naylor v. Mangles*, 1 Esp. N. P. C. 109, was cited, where a lien for a general balance being set up by a wharfinger, Lord Kenyon is reported to have said at nisi prius, "A lien from usage is matter of evidence. The usage in the present case has been so often proved that it must be

an insurance broker (*d*). Lord Kenyon, indeed, says, in *Davis v. Bousher*, that general liens in certain trades are part of the general law of the land. But, however general the usage may be in a particular trade, the fact of the contract arising out of such general usage must be pleaded and found. This was conceded by the other side, and it is a concession from which the court will not readily allow them to recede. In *Hewison v. Guthrie* (2 New Cases, 755; 3 Scott, 298; 2 Hodges, 51), the general lien contended for by [660] the defendant was not allowed, because not properly set up by a special plea. [Patteson J. You say that there is no such thing as a general lien at common law.] Certainly. [Parke B. Where the custom is set out upon the record, the court can see the extent of the custom,—whether it extends to all negotiable securities for whatever purpose deposited, or whether it is limited to deposits made with the banker in the course of business. Alderson B. You are giving the go by to the question.] On the other side it is assumed, that the exchequer bills were deposited with the bankers for safe custody. [Alderson B. Suppose the exchequer bills to have been delivered to the bankers for the purpose of receiving the interest, exchanging the bills, and then depositing them in the box.] It is so found. [Alderson B. Not precisely.] It is so in effect. [Alderson B. The difficulty arises upon the uncertainty of the finding.] The correspondence set out in the special case is shut out of the special verdict. [Lord Denman C. J. The case had better be argued on the assumption that the custom is set out.] Taking the facts as argued upon by Mr. Kelly, it is obvious, from the special verdict, that the exchequer bills in question were given to the bankers for a special and limited purpose,—the new ones to be delivered to Burn to be locked up in the box when that special purpose should have been accomplished. [Parke B. I think a banker has a general lien at common law.] It is submitted that lien extends only to securities placed in the banking account, or deposited for the purpose of lien, and not to securities or goods placed for safe custody. It is admitted, that if the key had been placed in the hands of the bankers, it would have been a breach of trust on the part of Burn. Why more so than if he had placed the securities in their hands for a specific purpose? No lien is acquired on the deposit of a [661] bond with a banker, because the possession of the bond does not enable the party to obtain payment. So, upon exchequer bills deposited for a specific purpose. There is no evidence that these exchequer bills were not entered in Burn's pass-book. In *Davis v. Bousher* a mere question of fact was raised. There the bill was paid in upon the general account. *Bolland v. Bygrave* is a decision favourable to the plaintiff. There, the bankers were in the habit of discounting bills for Tavernier, and they received the bill in question for that purpose; a circumstance which Abbott C. J. must be taken to have considered material, from the circumstance of his admitting evidence to prove it. There the evidence excluded the bill being placed with the banker for safe custody. Here, they were so placed, and it was a mere accident that they were not received back. [Alderson B. It would be more plausible to say, that the lien was confined to the old bills, on which the bankers had something to do. It is not shewn that there is any lien, by custom, upon exchequer bills left to be exchanged.] It is customary for bankers to receive into their custody boxes of plate, but it is not contended that any lien attaches upon the plate so deposited. Burn would have been liable to be transported, if he had made the deposit in the manner which the argument on the other side supposes it to have been made. It cannot be presumed, that the bankers were ignorant of this course of trade. In *Vanderzee v. Willis*, it was immaterial to consider the general question, it being admitted that no lien attaches on bonds. The difficulty in arguing the case is really this, that the jury attempted to establish a lien through the negligence of Burn. The general property being confessedly in the plaintiff, it lay upon the defendants to cut down the rights arising therefrom by a clear lien existing in some other person. [Patteson J. The bankers [662] had something more to do than merely to exchange the exchequer bills, inasmuch as they were to receive the interest, and carry the amount to Burn's account. Parke B. Suppose a bill of exchange placed in the hands of a banker for the purpose of receiving the

considered as a settled point, that wharfingers had the lien contended for." This appears to explain what is to be understood by the expression, "the general law of the land," in *Davis v. Bousher*, *supra*, 651.

(*d*) *Hewison v. Guthrie*, 2 New Cases, 755, 3 Scott, 298.

amount from the drawee, and buying a foreign bill of exchange, which the banker is to keep till called for, will not the banker have a lien upon the foreign bill so purchased? It is submitted, that there would be no lien in the case supposed. [Parke B. You would confine the lien to bills of exchange entered short.] We do not say that they must be entered short, but that they must have been paid in on the banking account. Otherwise, there is no reason why the plate left with a banker should not be held by him as a lien. In *Key v. Flint* (8 Taunt. 21, 1 J. B. Moore, 451), the bill was sent to the defendant for the purpose of being discounted. This the defendant refused to do, but he advanced 155l., and promised to make further advances, which he failed to do. It was held, that the defendant was not entitled to hold the bill as against the assignees of the depositor of the bill, it not being a case of mutual credit under the bankrupt acts. [Parke B. There the bill was sent for a specific purpose.] Here, the general right of property in the plaintiff must prevail, it not being found that the exchequer bills were deposited in any way by which a general lien could be created (b).

Martin now replied instead of Kelly (under a protest on the part of the opposite counsel) for the defendant in error. A general lien is as well known to the law as any other common law right, and does not require, and is not con-[663]-trolled by, the finding of the jury in the particular case. It is, as Lord Kenyon says, "part of the general law of the land." In so declaring the law that learned judge did not want authorities. In *Spears v. Hartly* (3 Esp. N. P. C. 81), it was contended, that a wharfinger had no general lien. But Lord Eldon C. J., referring to the case of *Naylor v. Mangles* (supra, 659 (c)), said, "this point has been ruled by Lord Kenyon, that a wharfinger has a lien for the balance of a general account, and, considered as a point completely at rest, I shall therefore hold it as the settled law on the subject, that he has such a lien as is claimed in the present case." The cases of bankers, attorneys, and wharfingers are known cases of general liens by the common law. In *Bolland v. Bygrave*, Abbott C. J. required no evidence to be given of the general lien of a banker upon all negotiable securities in his hands. Such evidence is never taken. If the general lien of bankers were a question of fact, and that fact was not sufficiently found by the present verdict, the court would award a venire de novo; but this being matter of law, such a course is unnecessary. [Parke B. Lord Mansfield refers to two cases in Chancery (c), in which the general lien of a factor (d) was treated as [664] matter of law.] It is the same thing, as if at the commencement of the dealings between the parties, Burn had said, "All money securities coming into your possession as bankers shall remain in your custody, whenever you are under advance for me." The right contended for, is a right to hold and not a right to sell. These proceedings will carry costs against the plaintiffs in error, unless they succeed in reversing the judgment. [Alderson B. It appears to me that the exchequer bills were delivered to the bankers to receive the interest due upon them.] A general lien is for the purpose of avoiding the necessity of a particular bargain on each occasion. Suppose a bill of exchange to be deposited with a banker for the purpose of being paid or renewed, or a country bank note sent up to be converted into cash; would not the bankers' lien attach upon the renewed bill, or upon the proceeds of the country paper?

Cur. adv. vult.

(b) In *Marzetti v. Williams*, 1 B. & Ad. 427, it is observed by Patteson J. "The relation in which the parties stood to each other, viz. that of banker and customer, was created by their own contract, and not by the formal operation of law."

(c) In courts of equity, where the necessity of accurately distinguishing between questions of law and questions of fact occurs less frequently than in courts of common law, the propriety of abstaining from applying such terms as "the general law of the land" to that which is, in strictness, merely the subject of a contract—the terms of which are evidenced by a long established usage which the parties to the contract are presumed to have had in view, and, by not dissenting from, to have adopted,—does not always force itself upon the attention of the speaker.

(d) In *Collins v. Martin*, 1 B. & P. 648, Eyre C. J. says, "In strict law, and with respect to third persons, bankers do not at all resemble factors."

In *Chapman v. Derby*, 2 Vern. 117, even a factor was not allowed by the Lords Commissioners of the Great Seal (Mr. Serjt. Maynard, Mr. Keck and Mr. Serjt. Rawlinson) to set up a general lien against the administrator of his debtor.

LORD DENMAN C. J. now delivered the judgment of the court of Exchequer Chamber.

There are two questions in this case for the determination of the court—one of form, the other of substance. The first, which is one of form, and was not the subject of discussion in the court of Common Pleas, is, whether the court ought to take notice of the general lien which bankers have on the securities of their customers; or it ought to have been averred, as a matter of fact, in the special plea, and found by the jury, that the bankers have such lien.

That such a general lien exists was not disputed; but it was insisted, on the part of the defendant in error, that the foundation of this lien is usage, from which a contract may be implied between the banker and the customer that the securities belonging to the latter shall [665] be pledged to the former for the balance due to him; and, being matter of implied contract, it should have been pleaded.

On the other hand, the learned counsel for the plaintiff contended that this lien existed by the general custom of trade, constituting the law-merchant, and need not be pleaded, for the court takes notice of that which constitutes the law-merchant. And we agree in this view of the case. The law-merchant forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them. They are binding on all without proof. Accordingly we find that usages affecting bills of exchange and bills of lading are taken notice of judicially.

In the case of a factor, the right to a general lien at first appears to have been made the subject of proof in the cause; as in *Kruzer v. Wilcox*, cited in 1 Burr. 494, and reported (as *Kruger v. Wilcox*) in Ambler, 252; in a further stage of which case, Lord Hardwicke, in order to satisfy himself, consulted the four merchants, who had given evidence, in open court, (a course which would not have been proper if it had been a mere question of fact); and he decreed in favour of a general lien (a).

Afterwards, in the cases of *Green v. Farmer* (4 Burr. 2218), and *Drinkwater v. Goodwin* (Cowp. 255), Lord Mansfield considers the right as fully established; and certainly, in modern practice, it is treated as a matter of settled law; and no proof is ever required, that such general lien exists, as a [666] matter of fact. The lien of bankers,—who are a species of factors in pecuniary transactions,—stands on the same footing; and Lord Kenyon, in *Davis v. Bousher*, who had laid down the same law before, in *Jourdain v. Lefevre* (1 Esp. N. P. C. 66), declares that he is clearly of opinion, that, by the general law of the land (b), a banker has a general lien upon all the securities in his hands belonging to any particular person, for his general balance. This right was acknowledged, without any evidence in support of it, in *Bolland v. Bygrave*; and it may be said, with equal truth of bankers as of factors, that by the general understanding of the profession, it is never deemed necessary to give evidence of usage in order to support the claim; and it would be productive of great expense and inconvenience if such a course were adopted. We are therefore of opinion that the right to a general lien in the case of a banker need not be pleaded, and that we are judicially bound to take notice of it.

The second question is, whether the defendants were entitled to a lien for their general balance, on the exchequer bills, the subject of this action.

The right of bankers does not extend to all securities which may happen to be in their hands for any purpose, but to such only as come to their possession as bankers, in the way of their business: upon those they have a general lien, “unless there be,” in the language of Lord Kenyon, “evidence to shew that the banker received any particular security under special circumstances which would take it out of the common rule.” A lease, therefore, which was accidentally left with a banker after he had

(a) In *Kruger v. Wilcox*, Amb. 242, the factor was held to have a lien upon goods consigned to him for sale, to cover the general balance of his account. There, Lord Hardwicke says, “All the four merchants, both in their examinations in the cause, and now in court, agree,” &c. Et vide infra, 663 (c).

(b) Quære, whether supposing this expression to have been used by this great equity lawyer sitting at nisi prius, any thing more was meant than a generally prevailing usage of trade. Vide supra, 659 (c), 663 (a).

refused to advance money upon it, has been held not to be subject to any lien; *Lucas v. Dorrien* (7 Taunt. 278; 1 J. B. Moore, 29). If it be a security for money within the meaning of the rule, [667] it is not in the bankers' possession in the way of his business; and instances may be put of a special agreement to deal with the securities in a manner inconsistent with the claim of lien, which would bring them within the exception stated by Lord Kenyon.

We have, therefore to decide whether the exchequer bills, the subject of this action, were liable to a general lien, within the terms of the above rule.

That they were securities which passed by delivery to the bonâ fide holder for value, according to the opinion of the majority of the judges, in *Wookey v. Pole* (4 B. & Ald. 1), was agreed: it was also conceded, that, if there had been an express pledge of the bills by Burn to the bankers, bonâ fide, and for value, the title to them would have passed. But it was contended that, under the circumstances of this case, there was no general lien, and that no title did pass.

The court of Common Pleas appear to have decided this case on the ground that a general lien of the banker was to be treated as arising out of an implied contract, which being between the bankers and their customers only, could not affect the property of third persons; and that it was not competent for the banker and customer to agree expressly, or in any other manner, that the banker should have a lien on the property of other persons, on which the customer had no authority to give one (b). But this position, which is undoubtedly true with respect to goods, the title to which does not depend upon the possession only (subject to such exceptions as have been created by the factor's acts), is not, in our opinion, true with respect to negotiable securities, the title to which is transferred by delivery [668] to a bonâ fide holder for value. These securities are to be deemed, with respect to such holders, and to the extent of the rights acquired by them by the transfer, as the property of the person transferring, whether the transfer be express or implied; and the bonâ fide holder acquires a title which did not belong to the person who gave it to him. The same rule which prevails as to bills or notes payable to bearer, placed in the hands of a banker to be received, would apply to exchequer bills transferable to bearer: in both, if the banker is a creditor on a general balance, and bonâ fide receives them as the property of the customer, he is entitled to a lien. In this case, the plaintiffs in error must be assumed to have acted bonâ fide; and it has been expressly found that they made the payment in the due course of their business, after the receipt of the bills, and that they were not aware that these bills did not belong to Burn. We therefore think that these bills must be treated, with respect to the defendant in error, as if they were Burn's own property; and that the judgment cannot therefore be sustained upon this ground.

On the argument before us, the endeavour was to support the judgment on another ground, which was argued in the court of Common Pleas, but on which that court thought it was unnecessary to decide. That ground was, that, if the exchequer bills had been the property of Burn, the plaintiffs in error would not have had a lien under the circumstances stated in the special verdict. But we are of opinion that they would.

These bills were received in lieu of certain other exchequer bills, which, after the public advertisement for the payment of interest on such instruments, were given by Burn to the bankers to be exchanged by them for others at the Exchequer Bill Office, receiving the interest; and that interest was credited to Burn's account. The original bills were taken by Burn from boxes left [669] in the custody of the bankers, of which he kept the key, and were delivered by him to the plaintiffs in error to be so exchanged. It is found by the special verdict that it is the custom of bankers, in the course of their trade as such, to receive interest on exchequer bills, and to exchange them. The delivery of the original bills, and the receipt of the substituted bills, were therefore both in the course of their business as bankers (a); and they would have a lien on each

(b) Quære, whether this objection to the judgment of the court below is not, that its language is not sufficiently guarded—that what is true generally may be supposed to be represented as being true universally.

(a) Plate left at a banker's for safe custody, is received by him as banker, but not in the course of his business as banker. The allegation in the third plea is, that the defendants below received the exchequer bills as bankers, not in the course of their business as bankers. When the terms of a proposition are varied, unless the terms

set for the general balance due to them as bankers, within the terms of the rule above laid down, unless there were some special circumstances which would take this case out of its operation. It appears to us that there are no such circumstances. It was contended that the bills must be treated as if they had been brought from Burn's own counting-house when they were taken from the boxes; and that they were delivered for a specific and limited purpose; and it may be conceded that the first of these propositions is true, and the second also in one sense, but not in such a sense as would exclude a lien. The bills were delivered for a special purpose, but that purpose was the performance of a duty as bankers (b)¹; for which indeed they would have been entitled to commission, if the course of business with [670] London bankers admitted of such a mode of remuneration. The exchequer bills received in exchange were equally in the bankers' possession in the course of business (a), whether they were intended to remain in their custody until it should suit the convenience of Burn to call for them (which was the fact in this case), or until he should choose to sell them or have them again exchanged, which is the more usual mode in which exchequer bills are deposited. If Burn had placed a bill of exchange, payable to bearer, or endorsed in blank, in the hands of the bankers to be received, or had given them a bill with directions not to receive it in cash, but procure it to be renewed, and hold the renewed bill until called for, and he had overdrawn his account whilst either the original or renewed bill was in their hands, no doubt could be entertained that the bankers would have had a lien; and this case is, in substance, the same: in both, the securities are in the bankers' hands in the usual course of their business (b)². If, indeed, there had been an agreement, express or implied, inconsistent with a right of lien,—as, to return them absolutely at all events to the depositor, at a certain time, the case would have been different.

We are, therefore, of opinion that the judgment of the court of Common Pleas must be reversed, and the verdict entered for the plaintiff below on the first issue, and for the defendants below on the second and third (c) issues.

Judgment accordingly (d)

End of Trinity Vacation.

are absolutely and unmistakeably convertible, there may be some difficulty in ascertaining whether the proposition which has been really under consideration, is or is not substantially the same with that which was originally propounded.

(b)¹ The finding is, "that it is the custom of bankers to receive the interest upon exchequer bills for their customers, and to exchange the exchequer bills when such interest is paid." If it were the duty of bankers to receive the interest and exchange the bills, it is difficult to understand that they would not be entitled, directly or indirectly, to some remuneration for the performance of that service.

(a) Vide *infra*, note (a).

(b)² It is not found, in terms, that these exchequer bills were in the bankers' hands in the usual course of their business; nor would such a finding have been warranted by the issue taken on the third plea.

(c) No opinion was expressed by the court of error as to the sufficiency of the third plea. That, however, would have been merely a question of costs.

(d) The law-merchant is the general law by which all civilised states regulate their commercial dealings. This rule is controlled and overridden in particular countries by municipal laws and local usages; and the law-merchant, so modified, is sometimes called the law-merchant of the particular country. But the matters, in addition to or in derogation from the general law-merchant, which obtain in a particular state or province, obviously derive their force, not from the general law-merchant, but from the particular municipal law or usage by which the general law is controlled. Thus, by the law-merchant, the drawee of a bill of exchange, by intimating to the holder of that bill his intention to pay it when due, becomes, and subjects himself to the liabilities of, an acceptor of that bill. By the statute 1 & 2 G. 4, c. 78, s. 2, there can be no acceptance of an inland bill of exchange except by writing on the bill itself. Though it may now be said, in a loose sense, that by the English law-merchant, the acceptance of an inland bill of exchange is void unless made upon the face of the bill, no one will contend that the exemption from liability of a drawee, in respect of a verbal acceptance, is part of the law-merchant, in the ordinary sense—of deriving its

[672] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term were, Tindal C. J., Coltman J., Erskine J., Maule J.

DODD AND DAVIES v. ACKLOM. Nov. 9, 1843.

[S. C. 7 Scott, N. R. 415; 13 L. J. C. P. 11; 7 Jur. 1017. Discussed, *Furnivall v. Grove*, 1860, 8 C. B. (N. S.) 512. Approved, *Phené v. Popplewell*, 1862, 12 C. B. (N. S.) 340.]

A. and B. demised a house, by lease in writing, to C., at a rent payable quarterly. The key was delivered to C.'s wife. C. entered into possession; but before the first quarter's rent became due (there having been some dispute as to arrears of rent and taxes), C.'s wife delivered the key back to A., who accepted it. B., after signing the lease, had never interfered.—Held, that the delivering back of the key by the tenant, *animo sursum reddendi*, and the acceptance thereof by the landlords, amounted to a surrender of the term by act and operation of law, within the statute of frauds. Held, also, that the jury were, upon the facts, warranted in finding that C.'s wife acted as his agent in surrendering the term, and that A. acted as agent for B. in accepting such surrender, and that B. was bound by such surrender and acceptance.

Assumpsit for use and occupation. Plea, *non assumpsit*.

At the trial before Erskine J. at the sittings for West-[673]-minster in last Trinity term, the following facts were proved in evidence.

On the 7th of October 1842, the plaintiffs, by lease in writing signed by both of them, demised a house to the defendant, at a yearly rent, payable quarterly. The defendant's wife received the key from the wife of the plaintiff Dodd, and the defendant entered into possession, and after communicating with Dodd upon the subject, began to whitewash and paper part of the premises. The defendant afterwards discovered that a considerable amount of rent was in arrear to the superior landlord; that the land-tax and water-rate were also in arrear; and he thereupon remonstrated with Dodd. About Christmas the key of the front door was delivered up by the defendant's wife to Dodd, and accepted by him. It was contended on the part of the plaintiffs that this was not sufficient to constitute a surrender by act and operation of law, under the 29 Car. 2, c. 3, s. 3, especially as it was not shewn that the defendant's

validity from that law. If this exemption had been derived, not from an act of parliament but from an express or tacit agreement amongst the merchants and bill-brokers of London, to treat nothing as an acceptance which did not appear upon the face of the bill, although such agreement, when long recognised and acted upon, might create so inveterate a custom as to be not unnaturally spoken of as forming part of the English law-merchant, the exemption would not be ascribed, generally, to the law-merchant, without referring it to its real origin.

The business of bankers, as carried on in England during the last 150 years, is derived, partly from the previous occupation of the goldsmith, and partly from that of the money-scrivener. The business, and the rights and liabilities arising out of it, are purely English; for though when speaking of a French or German *banquier*, we sometimes use the term *banker*, and though when speaking in the French or German language, of an English banker, we use the term *banquier*, the engagements and employments of the two classes are essentially different, and are no more to be confounded than the qualities of an English knight and those of a Roman *eques* or *miles*. The engagements of an English banker with his customers, and of those customers with him, form no part of the general law-merchant, and the introduction of such engagements into the English law-merchant must, in the absence of any specific municipal law, be referred to local usage. Although these engagements may be said, *lato sensu*, to form, in England, part of the law-merchant, they derive no force or efficacy from the general law-merchant, in derogation of, or by way of superinduction upon, which law, they have been introduced.

wife had authority to give up the key; and that, at any rate, a surrender to one plaintiff, would not enure as a surrender to both.

The learned judge told the jury that the plaintiffs were entitled to a verdict, unless the jury thought that the plaintiffs had, by some act, prevented the defendant from having a beneficial occupation of the premises; or unless the tenancy had been put an end to by all parties before any rent became due; and, further, that if the jury thought that the defendant's wife had authority from her husband to deliver up the possession by giving up the key, and had done so, and that the plaintiff Dodd had accepted it, also having authority from the other plaintiff so to do, that would amount to a surrender of the tenancy by act and operation of law, and the defendant would be entitled to a verdict.

The jury having returned a verdict for the defendant,

[674] Byles Serjt., in last Trinity term, obtained a rule nisi for a new trial upon the ground of misdirection, and also that the verdict was against evidence. Upon the former point he renewed the objection taken at the trial, and cited *Thomas v. Cook* (2 B. & A. 119, 2 Stark. N. P. C. 408) *Mollett v. Brayne* (2 Campb. 103. S. C. 2 Mann. & Ryl. 439, n.), and *Grimmann v. Legge* (8 B. & C. 324, 2 M. & R. 438).

Talfourd Serjt. (with whom was Thomas) now shewed cause. The questions were properly left to the jury. Under the circumstances the defendant would even have been justified in giving up possession of the house without the consent of the landlords; as in every letting of a house there is an implied contract that it is fit for habitation; *Smith v. Marrable* (11 M. & W. 5. But see *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68). But here, the landlords did assent to the determination of the tenancy, by accepting the key. That has always been held to be a surrender by act and operation of law; *Whitehead v. Clifford* (5 Taunt. 518), *Grimmann v. Legge* (8 B. & C. 324, 2 M. & R. 438). In the former of these cases, *Mollett v. Brayne* (2 Campb. 103) was referred to, but was distinguished by Gibbs C. J.; as in that case there had been a parol notice to quit, which was acted upon, not by both parties, but by the tenant only. Here, the defendant's wife having acted as agent for her husband in receiving the key; it was a fair inference that she acted in the same character in giving it up. It was also a fair presumption that the plaintiff Dodd acted by the authority of the other plaintiff, who was not shewn to have interfered in the transaction after he executed the lease. [Maule J. In Co. Litt. 183 a. it is said—"If a man maketh a lease for life, and granteth the reversion [675] to two in fee, the lessee granteth the estate to one of them, they are not joint tenants of the reversion; for there is an execution of the estate for the one moiety, and an estate for life, the reversion to the other, of the other moiety." To which the following note is added by Mr. Hargrave.—"But it is otherwise on a surrender; for that enures to both joint-tenants of the reversion" (a).]

Byles Serjt. in support of the rule. There having been a regular lease from both the plaintiffs to the defendant, under which he entered, it lies upon him to shew a legal determination of the tenancy. Suppose the plaintiff Dodd had been the sole lessor, and the key had been delivered to him by the defendant, instead of his wife, there would still have been no surrender by act and operation of law within the statute of frauds. But the delivery of the key was by the wife who was not shewn to be authorized. She was not a general agent for her husband; and there was no ratification by him of her act. And even assuming that she had authority, and that the delivery of the key by her to Dodd amounted to a surrender to him, still, as regarded Davies, there was no surrender.

The mere delivery of the key was not a surrender. It was not shewn that the landlords took possession of the premises, or that the tenant quitted. [Tindal C. J. What could have been the intention of the parties? Maule J. Might not the jury infer from the facts proved, that the landlords went in?] *Mollett v. Brayne* and *Doe v. Huddleston v. Johnston* (M'Clel. & Y. 141) are authorities for the plaintiffs upon this point. [Maule J. In the former of those cases it would appear that the landlord merely meant to say to his tenant—"You may leave the pre-[676]-mises if you like; but I shall have my rent." Lord Ellenborough C. J. treats it as a licence.] In *Whitehead v. Clifford*, Gibbs C. J. lays great stress upon the change of possession, and

(a) A position not supported by either of the authorities to which Mr. Hargrave refers.

upon the fact that the landlord had taken possession of the house, and made a profit of the premises. In *Grimmann v. Legge* the tenant, before delivering up the key, went out and removed his furniture. So, in *Thomas v. Cook* the tenant had put an under-tenant into possession, whom the landlord had accepted, and distrained upon. In these cases there were acts by both parties amounting, no doubt, to a surrender by operation of law. Here, nothing is shewn but the mere giving up of the key. Suppose the premises had been a farm, the delivery by the tenant of the key to the main gate of the premises would not have been sufficient evidence of a surrender of the term by operation of law; nor would the delivery of a key of an inner door of the house, or of one room in it. [Maule J. The plaintiffs must shew either that the defendant actually occupied the premises, or that he might have occupied them; otherwise this action, for use and occupation, will not lie. Now, is not the fact that the landlords had the key, evidence to exclude the occupation by the defendant?] It might have been so, if there had not been a subsisting term.

But assuming that the giving up of the key would have been a sufficient surrender by operation of a law, if made by the defendant, the wife was not a sufficient agent to determine her husband's estate. Or, if it be said that the plaintiff Dodd cannot object to her agency, as he accepted the key from her, still his acceptance will not bind the other plaintiff, Davies, or the defendant. If the latter brought ejectment it would be no answer that his wife had given up the key to Dodd. There was no recognition of her agency by the defendant; nor would it have been sufficient if there had been; as in [677] the case of a notice to quit given by an unauthorized agent, and afterwards recognised by the landlord after the notice had begun to run; *Doe d. Lyster v. Goldwin* (2 Q. B. 143. See also *Right d. Fisher v. Cuthell*, 5 East, 491, 2 J. P. Smith, 83, 5 Esp. N. P. C. 149).

At any rate there was no surrender to the plaintiff Davies; he was joint lessor with Dodd; and it is immaterial whether they were joint tenants or tenants in common. The first quarter's rent would become due on the 7th of January, and the acceptance of the key by Dodd, before that time, would not deprive Davies of the accruing rent. In *Tooker's case* (2 Rep. 68 a. S. C. nom. *Rud v. Tucker*, Cro. Eliz. 802) it is said by Popham J. that "every act done by one joint tenant, in benefit of himself and his companion, is good; as payment of rent, &c. to the lord by one doth discharge the other; but one joint-tenant cannot prejudice his companion as to any matter of inheritance or freehold." And in the report of the same case in Cro. Eliz. it is said to have been resolved that "every act by the one joint tenant for the benefit of his companion shall bind, but those acts which prejudice his companion in estate shall not bind; as the default of the one, the surrender of the one, &c." And if one joint tenant cannot make a surrender, neither can he accept one. The rule in that case is recognised by Lord Ellenborough C. J. in *Right d. Fisher v. Cuthell* (5 East, 494. S. C. 2 J. P. Smith, 83); and his lordship adds—"The only question, therefore, for consideration is, whether the giving notice to determine the lease, whereby the joint-tenants are to acquire possession of the estate, be such an act as must necessarily be a benefit to the third joint-tenant, or whether it may prejudice him." This doctrine explains the note of Mr. Hargrave to Co. Litt. [678] 183 a. The plaintiff Davies might possibly take advantage of the surrender, in which case it would enure to his benefit; but the question here is whether he is bound by it, where it is necessarily to his prejudice, as causing a loss of rent. [Maule J. How could Davies make the surrender enure to his advantage?] Suppose the present plaintiffs brought ejectment against another tenant of the premises; and he set up the lease to the present defendant, as a *jus tertii*, the plaintiffs might shew a surrender by the present defendant to one of them, of which they might both take the benefit. [Maule J. In a note to *Doe d. Elliot v. Hulme* (2 Mann. & Ryl. 433, 434, n. (a)) it is pointed out that in *Right d. Fisher v. Cuthell* the lessors of the plaintiff were trustees, and the lease under which the defendant held, expressly required a notice "under his or their respective hands." And this distinction was afterwards remarked upon by Lord Tenterden C. J. in giving the judgment of the court in *Doe d. Aslin v. Summerset* (1 B. & Ad. 135); in which case it was held that a notice to quit signed by one of several joint-tenants, on behalf of the others, is sufficient to determine a tenancy from year to year, as to all. After all is it not rather a question of law than of fact whether the surrender was for the benefit of the other joint-tenant? It would surely be very unsatisfactory that it should be left as a question for the jury to decide upon. Colman J. In *Right d.*

Fisher v. Cuthell Lord Ellenborough C. J. must be taken to allude to cases where the one joint-tenant had no authority from the other.] One question left to the jury in this case was, whether Dodd had authority; but the question whether one joint-tenant has authority to bind another is surely a question of law. [Tindal C. J. Dodd is the party who transacts the whole business, and Davies never interferes. Surely [679] these are facts for the jury.] A mere authority to receive rent or deal generally with the premises would not be an authority to receive a surrender.

TINDAL C. J. Two questions arise in this case. First, whether, under the circumstances, there was a surrender of the premises by the tenant by act and operation of law, within the meaning of the statute of frauds; and secondly, whether, supposing there was such a surrender, Davies, one of the joint lessors, was affected by that surrender. And I am of opinion, upon the evidence, that there was a sufficient surrender, and that Davies was bound by the acts of Dodd, his co-lessor. There was undoubtedly no formal surrender by deed or note in writing; but it is clear there may be a surrender by act and operation of law, where there is a change of possession. By the old law, before the statute of frauds, if a lessee took a new lease from the lessor it would operate as a surrender of the former term, although the second lease were for a shorter period than the first, or were by parol; and the reason is, that the lessee, by taking the second lease, affirms that the lessor is able to make such lease (a). So, where there has been a change of possession, with the assent of both parties, it amounts to a surrender of the term by act and operation of law.

The present case is not like *Doe d. Huddleston v. Johnston*, where the second tenant was never substituted, nor *Mollett v. Brayne*, where the landlord told the tenant that he might go, but that he would hold him to the payment of rent. Here, there is evidence that after a lease in writing had been executed, the tenant finding that the ground-rent and land-tax were [680] due, and that there was a dispute as to the payment of the water-rate, felt a disinclination to continue in possession. I am not prepared to say that if the landlords had known this state of facts, and had concealed them from the tenant, there might not have been an action for deceit by the tenant against the landlords. It is true that the defendant enters into possession, and that he proceeds to paper and whitewash some part of the premises; but some time about Christmas his wife delivers the key of the house to the plaintiff Dodd. Now the first question is, was that a change of possession? The jury have found there was such a change, by consent of both parties; and that amounts therefore to a surrender by act and operation of law. The key was shewn to have been delivered to the plaintiff Dodd; and when a given state of things has been shewn to exist, the law will assume that it continues unless a change be shewn. The natural presumption, therefore, is that the key remained in Dodd's possession.

One objection that has been taken is, that the defendant's wife could not bind her husband by the delivery of the key. But we must look at all the circumstances of the case. The key was first delivered by the wife of the plaintiff Dodd to the wife of the defendant; and from her Dodd afterwards received the key back. I think therefore there is no objection on the ground of the want of authority in the defendant's wife.

Then the last question is, whether the plaintiff Davies is affected by the acts of Dodd. And here we must look to the circumstances again. Davies signs the lease, it is true, but he is then lost sight of. Dodd always acts in the business. The application by the defendant as to the repairs, is made to Dodd. And there are many other circumstances in which Dodd was concerned and not Davies. I think it was properly left to the jury to say whether Dodd was not to conduct the whole business. [681] Upon the whole therefore it appears to me that the case was properly submitted to the jury.

With respect to the evidence, there is no affidavit to negative the receipt of the key by Dodd; and I see no reason to disturb the verdict upon this ground.

I think the rule must be discharged.

COLTMAN J. I am of the same opinion. Upon the question of surrender by operation of law, there is *prima facie* a good deal of difficulty as to the precise meaning

(a) Plowd. 106, 107 a. But there, both Portman J. and Bromley C. J. state that it is a surrender by the course of the common law, (viz. by the act of the parties acting according to the common law,) not a surrender by operation of law.

of the term as used in the statute of frauds. Probably the expression referred to such surrenders as were then known, and which are mentioned in *Plowden (a)*¹. Subsequent cases have gone much further than the old doctrine. In *Thomas v. Cook* (supra, 674, 678, 679) it appeared that the plaintiff had originally let the premises to the defendant as tenant from year to year. After the defendant had resided there for some time, he underlet them to one P. commencing at Christmas 1806. At Lady Day 1807, the defendant distrained upon P. for rent in arrear. Rent being then due from the defendant to the plaintiff, the latter gave notice to P. not to pay the rent to the defendant, but to pay it to him; and upon the defendant's refusing to take P.'s bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from the defendant to him, saying that he would not have any thing more to do with the defendant; and in the following October, the plaintiff himself distrained upon the goods of P. for rent in arrear. It was held that these circumstances constituted a valid surrender of the defendant's interest by act and operation of law, within the statute of frauds. So, in *Grimmann v. Legge* (supra, 674, 679) it was also decided that where there is an agreement between [682] the landlord and tenant that the latter shall deliver up possession, and possession is delivered up accordingly, that is a surrender by operation of law. In the present case I think there was sufficient evidence of such a surrender. *Mollett v. Brayne*, and *Doe d. Huddleston v. Johnston*, are quite distinct from *Grimmann v. Legge*. In *Mollett v. Brayne* it was not shewn that the landlord took possession. In *Doe d. Huddleston v. Johnston* the agreement to put an end to the tenancy, was never carried out. In the present case the jury have found that the key was delivered up with the intent that the landlord should resume possession; and that amounts to a surrender by operation of law.

Then comes the further question whether Davies was bound by the act of Dodd. Upon this point I have found a little difficulty in making up my mind; but it appears to me upon the whole—the management of the business being left entirely to Dodd—that there was evidence to warrant the jury in inferring that Dodd had authority to act for his co-lessor Davies. That puts the case out of the rule in *Reid v. Tucker*; which is applicable only where one joint tenant acts for the other without authority, or where the only authority is that which is to be implied from the relation in which they stand to each other as such joint tenants.

As to the weight of evidence, I am of opinion that the verdict was correct.

MAULE J. I also think this rule must be discharged. As to the evidence, I think it was sufficient to support the verdict. As to the alleged misdirection, I think there was none. This was an action of assumpsit for use and occupation, in which the plaintiffs say that the defendant is indebted to them for the occupation of certain premises. The defendant denies his liability. The question is, whether, on a certain day—namely on the [683] day on which by the original lease the rent would fall due—the defendant was occupying the premises with the consent of the plaintiffs so as to give rise to an implied promise on his part. Now if one of the plaintiffs had put the defendant out of possession, it might be a question whether, it being a joint contract, they could both sue upon it. But supposing there was an authority on the part of Dodd to act for Davies in accepting the key, then there is no doubt that there was a surrender of the premises by operation of law. It seems clear, from all the circumstances, that Dodd, being the managing owner, was satisfied with the authority of Mrs. Acklom to give up the key; and that is quite sufficient against his joint-tenant.

ERSKINE J. Having the sanction of the rest of the court for the way in which I left the case to the jury, I shall say nothing as to the law. And as to the verdict, I am by no means dissatisfied with it.

Rule discharged (a)².

(a)¹ In *Fulmerston v. Steward*, p. 106. And see Bac. Abr. tit. Leases and Terms for Years (S.) 3.

(a)² The 11 G. 2, c. 19, s. 14, enables landlords, where the agreement is not under seal by deed, to "recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed." It is usual to declare upon this statute in assumpsit, laying a promise by the defendant, and a consideration for that promise, in an occupation at the request of the defendant by the permission and sufferance of

[684] JUDITH FARMER, Executrix of James Fitzjames, Deceased, v. MOTTRAM.
Nov. 8, 1843.

[S. C. 7 Scott, N. R. 408; 1 D. & L. 781; 13 L. J. C. P. 10; 7 Jur. 994.]

Notwithstanding the 1 & 2 Vict. c. 110, s. 18, it is no answer to a *scire facias* upon a judgment for 94l. 12s., that, after the obtaining of the verdict, and before the giving of the judgment for that sum, it was, by a rule of court, ordered that the verdict should be reduced to 1s., and that the defendant should pay to the plaintiff's attorney the costs of the action; and that the *scire facias* was sued out, after the making of the rule, fraudulently and in breach of good faith.

Scire facias, at the suit of the plaintiff as executrix, upon a judgment for 94l. 12s. obtained by the testator against the defendant in this court, alleging, that, "after the obtaining of the verdict upon which the said judgment was so given as aforesaid, and within two terms of the entry of the said judgment, to wit, on the 7th of April last, the said James Fitzjames died, having first duly made and published his last will and testament, and [685] thereby constituted and appointed Judith Farmer, widow, executrix thereof; after whose death the said Judith Farmer duly proved the said last will and testament of the said James Fitzjames, and took upon herself the burthen of the execution of the same," &c.

Plea: That, after the obtaining of the said verdict, and before the giving of the said judgment thereupon as aforesaid, to wit, on the 31st of January, in Hilary term, in the sixth year of the reign of our Lady the now Queen, by a certain rule of the said court of our said Lady the Queen, before Her justices of Her Bench, then made in the said cause, it was ordered by the said court, that the said James Fitzjames, upon notice of the said rule to be given to him or his attorney, should shew cause to the said court, on the first day of the then next term, why the verdict found for him on the trial of the said cause at the last sittings in the said term, holden at Westminster, in and for the county of Middlesex, should not be set aside, and a new trial had between the said James Fitzjames and the defendant, and that, in the meantime, and until the said court could otherwise order, the *postea* should remain in the hands of the associate, and the entry of final judgment on the said verdict should be stayed:

the plaintiff. Neither request, permission, nor promise, express or implied, appear to be required by the statute.

In the principal case the plaintiffs having brought the defendant within the words of the 11 G. 2, c. 19, s. 14, the question would arise, whether by virtue of the exception in the statute of frauds, with respect to surrenders by act and operation of law, the defendant was discharged from his *prima facie* liability.

Grimmann v. Legge, 8 B. & C. 324, 2 Mann. & Ryl. 438, goes further than the cases in which the granting of a new lease, with the assent of the former lessee, has been held to operate as a surrender. In those cases the acts of the lessor and lessee are treated as amounting to a recognition or assumption [684]-tion of an instantaneously precedent surrender,—though they would rather appear to constitute an actual, though tacit, contemporaneous surrender and acceptance by the parties. In *Grimmann v. Legge*, however, the act relied on is the very act of surrender and acceptance, which the statute requires to be in writing. The decision in *Grimmann v. Legge*, therefore, appears to have brought back the law as to parol surrenders of leases, to nearly the same state in which it was in the time of Lord Coke.

The surrender and acceptance, if established, would appear to be an answer to the action. At common law a surrender made and accepted before the day on which the rent would have become due, was a bar to any claim for that rent; and it is not to be presumed, that the legislature, in passing the 11 G. 2, c. 19, intended indirectly to alter the law in that respect, and to make the tenant liable for that which is substantially rent, notwithstanding an accepted surrender.

It may not, perhaps, be equally clear that the surrender is admissible in evidence under a plea of non assumpsit. As the allegation of a promise to obey a statute is immaterial, the only question upon non assumpsit seems to be, whether the plaintiff has established the state of facts which the statute requires. If he has, the surrender would rather appear to be matter of discharge to be specially pleaded.

that afterwards, and before the entry of the said judgment in the said declaration mentioned, to wit, on the 11th of May, in Easter term, in the year last aforesaid, by a certain other rule of the said court then made in the said suit, it was ordered by the said court, upon reading the said rule hereinbefore mentioned, and on hearing, and by consent of, counsel on both sides, that the last-mentioned rule should be, and the same was, thereby discharged, without the payment of any costs of and occasioned by the said application to the said court on either side; and it was further ordered, by such consent as aforesaid, that the verdict in the said cause should be reduced to 1s., and that the defendant should pay to the attorney of the [686] plaintiff in the said cause the costs of the said action, to be taxed by one of the masters of the said court: that the said rules were and each of them was made in the said action wherein the said verdict was so obtained as in the said declaration mentioned, and that the last-mentioned rule still was in full force and effect, and not in any wise altered or discharged; and so the defendant in fact said that the said writ of scire facias in the said declaration mentioned, was sued out by the plaintiff, executrix as aforesaid, after the making of the said last-mentioned rule, fraudulently, and in breach of good faith. Verification.

Replication—that, after the making of the rule in the said plea last mentioned, to wit, on the 21st of May, in the year last aforesaid, the said costs therein mentioned were taxed, by one of the masters of the said court, at a certain sum of money, to wit, 94l. 11s.; and thereupon afterwards, and before the issuing of the said writ of scire facias, to wit, on the day and year last aforesaid, the attorney of the plaintiff in the said cause, to wit, E. E., requested the defendant to pay to the said attorney of the plaintiff the said amount of the said costs in the said rule mentioned, but the defendant then wholly refused to pay the same or any part thereof: and that the said writ of scire facias was not issued until after the expiration of a reasonable time after the making of the said request; without this, that the said writ of scire facias in the said declaration mentioned was sued out by the plaintiff, executrix as aforesaid, after the making of the said mentioned rule, fraudulently, and in breach of good faith, in manner and form as the defendant had, in his said plea, in that behalf alleged—concluding to the country.

Special demurrer to this replication, assigning for causes, amongst others, that the plaintiff, in and by the replication, both traversed, and confessed and avoided, [687] the defendant's plea; that the plaintiff, in and by the said replication traversed, and attempted to put in issue, an immaterial allegation of the defendant's, inasmuch as the plea contained a sufficient answer which was not traversed, and therefore admitted, though the allegation traversed were omitted; for the plea did not rely upon any fraud or want of good faith on the plaintiff's part as an answer to the declaration, but on the facts stated in the former part of the plea, which, the defendant contended, shewed that the plaintiff was not entitled to sue out a writ of scire facias; that the replication concluded with traversing and attempting to put in issue an inference of law to be drawn from the preceding allegations in the plea, instead of traversing and putting in issue some one of the facts from which that inference was drawn; for the concluding allegation of the defendant's plea, when taken in connection with the rest of the plea, was not an independent and substantive allegation of fraud and want of good faith, but amounted merely to a statement of the legal inference arising from the facts before alleged in the plea; that the inducement to the said traverse was bad, inasmuch as, instead of being an indirect denial of the plea, it was in the nature of a confession and avoidance thereof; and that the inducement was uncertain and defective, in this, that it did not state whether the taxation of costs was made under and in pursuance of, and upon, the rule, or upon the judgment alleged in the declaration to have been signed.

The plaintiff joined in demurrer (a).

[688] Manning Serjt., in support of the demurrer. The objection to the plea will be, that it is an attempt to avoid the effect of a judgment by matter not equally high;

(a) The points marked for argument were:—

For the defendant—That the plea was sufficient, inasmuch as by the 1 & 2 Vict. c. 110, s. 18, all rules of courts of common law are to have the effect of judgments in the superior courts of common law, and are placed, in point of remedy, upon the same footing as judgment debts; and that, upon the facts stated in the pleadings, the

and for this, the other side will rely on *The King v. Bingham* (3 Y. & J. 101). It was there held that the condition of a recognisance returned, and filed, and inrolled as of record, cannot be varied by a rule of court, and that the matter could not be replied. Now, however, by the 1 & 2 Vict. c. 110, s. 18, "all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be deemed judgment-creditors within the meaning of this act," &c. [Maule J. Suppose your rule had been a judgment, and the court had afterwards given the judgment in question. Tindal C. J. [689] What answer is it to the judgment?] It is contended that after making the rule the court had no power to give the judgment. [Coltman J. The judgment can only be irregular or erroneous. If the latter, you may bring a writ of error; if the former, you may move to set it aside.] The judgment is a nullity. [Tindal C. J. Is it the meaning of the eighteenth section of the 1 & 2 Vict. c. 110, that rules shall have the effect of contravening formal judgments of the court? That section seems to afford no answer to a formal judgment.] Supposing the defendant had pleaded, as a reason for not complying with a judgment of Easter term, a previous inconsistent judgment pronounced in Hilary term, it could hardly be contended that the previous judgment would not have afforded a sufficient answer to the charge of not performing the later judgment. The court cannot pronounce two inconsistent judgments.

TINDAL C. J. Why did you not come to the court to set aside the judgment on the ground that the plaintiff had obtained a remedy in the rule? The section referred to does not bear out your view. It does not say that the rule shall be a judgment for all purposes.

ERSKINE J. How could the plaintiff obtain the 1s. under the rule? Unless he entered up judgment, he could not recover the amount of the judgment.

MAULE J. Supposing a formal judgment could be set aside on the ground that there was a previous rule inconsistent with such judgment, there is nothing in the present rule inconsistent with the judgment. The plaintiff must proceed to judgment, to enable him to recover the 1s.

Judgment for the plaintiff.

[690] KENNEDY v. WALFORD. Nov. 6, 1843.

Where the defendant pleads that he was liable to be summoned to the Westminster court of Requests, and that plea is found for him, and the plaintiff recovers on other issues less than 40s., no suggestion on the roll is necessary.

This was an action of debt, to which the defendant pleaded, first, *nunquam indebitatus*; and, secondly, that the defendant was liable to be summoned to the Westminster court of Requests.

A verdict having been found at the trial for the plaintiff on the first issue, to the

plaintiff ought to have taken out execution on the rule, or proceeded by attachment, and could not have a writ of *scire facias*.

For the plaintiff—That the plea was bad in law, the facts therein stated constituting no answer whatever to the claim of the plaintiff; that the plaintiff's claim, which was founded on a record, could not be controlled or defeated by the rules of court set out in the plea; that it was not alleged in the plea that the defendant had ever paid the costs of the action, pursuant to the rule of court mentioned in the plea; that the circumstances alleged in the plea would, at most, amount to grounds for applying to the court summarily to stay the proceedings in the *scire facias*, upon the defendant's complying with the terms of the rule of court lastly mentioned in the plea; that the only material allegation in the plea was traversed by the replication; and that, the plaintiff having died, execution could not have legally issued on the rule lastly mentioned in the plea, and that the proper course to render the property of the defendant liable to the amount of the costs mentioned in that rule, was, by proceeding on the judgment.

extent of 1l. 18s. 6d., and for the defendant as to the residue of the debt claimed, and also upon the second issue,

Shée Serjt. now moved for a rule calling on the plaintiff to shew cause why he should not carry in the roll, in order that the defendant might enter a suggestion thereon in the terms of his second plea.

TINDAL C. J. You do not want a suggestion; for the matter which you now seek to suggest is already upon the record in a plea, the truth of which the jury have affirmed by their verdict. A suggestion is only required where the matter is not pleadable.

The rest of the court concurring,

Rule refused.

[691] JOYCE v. ELLIS. Nov. 10, 1843.

Where an affidavit assigned as the excuse for not proceeding to trial, pursuant to a peremptory undertaking, the plaintiff's poverty and inability to furnish his attorney with money to pay fees, and his subsequent imprisonment at the suit of the defendant for the costs of the day, the court enlarged the undertaking.

Glover Serjt. had obtained a rule nisi to enlarge the peremptory undertaking in this case, on an affidavit which alleged by way of excuse for the plaintiff not having proceeded to trial pursuant to his undertaking, his poverty and inability to furnish his attorney with money to pay fees, and his subsequent imprisonment for a considerable period at the suit of the defendant for non-payment of the costs of the day (but which had since been paid).

Halcombe Serjt. now shewed cause. The affidavit is insufficient. In *Cleasby v. Poole* (5 Tyrwh. 146, 1 C. M. & R. 521) it was held to be no answer to a rule for judgment as in case of a nonsuit, that the plaintiff is poor, and has neglected to furnish his attorney with money to conduct the suit. And in *Ward v. Turner* (5 Dowl. P. C. 22) it was decided, that, where a plaintiff has given a peremptory undertaking to try at a particular assize, and he is prevented from fulfilling it by the sudden illness of the judge, that is not a sufficient excuse to prevent the defendant from obtaining a rule absolute for judgment as in case of a nonsuit. [Tindal C. J. You have put forward, as a general proposition, that the illness of the judge would furnish no excuse. In *Ward v. Turner*, however, the plaintiff never applied to enlarge his undertaking, but allowed Michaelmas term to pass over without doing so.]

Glover Serjt. in support of his rule, referred to *Radford v. Smith* (4 M. & W. 100).

[692] TINDAL C. J. The rule must be absolute.

Halcombe Serjt. applied for costs.

TINDAL C. J. The costs will be costs in the cause.

Per curiam. Rule absolute.

GIBBONS v. MOTTRAM. Nov. 17, 1843.

To an action by the indorsee against the maker of a promissory note payable to J. S. or order, the defendant pleaded that the note was given as a collateral security for a bill drawn by the defendant upon J. S.,—that it was agreed between the defendant and the payee that the note should not be negotiated,—and that the defendant had paid the bill, with notice of the premises to the plaintiff before indorsement of the note to him; the plaintiff replied *de injuriâ*. *Semble*, upon special demurrer, that the replication was good.—The defendant had leave to amend upon terms.—It is an irregularity to set down a demurrer for argument before the delivery of the joinder in demurrer.

Assumpsit by the indorsee against the maker of a promissory note payable to Samuel Moore or order.

Plea: that the note was made and delivered to Moore as a collateral security for, and to indemnify the said Moore from all liability on, a certain bill of exchange, bearing date, to wit, &c., drawn by the defendant on, and accepted by, Moore, and at the request, and for the accommodation, of the defendant, for the payment of 108l. 17s.

to the defendant or his order, three months after date, and indorsed by the defendant to one William Fawcett; and further, that at the time of the making and delivering of the note to Moore as aforesaid, it was agreed by and between Moore and the defendant, that the note should not be negotiated by Moore, but should be kept by him as such collateral security, and for the purpose of indemnifying him, as aforesaid, and [693] that on the payment of the bill by the defendant, the same should be cancelled and delivered up by Moore to the defendant; of all which premises Thomas Nias thereafter mentioned, and the plaintiff, before the delivery of the note to them respectively had notice; and further, that Moore afterwards, to wit, on the day and year in the declaration mentioned, fraudulently and in violation of good faith, and contrary to the agreement so made by and between him and the defendant as aforesaid, indorsed and delivered the note in blank to Thomas Nias, who then delivered the same note to the plaintiff with Moore's said indorsement thereon, which is the same supposed indorsement by Moore to the plaintiff in the declaration mentioned; and further, that after the making of the note and the delivery thereof to Moore by the defendant as aforesaid, and before the commencement of this suit, to wit, on, &c., he the defendant paid the sum of 108l. 17s. in the bill thereinbefore mentioned, and thereby made payable, to Fawcett, then being the bonâ fide holder of the bill; and further, that there never was, at any time, any value, or consideration, for the making of the note, or the payment thereof, by the defendant, except as aforesaid.

Replication: *de injuriâ*.

Special demurrer: assigning for causes, that the replication *de injuriâ*, &c. is not applicable to this form of action: that, in those forms of action in which such a replication is admissible, it is allowed in those cases only where the plea contains matter of excuse, and, admitting the facts constituting the cause of action stated in the declaration, attempts to excuse or justify such facts by matter of law or otherwise; whereas the defendant's plea does not confess and avoid the promise mentioned in the declaration and the breach thereof, inasmuch as the declaration alleges a promise by the defendant to pay to the plaintiff the amount of the promissory note therein alleged, which is a promise which the law im-[694]-plies from the fact of indorsement and delivery of the note to the plaintiff; whereas the plea states facts which shew that the indorsement and delivery of the note to the plaintiff were made under circumstances in which no promise by the defendant to pay to the plaintiff the amount of the note can be inferred by law: that the plea amounts to a constructive denial of the indorsement of the note by Moore to the plaintiff, and does not consequently admit and excuse any breach of the promise to pay the plaintiff, which is alleged in the declaration: that the allegation in the declaration that Moore indorsed the note to the plaintiff must be taken to mean that Moore made such transfer of the note by indorsement as is valid in point of law, and entitles the plaintiff to sue the defendant for non-payment of the bill; whereas the agreement set out in the defendant's plea, coupled with the allegation that the plaintiff and Nias, through whom he claims, had notice of that agreement before either of them took the note, shews that the indorsement to the plaintiff was not valid in point of law, and such as entitled the plaintiff to sue the defendant for the non-payment of the note; which facts, therefore, amount to a constructive traverse of the indorsement of the note to the plaintiff, and the indorsement being the matter of fact from which the defendant's promise to the plaintiff is by law inferred, the defendant's plea constructively traversing the said indorsement consequently traverses the alleged promise, and does not confess and avoid it by matter of excuse or otherwise. Joinder.

Manning Serjt., on Tuesday, November the 7th, (the demurrer having been set down for argument for Friday the 10th,) obtained, on behalf of the defendant, a rule nisi to strike the demurrer out of the special paper, or that the defendant might be at liberty to deliver his copies of the demurrer book to the two junior judges,—and that the plaintiff should pay the costs of the application. He [695] moved upon an affidavit, which stated that, at five o'clock on the afternoon of Saturday the 4th, the plaintiff's attorney delivered a joinder in demurrer accompanied by a notice, that the demurrer had been set down for argument for Friday the 10th; and on Monday the 6th, when the defendant's attorney went to the judge's chambers to deliver the demurrer-books, the clerks refused to receive them, as the plaintiff's attorney had delivered all the four demurrer-books that morning.

Channell Serjt. afterwards shewed cause.

Per curiam. The plaintiff's attorney was too precipitate in setting down the demurrer for argument before there was a joinder in demurrer.

Rule absolute, with costs.

The case was ordered to stand over till this day.

Manning Serjt. in support of the demurrer. The plea is in denial of the promise alleged in the declaration. Probably before the new rules it might have been bad as amounting to the general issue; but as there is no longer a general issue in an action upon a bill of exchange or promissory note, it is now necessary to deny the contract specially. The plea shews a gross fraud practised on the defendant, and it amounts to a special traverse of the contract alleged. [Maule J. If so, it should have concluded to the country; but that would have been matter of special demurrer.] The plea states new facts, which the plaintiff ought to have an opportunity of answering.

The replication de injuriâ is, properly speaking, inapplicable to actions ex contractu. It has indeed been held otherwise; but the point seems never to have been argued upon principle. The first case on the subject [696] was *Isaac v. Farrar* (1 M. & W. 65, Tyrwh. & Gr. 281, 4 Dowl. P. C. 750). [Tindal C. J. The principle upon which this replication is admissible, is discussed in the notes to Williams's *Saunders* (b).] The judgment in *Isaac v. Farrar* proceeds upon the ground, that the replication de injuriâ is proper in an action of trespass on the case. Since the new rules, assumpsit can no longer be considered as an action on the case. [Maule J. Do you mean that if de injuriâ would have been a good replication in assumpsit at the time of *Crogate's case* (8 Co. Rep. 66), it has become bad by reason of the new rules?] It never was good; but now even the fallacy founded upon the name of the action is destroyed. It has never been considered to be admissible in covenant or debt. [Maule J. It was pleaded in *Rickards v. Murdock* (d), which was an action of covenant.] In that case the defendants, having chosen to accept the multifarious issue tendered, and having succeeded upon that issue, the point was not, and could not afterwards, be raised. As this court will probably consider itself bound by the decisions of co-ordinate courts, which have allowed this replication in actions ex contractu for some years (e), the general question had, however, better be reserved for a court of error.

At any rate the replication is not proper here, as the plea does not set up matter of excuse, and therefore does not fall within the second resolution in *Crogate's case*. [Maule J. The criterion of the admissibility of this repli-[697]-cation is, that the plea must "consist merely of matter of excuse, and of no matter of interest whatsoever;" these last are the emphatic words.] The promise alleged is, to pay Moore or his order; and the plea shews that there was no consideration, and therefore no legal promise. That is not matter of excuse. It amounts to an indirect denial of the promise, or to an allegation of matter in avoidance of the contract. Taken either way the replication is insufficient; *Parker v. Riley* (3 M. & W. 230, 6 Dowl. P. C. 375), *Cleworth v. Pickford* (7 M. & W. 314, 8 Dowl. P. C. 873), *Elwell v. The Grand Junction Railway Company* (5 M. & W. 669, 8 Dowl. P. C. 225), *Fisher v. Wood* (1 Dowl. N. S. 54). In *Schild v. Kilpin* (8 M. & W. 673, 9 Dowl. P. C. 803), to an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that, after the indorsement to the plaintiff, and before the commencement of the suit, to wit, on, &c., the plaintiff, for a good and valuable consideration, indorsed the bill to J. W., who from thence until, &c. was, and still is and remains, the indorsee and holder thereof, and that the defendant, from the time of such indorsement to the said J. W. continually had been, and still was, liable to pay the amount of the bill to the said J. W. The plaintiff replied de injuriâ. It was held, on special demurrer, that the plea was in denial, not in excuse, of the breach alleged in the declaration, viz. the non-

(b) See vol. i. p. 244 c. n. (7), to *Craft v. Boite*; vol. ii. p. 295, n. (1), to *White v. Stubbs*; 5th edit.

(d) 10 B. & C. 527, 5 Mann. & Ryl. 418. So, in *Courtney v. Taylor*, Mich. vacation, 7 Vict. post, 851. And see the cases there referred to.

(e) See the cases collected in the note to *Crogate's case*, 1 Smith, L. C. 55, et seq. 1st edit.

The replication de injuriâ in assumpsit was held good in this court in *Griffin v. Yates*, 2 N. C. 579, 2 Scott, 845, 4 Dowl. P. C. 647. See also *Garrard v. Hardey*, ante, vol. v. p. 471. Vide tamen, ante, vol. i. p. 720, n.

payment of the bill according to the tenor and effect of the acceptance; and, therefore, that the replication was improper. In that case the parties were in the same situation as they are here. [Maule J. There, the plaintiff had indorsed the bill. The plea, therefore, set up an authority from him; and that brought the case within the exception to the rule in *Crogate's case*.] It is submitted that the authority, mentioned in the third resolution in *Crogate's case*, must be taken to mean an authority given by the plaintiff [698] to the defendant. [Maule J. In *Schild v. Kilpin* the plea stated that the defendant was liable to pay the party who had authority from the plaintiff to sue; and that comes to the same thing. Leave was given to amend, so that there was no regular judgment in the case. What do you say would have been the proper form of replication here?] The plaintiff might have traversed the agreement or the notice. The plea does not traverse the fact of the indorsement to the plaintiff, but it shews that such indorsement conferred no rights upon the plaintiff. [Tindal C. J. If the plea states matter inconsistent with the indorsement, it should, by the rules of pleading, have concluded with a special traverse; but the plaintiff cannot take that objection now. Is there not a case in this court where a replication, traversing several allegations in a plea, was held good, though the plaintiff might have replied *de injuriâ*? Channell Serjt., for the plaintiff, referred to *Bell v. Tuckett (a)*.] In that case the plea was clearly in excuse only; and the replication, which was not *de injuriâ*, was held good, as all the matters in the plea amounted only to one defence. [Maule J. The plea there set out matter rather of authority than of excuse.] If so, the case has no bearing on the present. There, Tindal C. J., after referring to *Benison v. Thelwall* (7 M. & W. 512, 9 Dowl. P. C. 739), observed, "That case brings the question to the well known distinction between a replication putting in issue several allegations in the plea, either of which, *per se*, would be a good answer, and a replication taking issue on several allegations, which together amount only to one single defence" (c). [Maule J. That passage is not to be taken as stating the whole law upon the subject of replica-[699]-tions.] It is submitted, that where a plea sets up several matters in excuse, either it must be bad for duplicity, or the replication *de injuriâ*, or some replication putting the whole in issue, will be good. If the facts stated in the plea in that case are to be taken as distinct propositions, the decision is inconsistent with the rule in *Crogate's case*.

Channell Serjt. *contra*. The declaration in this case avers a promise and a breach. The plea does not deny the breach or state any facts as a performance of the promise, but it sets up an excuse for the non-performance. Therefore, according to *Isaac v. Farrar*, this is exactly the case in which the replication of *de injuriâ* is proper. The facts of that case tally to a great extent with those of the present; and the principle is precisely the same in both cases. The plea there amounted to a denial of the promise. In this case the making of the note is admitted; but an excuse is set up for the breach, by a statement of contemporaneous circumstances within the knowledge of the plaintiff and the other parties. In *Basan v. Arnold* (8 Dowl. P. C. 356, 6 M. & W. 559); the same objection was taken as here; and Parke B., interposing in the course of the argument, said, "The plea admits the indorsement, but shews it to have been without consideration, and that, in consequence, the defendant is excused from payment" (8 Dowl. P. C. 358). In *Humphreys v. O'Connell* (7 M. & W. 370, 9 Dowl. P. C. 213), to an action by an indorsee against the acceptor of a bill of exchange, the defendant pleaded that it was accepted for a gaming debt, with notice to the plaintiff; and it was held that the replication *de injuriâ* was good. It was there argued that the plea in a certain sense denied the contract by setting up its illegality; but Parke B. said, "It is very difficult to distinguish this case from *Isaac [700] v. Farrar*; because this is not a question between the drawer and acceptor; if it were, there would be good reason for saying the contract itself was voided: but there is a new contract by the indorsement: then the question is, whether the plea does not consist of mere matter of excuse for the non-performance of the *prima facie* contract by indorsement? In *Isaac v. Farrar*, the contract was void between the original parties, as here." In *Scott v. Chappellow* (*ante*, vol. iv. p. 336; 5 Scott, N. R. 148; 2 Dowl. N. S. 78), which was an

(a) *Ante*, vol. iii. p. 785, 4 Scott, N. R. 402, 1 Dowl. N. S. 458. And see the observations of Maule J., *ante*, vol. iii. p. 796.

(c) *Ante*, vol. iii. p. 801. The learned serjeant also read the note (b) to the passage cited.

action by the drawers against the acceptor of two bills, the plea set up that the contract was void between the original parties. Upon that ground it was attempted to distinguish that case from *Humphreys v. O'Connell*; but this court held the replication de injuriâ to be good. Tindal C. J. there said, "The plea, as it appears to me, amounts to no more, in substance, than an excuse for the non-payment of the bills by the defendant, by reason of there having been no consideration for his acceptance of them; and to such a plea de injuriâ is a proper replication" (ante, vol. iv. p. 351). So here the plea sets up the want of consideration, not as a denial of the promise, but as a denial that any liability had attached to the defendant.

The cases cited on the other side are all distinguishable. In *Parker v. Riley* the defendant might have pleaded the general issue. The general language used in that case is restrained by the subsequent cases of *Humphreys v. O'Connell* and *Scott v. Chappellow*. [Maule J. It is probable that the court, in giving judgment in *Parker v. Riley*, had in view the case of *Solly v. Neish* (2 C. M. & R. 355, 5 Tyrwh. 625, 4 Dowl. P. C. 248), and considered that the statement of facts in the plea before them set up the illegality of the contract, and amounted to the general issue,—the action being in indebitatus assumpsit.] In *Solly v. Neish* the plea clearly [701] claimed an interest in the money, and also set up an authority from the plaintiff. The plea in *Cleworth v. Pickford* set up a separate contract. *Elwell v. The Grand Junction Railway Company* is to the same effect. *Schild v. Kilpin* has already been answered from the bench.

Manning Serjt. in reply. The contract alleged is to pay the note according to its tenor, viz. to the order of the payee. This contract is circumstantially and argumentatively denied by the plea, which sets up another contract. The case falls, therefore, within the rule in *Elwell v. The Grand Junction Railway Company*. The declaration alleges the contract to be, that the defendant would pay Moore or order; that is, that Moore had power to indorse the note, and that in that case the defendant would pay the indorsee. The contract set up in the plea is, that Moore only had the power to indorse the note in case the bill was not paid. With regard to *Isaac v. Farrar* the court in giving judgment observed, "The plea confesses that the defendant made the note in question and indorsed it to Richardson, who indorsed it to the plaintiff, which constitutes a *prima facie* case of liability, and an implied promise to pay the amount to the plaintiff." Now, if by "an implied promise" is there meant a *prima facie* implication of a promise, the doctrine cannot be dissented from; but if it means a promise absolutely implied, it is submitted that the position is not law: and though the argument is not reported, that seems, from the tenor of the judgment, to have been the contest in the case. The court appear to have fallen into some confusion between an implied promise and a *prima facie* liability. [Maule J. You would distinguish this case from *Isaac v. Farrar*, not by pointing out any substantial difference between the facts of the two cases, but by saying that *Isaac v. Farrar* is wrong.]

[702] Manning Serjt. then stated that as he was instructed that there was no doubt of the truth of the plea, it would be more advisable for the defendant to take issue than to incur the expense of a writ of error for the purpose of settling the general question; and he prayed leave to amend.

Channell Serjt. The application is too late.

Per curiam (a). The defendant may have leave to amend upon the terms of paying the costs within ten days, producing an affidavit of the truth of his plea, rejoining instantly by joining issue on the replication, and taking short notice of trial, if necessary, for the sittings after term.

Rule accordingly.

MICHAEL v. MYERS. Nov. 17, 1843.

[S. C. 7 Scott, N. R. 444; 13 L. J. C. P. 14.]

In an action by an indorsee against an indorser of a bill, it was held to be no defence that the plaintiff, before the commencement of the suit, had consented to a judge's order,—in an action against the drawer,—that upon payment of the debt and costs within one month, all further proceedings should be stayed, and that unless such payment were so made, the plaintiff should be at liberty to sign final judgment;

(a) Erskine J. was absent.

although the plea also stated that the plaintiff could have obtained such judgment before the expiration of the month; inasmuch as such order did not amount to an absolute stay of proceedings.—The defendant also pleaded, that the plaintiff, before the commencement of that suit, had recovered judgment against the drawer, had taken him in execution, and released him from custody without the consent of the defendant. The plaintiff replied, that he did not release the drawer without the consent of the defendant: *Quære*, Whether this replication involved a negative pregnant?

Assumpsit, upon a bill of exchange for 38l. 18s. 3d., dated the 29th December 1842, drawn by Samuel Braham upon, and accepted by, Schrimmer Wolf, payable [703] at two months after date, and indorsed by the drawer to the defendant, and by him to the plaintiff.

Third plea, that, after the bill of exchange in the said declaration mentioned became due, and before the commencement of the suit, to wit, on the 9th of March 1841, the plaintiff commenced an action on promises in the court of Queen's Bench at Westminster, against Braham for the recovery of the amount of the said bill, and the damages sustained by the plaintiff by reason of the non-payment thereof; that such proceedings were thereupon had in the said action, that afterwards, and before the commencement of this suit, to wit, on the 5th of July, 1841, by an order, then made by Sir John Williams knight, one of Her Majesty's justices, &c., upon hearing the attorney for the plaintiff and Braham in person, and by consent of the parties, it was ordered that, upon payment of 39l. 16s. the debt due from Braham to the plaintiff, and for which the action was brought,—being the amount payable by the said bill and of the damages by the plaintiff sustained by the non-payment thereof,—with costs to be taxed, and paid in one month, all further proceedings in the said action should be stayed; and that, unless the said debt and costs were paid as aforesaid, the plaintiff should be at liberty to sign final judgment and issue execution for the amount, with costs of judgment and execution, &c.; that the plaintiff could and might have obtained a final judgment of the said court in the said action against Braham for the amount of the said bill, and the damages by him sustained by the non-payment thereof, and of the costs and charges by him about his suit in that behalf expended, and obtained and issued execution thereon, long before, to wit, fourteen days before, the expiration of the one month in the said order mentioned, had the plaintiff proceeded in the said action, and had the said order not been so made; and that the order so made as aforesaid, and the time so given [704] thereby as aforesaid, were made and given without the leave or licence, or the consent or authority, of the defendant. *Verification*.

Fourth plea to the same: stating the action upon the bill at the suit of the plaintiff against Braham, in the same manner as in the third plea; and that afterwards, to wit, on the 25th of November 1841, the plaintiff recovered judgment in the said action against Braham, and took him in execution; and that Braham was then kept and detained in the custody of the sheriff under and by virtue of the said writ, and in execution for the damages aforesaid, at the suit of the plaintiff, until the plaintiff afterwards, and before the commencement of this suit, freely and voluntarily, and of his own act, and without the leave, licence, consent or authority of the defendant, released and discharged Braham from and out of the said custody, and suffered and permitted him to go at large wheresoever he would. *Verification*.

Replication. To the third plea: that the supposed order in that plea mentioned was not made as in that plea alleged, and the time so supposed to have been given thereby, as in that plea alleged, was not given, without the leave, licence, consent or authority of the defendant, *modo et formâ*: concluding to the country.

To the fourth plea: that the plaintiff did not, without the leave or licence, or consent or authority of the defendant, release and discharge Braham from and out of the supposed custody in that plea mentioned, or suffer and permit him to go at large wheresoever he would, *modo et formâ*: concluding to the country.

Special demurrers to the replication to the third and fourth pleas (which are not set out, judgment having been given upon the pleas). Joinder in demurrer.

Bytes Serjt. in support of the demurrers. With respect to the third plea, it is perfectly good in sub-[705]-stance. It contains an allegation that the judgment against the principal could have been obtained in less time than was given by the judge's order; which allegation was wanting in *Kennard v. Knott* (ante, vol. iv. 474,

5 Scott, N. R. 247). Where time is given upon a bill or note to a party prior to the defendant, the latter is discharged, even though the time is given after action brought; *Hall v. Cole* (4 A. & E. 577, 6 N. & M. 124). In that case the drawer had given a cognovit to the holder, by which, it appeared, the time was enlarged. The rule is undoubtedly different where it does not appear that by the security given the time has been enlarged; *Hulme v. Coles* (2 Sim. 12), *Price v. Edmunds* (d). [Maule J. The order of Williams J., stated in the third plea, does not stay the proceedings.] It does not do so in terms; but the plaintiff could not have proceeded in the action until the expiration of the month. [Tindal C. J. He might have done so, though he might have been liable to an attachment. It is possible the order was drawn up in this form with a view to avoid a positive stay of proceedings, so as to obviate this very objection. The plaintiff might have applied for a positive stay of proceedings. Suppose the drawer had been insolvent and had been selling off his goods, might not the plaintiff have gone on with the action?] If the words in the order were transposed thus—"that all further proceedings in the action shall be stayed unless the debts and costs shall be paid within a month," there could be no doubt but that it would have operated as a positive stay of proceedings for a month. [Maule J. By transposing words you may turn a condition precedent into a condition subsequent.] The argument [706] was used to shew the effect of the present condition, namely, that the plaintiff could not go on within the month. But, at any rate, the order may be treated as an agreement between the plaintiff and Braham. [Coltman J. If it was an agreement, ought not the defendant to have pleaded its legal effect? (vide ante, vol. iii. 780).] A party may set out a written agreement in its terms (sed vide ante, vol. iii. p. 780, n.); it is for the court to say what is its legal effect. [Tindal C. J. The order contains nothing more than a reservation of the power possessed by the plaintiff, under the expectation of indulgence on the part of the defendant. I think the third plea cannot be supported.]

With respect to the fourth plea; it alleges the discharge of the principal debtor from custody; which is a complete release to him, and therefore a discharge to the surety. This case is stronger than *Mayhew v. Crickett* (2 Swanst. 185); where it was held that the goods of the principal debtor having been taken in execution, and the execution having been withdrawn, the surety was thereby discharged. It is true that in *Bray v. Manson* (8 M. & W. 668), where time had been given to a prior indorser, after judgment had been signed in an action on the same bill against a subsequent indorser, the court decided that they could not, on that ground, interfere to set aside the judgment, as it could not be affected by such indulgence being given after it was signed. But that case was decided on the authority of *Pole v. Ford* (2 Chitt. R. 125); and *Mayhew v. Crickett* was not brought before the notice of the court. [Maule J. In *Davey v. Prendergrass* (5 B. & Ald. 187, 2 Chitt. R. 336) considerable doubt was entertained whether giving time to the principal debtor would, in all cases, release the surety.] That was an action upon a bond, in which time had been given to the principal by parol; and [707] although this might amount to a release to the principal in equity, it was held to be none at law. [Tindal C. J. This is not a case of the discharge of the principal debtor. I do not mean to say, however, that the rule does not apply.] In *Mayhew v. Crickett* the discharge certainly was of the principal debtor. Lord Eldon there says: "I think it clear, that, though the creditor might have remained passive if he chose, yet, if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety, both at law and in equity." An indorsee of a bill has a remedy against the drawer to the same extent as against the acceptor. Quoad the indorsee the drawer is a principal. It is not like the case of a co-surety. [Maule J. In *Moore v. Bowmaker* (7 Taunt. 97, 2 Marsh. 392. And see *Bowmaker v. Moore*, 4 Price, 223) the parties to a replevin suit referred to arbitration the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them, when awarded, from the rent; and the avowant agreed to suspend proceedings in replevin pending the reference. After award made, it was held that the sureties in the replevin bond were not thereby discharged.] That case was probably decided on the same principle as *Davey v. Prendergrass*. [Maule J. The rule appears to have been first adopted at

(d) 10 B. & C. 578, 5 Mann. & Ryl. 287. In that case the judgment appears to have proceeded upon a misapprehension of the real effect of the acts of the plaintiff. Vide 5 Mann. & Ryl. 292, n.

law in cases on bills of exchange and on bail bonds; in the latter of which the court exercises an equitable jurisdiction.]

The learned serjeant then proceeded to argue that the replications to the fourth and ninth pleas were bad, as containing a negative pregnant. Upon this point he cited *Myn v. Cole* (Cro. Jac. 87), and *Auberie v. James* (1 Vent. 70, 1 Siderf. 444, 2 Keb. 623), and referred to Com. Dig. tit. Pleader (R 5).

[708] Channell Serjt., *contra*. The fourth plea can only be considered good on the ground that some act has been done with reference to Braham, by reason whereof, were the present action to succeed, it would be either a fraud upon the defendant, inasmuch as he would lose his remedy against the principal debtor, or a fraud upon the principal debtor, if the remedy that remained to the surety were to lead to enforcing a liability against the principal, from which he had been discharged (*vide* 5 Mann. & Ryl. 292, n.). But there can only be fraud in this case in the absence of the consent of the defendant, the surety. This, then, being the effect of the plea, it was competent to the plaintiffs to traverse all the allegations therein that are requisite to the validity of the defence without rendering his replication double; and if not double, it is not open to the objection of being a negative pregnant. Where a party is entitled to dispute two matters, he must always leave it somewhat in doubt which he intends seriously to dispute. [Maule J. He probably intends to dispute both.] The entire issue in this case is, that the plaintiff did not release Braham without the defendant's consent. [Maule J. You say that does not admit that the plaintiff did release him with the defendant's consent.] It denies both propositions. [Tindal C. J. The proper and distinct issue would appear to have been, that the defendant did give his leave and licence for the release of Braham.] The plaintiff might have so replied; or that he did not discharge Braham at all; but if, as is submitted, the proposition was an entire one, he had also a right to put the whole in issue. [Maule J. In the case of an action on a deed, the defendant may deny the sealing of the deed, or its delivery; but he may plead *non est factum*, which puts both of these facts in issue. Tindal C. J. It seems difficult to distinguish this case from *Myn v. Cole*.] The doctrine in that case was much qualified in [709] *Bell v. Tuckett* (*ante*, vol. iii. p. 785, 4 Scott, N. R. 402). [Tindal C. J. The issue there was not so pointedly accordant with that in *Myn v. Cole* as in the present case.]

With regard to the plea itself, it is to be remembered that the party who was discharged was the drawer and not the acceptor, who is the principal debtor. All the cases cited are cases in which the discharge was of the acceptor. An indorser is rather a surety for the acceptor. In *Hayling v. Mulhall* (2 W. Bla. 1235) it was held, that the holder of a bill of exchange may sue a prior indorser, notwithstanding he has ineffectually taken in execution a subsequent indorser, and afterwards set him at liberty. In the marginal note to that case in the original edition of Sir W. Blackstone's Reports the words *prior* and *subsequent* were transposed. The error was pointed out by Lord Eldon C. J., in *English v. Darley* (2 B. & P. 62); and it has been corrected in a subsequent edition (2d edit. by Elsley); but undoubtedly no distinction is made in the language of the judges between a prior and a subsequent indorser; they seem to put each indorser on the same footing. [Maule J. Lord Eldon's opinion would support this plea. Byles Serjt. referred to *Smith v. Knox* (3 Esp. N. P. C. 46).]

It was then suggested by the court that, as the defendant had judgment on one point, he had better amend upon the other, to which Channell Serjt. assented; Maule J. observing that the court was not to be understood as giving any opinion upon the point as to whether the replications to the fourth and ninth pleas involved a negative pregnant.

Judgment for the plaintiff on the demurrer to the replications to the third and eighth pleas, and leave to amend the replications to the fourth and ninth.

[710] CANDY AND DEAN v. MAUGHAM. Nov. 6, 1843.

[S. C. 7 Scott, N. R. 401; 13 L. J. C. P. 17.]

Pending an action, an extent in chief issued against the plaintiffs, and upon the inquisition had thereunder, the debt sought to be recovered was returned as seized to the use of the crown. Held, not a case for relief under the interpleader act.

On the 20th of July, an extent in chief for 6000l. issued against the plaintiff William Dean, and the sum of 228l. 2s. 11d. (a balance remaining due upon an account

for goods sold and delivered, being found by inquisition to be owing from the defendant Maugham, a warehouseman, carrying on business under the firm of Maugham and Co., to the plaintiffs Charles Candy and William Dean, was seized into the Queen's hands by the sheriff. On the 26th of July, the plaintiffs sued out a writ of summons against the defendant, indorsed for 228l. 2s. 11d. On the 27th of July, an extent in chief for 3954l. issued against both of the plaintiffs. On the 3d of August, the defendant received from Mr. Walford, the solicitor to the Customs, the following letter:—

“Custom House, London, August 1843.

“Sirs—I beg to inform you that on the 20th day of July last, a writ of extent, at the suit of the Crown, was issued against William Dean, one of the firm of Charles Candy and Co. of Watling Street, in the city of London, warehouseman, for the sum of 6000l., and that on the 27th day of July last, another writ of extent, also at the suit of the Crown, was issued against the said Charles Candy and William Dean, for the sum of 3954l. 1s. 4d.; and that under those processes, all debts due to the said firm at the date of the fiats for the said writs of extent respectively, will be recovered for the use of the Crown. And I also beg to inform you that all such debts paid to the said firm by any debtor thereto, after notice of the above extents having issued, will be recovered over again at the suit of the Crown from the party paying the same.—I am, &c.

“Messrs. Maugham and Co., Gutter Lane.”

[711] Upon an affidavit stating these facts, denying collusion, and offering to bring the 228l. 2s. 11d. into court,

Manning Serjt., on the part of Maugham the defendant, moved, under the 1 & 2 W. 4, c. 58, s. 1, for an interpleader rule. [Tindal C. J. Does the interpleader act apply to claims made on behalf of the Crown? Maule J. The provisions of that act, especially those relating to costs, shew that the court has no jurisdiction to make the Crown a party to an interpleader rule.] Here, the claim is made by the Board of Customs, against whom, as a distinct body from the Crown, a mandamus may issue. [Tindal C. J. All the proceedings under the extent in chief are by, and in the name of, the Crown. You call upon us to direct an interpleader between the defendant and the Crown, eo nomine.] Independently of the interpleader act, the defendant, whose time for pleading is now expired, is entitled to the protection of the court. Wherever the court sees that the Crown, though no party to the record, has an interest in the matter in suit, they may pronounce judgment for the Crown. And if a presumption of title only appears for the Crown, the court will, in some cases, proceed to give judgment in the action; but will suspend execution until the party has interpleaded with the Crown. For these positions a variety of authorities will be found collected in Mann. Exch. Prac. 2d edit. 126 (a). [Maule J. In the cases [712] referred to, was the court put in motion by an application on the part of the Crown, or did the suggestion come from the party in the cause?] The court proceeded sometimes on the suggestion of the king's serjeants, sometimes proprio motu.

Per curiam. If by the extents and the proceedings under them the plaintiffs' right of action is now vested in the Crown, the defendant may plead that. We cannot interfere. The defendant may apply to a judge at chambers for a summons for time to plead, returnable at ten in the morning.

Rule refused.

SIR WILLIAM HENRY RICHARDSON, KNIGHT, v. HENRY KENSIT, THE YOUNGER.
Nov. 11, 1843.

The directions to the taxing officers of Hilary Vacation, 1834, do not apply to the costs of defendants; though, where the master has exercised a sound discretion in

(a) Vide *Adam Penreth's case*, T. 29 E. 1, Maynard's Memoranda in Scaccario, 42, 43; T. 11 H. 4, fo. 71 b. per three justices; M. 12 H. 7, fo. 12 a.; T. 16 H. 7, fo. 12 a.; F. N. B. 34 H. 38 E.; *Willion v. Berkley*, Plowd. 243; *Brownloe v. Michell*, 1 Roll. Rep. 206, 208; *Chancellor, &c., of Cambridge v. Walgrave*, Hob. 126, 127; *Colt v. Bishop of Coventry*, *ibid.* 163; *Cumber v. Bishop of Chichester*, Cro. Jac. 216; *Barclay v. Russell*, 3 Ves. jun. 436. And see *E. Strange's case*, Lib. Ass. anno 1, fo. 1, pl. 1; 2 Roll. Abr. tit. Rege Inconsulto; 18 Viner's Abr. tit. Rege Inconsulto.

taxing a defendant's costs, according to the scale there given, the court will not interfere.—In an action to recover the sum of 5l. for a fine alleged to be payable to the lord of a manor on the admittance of the defendant as tenant in remainder in fee to certain copyhold premises, in which action the plaintiff had obtained a rule for a special jury, a verdict was taken subject to the opinion of the court upon a special case; and it was referred to a barrister to ascertain and state the amount of the annual value of the premises, and any deductions proper to be made in respect thereof—the arbitrator to have power to certify that the cause was proper to be tried before a judge of a superior court and not before the sheriff. Upon a special case, the decision of the court was in favour of the defendant, but no certificate was obtained from the arbitrator. The master having taxed the costs upon the full scale: Held, that he had acted within his authority, and exercised a proper discretion.

Assumpsit by the plaintiff, the lord of the manor of Chipping Barnett and East Barnett, to recover from the defendant 5l., being the amount of the fine alleged to be payable on the admission of the de-[713]-fendant as tenant in remainder in fee to certain copyhold premises within and parcel of the manor. The sum indorsed on the writ of summons was 5l.

At the trial before Tindal C. J., at the Middlesex sittings after Michaelmas term 1841, a verdict was taken for the damages laid in the declaration, subject to the opinion of the court upon a special case, with liberty for the court to draw such inferences as a jury might draw: and it was referred to a barrister to ascertain and state the amount of the annual value of the copyhold premises mentioned in the pleadings, and all questions touching the same, and any deductions or deduction claimed by the defendant as proper to be made in respect of such premises: and it was ordered that the arbitrator, if required by either party, should state upon the face of his award the finding as well as the principle of such finding, and that such award should be introduced into the special case: the arbitrator to have the same power as a judge sitting at nisi prius, to amend the record and to certify that the cause was proper to be tried before a judge of the superior courts, and not before the sheriff or judge of an inferior court, and likewise, if necessary, that the cause was proper to be tried by a special jury.

Upon the argument of the special case, two questions were raised, first, whether certain extracts from the court-rolls of the manor, which were set out in the case, were sufficient evidence of the existence of a custom in the manor for the payment of a fine by a remainder-man on admittance to a copyhold—secondly, whether the fine assessed was a reasonable fine. After taking time to consider, the court held, as to the first question, that by the custom of the manor a fine was due on the admittance of a remainder-man, whether he prayed admittance, and was admitted, at the same time as the tenant of the particular estate, or during the continuance [714] of such estate. But, upon the second question, they were of opinion that the fine claimed was unreasonable, inasmuch as in calculating it no allowance had been made for the expense of repairs: and they thereupon directed that a nonsuit should be entered (ante, vol. v. 485. 6 Scott, N. R. 419).

On the taxation of the defendant's costs before the master, it was contended for the plaintiff, that, as the sum sought to be recovered was only 5l., the costs should be taxed upon the reduced scale provided by the directions to the taxing officers in Hilary Vacation, 4 W. 4 (1834). The taxation having been adjourned, in order to give the defendant an opportunity of applying to the Lord Chief Justice for a certificate that the cause was proper to be tried before him, application was accordingly made; but his lordship, declined to give such certificate, on the ground that, by the order of nisi prius, the power of certifying had been transferred to the arbitrator. The arbitrator having made his award, it was assumed that his power to certify had ceased (see *Astley v. Joy*, 9 Ad. & E. 702, 1 P. & D. 460. But see also *Hallen* (or *Wallen*) v. *Smith*, 5 M. & W. 159, 7 Dowl. P. C. 394). On a second attendance the master taxed the costs upon the usual unreduced scale.

Bompas Serjt., in Trinity term last, obtained a rule nisi to review the taxation, on the ground that, as the action was brought to recover the sum of 5l. only, and neither the judge nor the arbitrator had certified that the cause was a proper one to be tried before a judge of a superior court, the master ought to have taxed the costs upon the

reduced scale. He referred to *Parsons v. Pitcher* (4 N. C. 306, 6 Scott, 298, 6 Dowl. P. C. 600), and *Williamson v. Heath* (4 Q. B. 402, 3 Gale & D. 474).

[715] Channell Serjt., now shewed cause. The directions as to taxation of H. V. 4 W. 4 apply only to the costs of plaintiffs. It is true that where, as in one of the cases cited when this rule was obtained, the master has adopted the lower scale in taxing a defendant's costs, the courts have refused to interfere with his discretion; but it is not therefore to be assumed that they will interpose where he has thought proper to tax them on the usual scale. It is impossible to say that this was a case which could properly have been decided by a sheriff's jury. [Tindal C. J. The test of these directions is not whether a writ of trial will lie.] If the plaintiff had succeeded, he clearly would have been entitled to the higher scale of costs.

Bompas Serjt., in support of his rule. The directions in question are applicable to the costs of defendants as well as of plaintiffs' costs. Upon this point, *Parsons v. Pitcher* and *Williamson v. Heath* are distinct authorities. [Tindal C. J. The case of *Williamson v. Heath* amounts only to this, that the court of Queen's Bench thought the master had not exercised an improper discretion.] It is a distinct decision that the directions, which have all the force of a rule of court, apply as well to defendants' as to plaintiffs' costs. A case can hardly occur in which the defendant will not be entitled to some costs, although the plaintiff may have the general costs of the cause. If it were held that the directions did not apply to both, two different scales of costs might be allowed in the same cause. [Maule J. If the master's discretion is in any case improperly exercised, the court may control it.]

TINDAL C. J. The question is, whether the taxation of costs in this case has been properly conducted, with reference to the directions given to the taxing officers [716] in Hilary Vacation, 1834, as to all writs issued on or after the 15th of March in that year. These directions are not, properly speaking, a rule of court: they are merely instructions given to the masters for the regulation of their conduct in a matter which, by the statute of Gloucester, has been left to the court—the costs of increase being, by that statute, given to the successful party, at the discretion of the court. Looking at these directions, it is clear that the costs of a defendant are not within their letter. The words are—"In all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20l. without costs, the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed." Nothing is said about the defendant's costs. The next clause provides that "at the head of every bill of costs taken to the taxing office to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of 20l. or not, in the following form—'Debt above 20l.,' 'Debt 20l. or under.'" That also seems to apply only to the plaintiff's costs. Then follows the proviso, that, "in case of a trial before a judge of one of the superior courts or a judge of assize, if the judge shall certify on the postea that the cause was a proper one to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale." The scale of costs annexed contains no costs peculiarly or exclusively applicable to defendants: all seem to be charges or disbursements incurred or made by or on account of the plaintiff only. It is said, however, that the masters have been in the habit of taxing defendants' costs upon the same principle as that upon which plaintiffs' costs are, by these directions, required to be taxed. That certainly is [717] so: and *Williamson v. Heath* shews that, where the master has, in the exercise of a proper discretion, dealt with a case as falling within the spirit of the instructions, the court will not, on that account, direct the taxation to be reviewed. That is all which that case decides. There, the defendant having resisted the plaintiff's application to have the cause tried before the sheriff, the court, in the exercise of a very wise discretion, refused to relieve him from a difficulty which he had brought upon himself. The question is, whether the master has, or has not, in this case exercised a proper discretion, in taxing the defendant's costs upon the higher scale; and I am of opinion that he has. It is true, the sum sought to be recovered was only 5l.: but the question between the parties involved two points of some nicety—first, whether the extracts from the court-rolls were sufficient evidence of the existence of a custom in the manor for the payment of a fine by a remainder-man on admittance to a copyhold; and, secondly, whether the fine that had been assessed, was or was not a reasonable one. What could a sheriff have done with questions of that descrip-

tion? It seems to me that this was a case which could only be properly tried before a judge of a superior court, and that the costs have been properly taxed according to the ordinary scale.

COLTMAN J. Although these directions do not, in strictness, apply to the costs of a defendant, they may furnish a guide, for the discretion of the master, in taxing a defendant's costs. In *Williamson v. Heath*, the master having taxed the defendant's costs upon the lower scale, the court of Queen's Bench declined to interfere. That case, upon the facts, appeared a proper one to be tried before the sheriff; but the defendant had successfully opposed the application for a writ of trial; and that is assigned by the court as one reason for their [718] approval of the exercise of the master's discretion. On the other hand, in *Parsons v. Pitcher* the costs were taxed upon the higher scale, and this court declined to order a review. There appears to be nothing in either of those cases to fetter the exercise of our judgment in the present case.

ERSKINE J. I also am of opinion that the directions in question apply only to the costs of plaintiffs; not merely because the items in the scale annexed are items that would exclusively form part of a plaintiff's bill of costs, but also because they are, in terms, limited to cases where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20l. without costs—not, where the sum sought to be recovered shall not exceed 20l.; which, probably, would have been the case if defendants' costs had been contemplated. The second paragraph also shews that plaintiffs' costs alone were meant; for, it requires a statement at the head of the bill which could not be applicable to a defendant's bill of costs. The present case, therefore, not falling strictly within the directions, the question is whether the master has done wrong in taxing the defendant's costs upon the ordinary scale. In the first place it certainly is a case in which no judge would have granted a writ of trial: and, if tried before a judge of one of the superior courts, a certificate that it was a proper case to be so tried would undoubtedly have been granted. What is there, therefore, to control our discretion? In *Parsons v. Pitcher* (4 N. C. 306, 6 Scott, 298, 6 Dowl. P. C. 600), the costs having been taxed upon the higher scale, though the sum in dispute was less than 20l., this court refused to interfere, on the ground that the attention of the [719] master had not, at the time of the taxation, been called to the fact that the demand was below 20l. But if these directions to the taxing officers had amounted to an imperative rule, forbidding the taxation of a defendant's costs on the higher scale in all cases where the sum sought to be recovered did not exceed 20l., the court ought to have interfered, and would have done so. In the other case, *Williamson v. Heath* (4 Q. B. 402, 3 Gale & D. 474), an application had been made by the plaintiff to try the cause before the sheriff, which was resisted by the defendant; and ultimately there was a judgment as in case of a nonsuit. The master having taxed the defendant's costs upon the lower scale, the court of Queen's Bench refused to interfere with that exercise of his discretion, because the defendant had himself prevented the case from going before the sheriff. Lord Denman certainly says that a defendant's costs are within the spirit of the instructions: but he clearly does not mean that in all cases the courts are bound so to deal with them, or it would not have been necessary to assign any reason for not interfering in that instance. Upon the whole, it seems to me that there is nothing either in the words or in the spirit of the directions, or of the decisions thereon, to call upon us to interfere with the discretion which the master has exercised in this case.

MAULE J. I also concur in thinking that this rule ought to be discharged. The question arises upon the directions given by the courts to the taxing officers in H. V. 1834. These directions, it is to be remarked, do not purport to be a rule of all the courts; and no doubt this was done advisedly. By various statutes, antient and modern, successful litigants are declared to be entitled to costs, which are to be measured by the discretion of the court. In determining the proper amount of costs in each case, the courts have been in the habit of being guided,—although I apprehend they are not in any case bound,—by the certificates of the masters. The operation of the directions is, to limit the discretion which the courts have been in the habit of confiding to their officers: but, they do not, as I conceive, limit the discretion exercisable by the courts themselves: nor do they profess to take away the power of the courts to award costs in any case as they may think fit. The reason why these

directions are not in the ordinary form of a rule of court probably is, that they might in that case have operated indirectly as a partial repeal of the statutes giving costs; and I believe that a power in the judges to make a rule that shall operate to take away the rights of parties, can only be given by an act of parliament. Without such an authority, the courts could no more do this than they could restrict a party to single costs, where an act of parliament had awarded him double costs. But, whether they might have done it or not, it is not material to consider; for, the judges have not, in fact, assumed to make any such rule. These directions to the taxing officers apply distinctly and plainly to the costs of plaintiffs only. Looking at the language of the introductory instructions and at the accompanying scale, I think it clear that the framers intended to confine them to plaintiffs' costs. The direction as to the heading of the bill, and every item of charge contained in the scale, equally point to the same conclusion. Nothing is said about instructions for plea, or ingrossing plea, or any thing else that is exclusively applicable to a bill of costs for a defendant. These directions, in cases to which they do apply, do not limit the master's discretion as to the lowness of the amount to be allowed; they only provide that he shall not allow more than the sums set down. Before, as well as after [721] the issuing of those directions, the master, if he thought fit, might allow a party less than the usual amount of costs; and it was competent to the court to adopt his act. It was in the exercise of such a discretion that the master taxed the costs in *Williamson v. Heath*. The defendant having complained to the court that he had not been allowed a sufficient amount of costs, the court, in effect, say, there is nothing in the instructions to interfere with the discretion of the master in such a case as this: the allowance he has made is in conformity with the spirit of the rule; or, in other words, they say, that the master has not made any improper deductions: and in confirmation of that, they add—"We find that the officers in all the courts have applied that rule to the defendant's costs as well as to the plaintiffs, and that the practice has been recognized and approved by the court of Common Pleas in *Parsons v. Pitcher*. We think such practice is quite within the spirit of the instructions to taxing officers, and that it ought to be supported." In *Parsons v. Pitcher* the costs were taxed upon the higher scale. If the instructions had been binding upon the court and the master, the master would have been precluded from giving the costs allowed in that case; and the decisions would not have been tenable upon the reason assigned.

Bompas Serjt. submitted, that, looking at the decision in the court of Queen's Bench in *Williamson v. Heath*, the rule ought not to be discharged with costs.

TINDAL C. J. As the object of the application was to arrive at a better understanding of a quasi rule of court, we think there should be no costs.

Rule discharged, without costs.

[722] EX PARTE BENTHALL. Nov. 7, 1843.

Where an attorney had changed his name by royal licence, the court allowed the roll to be amended by substituting the new name for the old.

Sir T. Wilde, Serjeant, moved that the name of Francis "Benthall" might be entered on the roll of attorneys of this court in lieu of "Bentall." The affidavit on which the motion was founded stated that in Michaelmas term 1839, the applicant was duly admitted an attorney of this court by his then name of "Bentall," but that he had since obtained the royal licence to assume, and that he had assumed, instead thereof, the "name of Benthall."

In *Ex parte Hayward* (a) this court refused to allow a similar application; but in *Ex parte Ware* (6 Dowl. P. C. 311) the court of Queen's Bench (c) came to an opposite decision. It is submitted that the present applicant is only doing that which every attorney is bound to do, under such circumstances, for the protection of the public.

Per curiam. Rule granted.

(a) 5 Scott, 712. In that case the Crown had granted leave to use an additional name.

(c) By Patteson J. in the Bail court. But this court, in the same term, refused a similar application from the same party. *Ware, Ex parte*, 6 Dowl. P. C. 463. And see *Ware, Ex parte*, Arn. 119.

[723] ROWLAND v. VIZETELLY AND ANOTHER. Nov. 9, 1843.

An affidavit of service of a rule to compute by leaving the copy "with a clerk or servant of the defendants at their warehouse," is insufficient.

Halcombe Serjt. moved to make absolute a rule to compute, in an action against two partners on a bill of exchange.

It appeared by the affidavit of service, that the copy had been left with a "clerk or servant of the defendants at their warehouse." The learned serjeant said that the officer objected to the affidavit on the authority of *Ibotson v. Phelps* (6 M. & W. 626, 8 Dowl. P. C. 770); where the court of Exchequer held an affidavit, which stated a service by leaving the copy of the rule "with the defendant's warehouseman at his warehouse," to be insufficient. The present case is distinguishable; for here the party with whom the copy was left is described as "clerk."

TINDAL C. J. Notwithstanding that, he may be in a very subordinate employment. You had better amend the service.

MAULE J. Service upon a domestic servant at the defendant's place of residence is held sufficient, on the ground that it is the servant's duty to receive papers and letters left there for his master, and to deliver them to him. That may not be the case with respect to his clerk.

The rest of the court concurred.

Rule refused.

[724] HATFIELD v. HAVERFIELD. Nov. 9, 1843.

A rule for an attachment for non-payment into court of the proceeds of a sale, pursuant to a rule, without stating the amount, must be a rule nisi.

Byles Serjt. moved for an attachment against the sheriff for disobedience of a rule for payment into court of the proceeds of a sale under a fieri facias. The learned serjeant submitted that the rule should be absolute in the first instance.

Per curiam. As the rule of court is not for the payment of a sum certain, the rule must be a rule nisi.

Rule accordingly.

CEAL v. COCKBURN. Nov. 10, 1843.

On a motion for a distringas to proceed to outlawry, reasonable ground must be disclosed by the affidavit for believing that the defendant is out of the country.—Where the affidavit for a distringas names the defendant by initials, it must shew that the action is brought on a document in which the defendant has so described himself.

Bompas Serjt. moved for a distringas, in order to proceed to outlawry against the defendant. His affidavits stated that all attempts to discover the defendant's place of abode had been ineffectual, all that the plaintiff could ascertain being that the defendant had held a situation in the Ordnance Office in the Tower of London; that, previously to the 30th of October last, several applications had been made at the office with a view to serving him with the writ of summons, but that on all such occasions the deponent had been informed that the defendant was not there, but had gone out of town, or had gone abroad, and that the time of his return was quite uncertain: that, on the 30th of October, the deponent called again at the office, and was informed [725] by the porter there that the defendant was out of town, and that he (the porter) could not tell when he would return, and did not know where he dwelt; that the deponent thereupon informed the porter that he came for the purpose of serving the defendant with a writ at the suit of the plaintiff, and made an appointment for the following day; that the deponent called on the following day at the office pursuant to his appointment, when he was informed by a clerk in the office that the defendant had gone abroad, to the South of France, he believed; and upon the deponent's informing the clerk the purpose of his visit, and asking if he knew the defendant's place of abode, the clerk replied, "No; in fact, no one knows; but, to my certain knowledge

he is away, not only to avoid this writ, but several others; and I question if he comes back;" and that the deponent then made an appointment for the next day, when he again saw the same clerk, and left a copy of the writ with him.

The affidavit described the defendant by his initials thus, "H. D. Cockburn;" and there being nothing in it to shew that the action was upon a bill of exchange accepted by the defendant by the initials only of his double Christian name (as was the case), the court required the defect to be supplied. This having been done the rule was Granted.

[726] PECK v. BOYES. Nov. 10, 1843.

[S. C. 7 Scott, N. R. 436.]

In debt for money had and received, it is not sufficient,—to bring the case within a proviso of an act of parliament directing that no action shall be brought for any thing done in pursuance of the act without a previous notice of action,—to plead that the debt arose out of the sale of certain cattle, and that the sale of such cattle was a thing done in pursuance of the act.

Debt. The plaintiff declared against "Daniel Boyes (the defendant in this suit), clerk for the time being of the pasture-masters of the borough of Beverley, in the East Riding of the county of York, according to the form of the statute in such case made" (6 & 7 W. 4, c. lxx.), who has been summoned, &c., in an action of debt: And the plaintiff demands of the defendant, as such clerk as aforesaid, the sum of 5l. 13s. 2d., which the said pasture masters owe to and unjustly detain from him: For that whereas the said pasture-masters on the 1st of April, 1843, were indebted to the plaintiff in 5l. 13s. 2d. for money received by them for the use of the plaintiff, which sum of money was to be paid by them to the plaintiff on request; whereby, and by reason of the non-payment thereof, and by force of the statute aforesaid, an action hath accrued to the plaintiff to demand and have of and from the defendant, as such clerk as aforesaid, the sum of money above demanded: Yet the said pasture-masters have not, nor has the defendant, as yet paid the sum above demanded, or any part thereof. Whereupon the plaintiff saith that he is injured and has damage to the value of 5l. And thereupon he brings suit, &c.

Pleas, first, "by statute"—that the said pasture masters never were indebted, in manner and form as in the declaration was alleged; secondly, that the debt in the declaration mentioned arose out of the sale of a certain heifer of the plaintiff by the said pasture-masters after the making of a certain act of parliament made and passed in the 6 & 7 W. 4 (c. lxx.), intituled, "An Act to provide for the better regulation of certain common [727] pastures within the borough of Beverley, in the East Riding of the county of York," and after the making of a certain other act of parliament made and passed in the 5 & 6 Vict. (c. 97), intituled "An Act to amend the laws relating to double costs, notices of action, and pleas of the general issue under certain acts of parliament;" that the said heifer of the plaintiff was, before the commencement of this suit, to wit, on the 1st of January, 1843, sold by the said pasture-masters, and the said sale was a thing done in pursuance of the said first-mentioned act of parliament; and that the proceeds of the said sale were then received by the said pasture-masters, and were and are the money in the declaration supposed to have been had and received by the said pasture-masters to the use of the plaintiff; yet the plaintiff did not, previously to the commencement of this action, give to him the defendant, or to the said pasture-masters, or any of them, one calendar month's notice in writing of the same; but, on the contrary, the plaintiff commenced this suit without giving the defendant, or the said pasture-masters, or any of them, one calendar month's, or any, notice in writing of his intention to commence the same; contrary to the first-mentioned act. Verification.

Special demurrer to the second plea, assigning for causes, that the said plea was uncertain, in this, that it did not state with sufficient or any certainty, or at all, that the promise in the declaration mentioned, or the said cause of action therein mentioned, was any thing done or omitted to be done in pursuance of the therein first-mentioned act, or in execution of the powers or authorities or of any of the orders made, given, or directed in, by, or under the same act, or any of them, or was made, or accrued, in respect of any thing so done or omitted to be done, or under what circumstances, or

for what reason or excuse or cause the said heifer was sold [728] as therein alleged, or how such sale was a thing done in pursuance of the first-mentioned act, or why the proceeds of the said sale were retained and not paid over to the plaintiff, or how the promise in the declaration was a thing done in pursuance of the said act; that the plea left it uncertain what question of fact was for the jury, and would leave to the jury questions of law and fact, viz. what was done by the said pasture-masters, and whether the thing so done was done in pursuance of the said act, and left it uncertain what issue could be taken thereon; that the allegation of the said sale being a thing done in pursuance of the said act was a conclusion without premises of fact whereon to found it—that the said plea was uncertain in this, to wit, whether it meant that the sale or cause of action in the declaration mentioned was a thing done, not in strict pursuance of the said act, but so far in pursuance that one calendar month's notice in writing was requisite previously to the commencement of the action by virtue of the said act, or whether it meant that the said sale or cause of action was a thing done in strict pursuance of, or in conformity with, the said act; and so left it uncertain what averment, if any, therein ought to be traversed by the plaintiff—that the said plea was double, in relying on the want of notice of action, and also on the sale therein alleged being a thing done in pursuance of the said act,—that the plea amounted to the general issue and was not a good plea in confession and avoidance; that it concluded with a verification, whereas it ought to have concluded to the contrary; and that it was in other respects uncertain, informal, and insufficient.

Joinder in demurrer.

Talfourd Serjt., in support of the demurrer. The 6 & 7 W. 4, c. lxx. contains a proviso, that no action shall be brought for any act done, or omitted to be done, [729] in pursuance of the act, unless ten days' previous notice in writing be given; and it enables the defendant to plead the general issue and give the special matter in evidence. By the general act, 5 & 6 Vict. c. 97, s. 3, "so much of any clause or provision in any act or acts, commonly called public local and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, is repealed." And by sect. 4, after reciting that "it is expedient that the law should be uniform with respect to notice of action in all cases where such notice of action is required," it is enacted, that "in all cases where notice of action is required, such notice shall be given one calendar month, at least (a), before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding." The third section renders it necessary to plead specially, and the fourth section requires one month's notice in all cases. Here, the plea, framed in conformity with the provisions of the statutes, sets up, as an answer to the action, that the matter out of which it arises, is within the scope of the local act, and that notice has not been given. The plea does not state the facts upon which the defendant relies in order to found the conclusion that the thing complained of was done in pursuance of the act; it merely alleges that the debt arose out of the sale of a heifer, and that the sale was a thing done in pursuance of the act. In the analogous case of a plea justifying an arrest for felony by a private person upon reasonable grounds of suspicion, which plea must shew the circumstances, in order to enable the court to judge whether the sus-[730]-picion was reasonable; *Mure v. Kaye* (4 Taunt. 34). This plea seeks to put matter of law in issue. This case is distinguishable from that of an action for a malicious prosecution, in which it is the duty of the judge to inform the jury, that if they find that the facts are proved, and that certain inferences necessary to the existence of reasonable or probable cause, are warranted by such facts, such facts and inferences do or do not amount to reasonable or probable cause, so as to leave the question of fact to the jury, and of law to the judge; *Panton v. Williams* (2 Q. B. 169; 1 Gale & D. 504). If the facts creating the necessity for a notice were set out upon the record, the plaintiff could take advantage of their insufficiency by demurrer. What difficulty could there be in stating that, in pursuance of the statute, the heifer had been seized damage feasant? The protection given by the notice is not limited to actions for torts; *Waterhouse v. Keen* (4 B. & C. 200, 6 Dowl. & R. 257).

MAULE J. The plea alleges that the sale of the heifer was a thing done in

(a) Vide *Gould v. Holt*, 4 Mann. & R. 301, n.

pursuance of the act. The plaintiff has not complained of the sale. The defendant might have pleaded that the money was *bonâ fide* received in pursuance of the powers and authorities given by the local act.

Channell Serjt. in support of the plea. The plea might possibly have been more correctly framed: but the question is whether enough is not stated to raise the defence intended,—that the plaintiff commenced the suit without giving him notice of action. The plea shews that the money was received upon the sale of a heifer, and that the sale was a thing done in pursuance of the local act.

[731] TINDAL C. J. To avoid all doubts (*a*), the defendant had better amend on the usual terms.

Rule accordingly.

The defendant afterwards delivered an amended plea, alleging that the money in the declaration stated to have been had and received by the said pasture-masters to the use of the plaintiff, was so had and received by the pasture-masters to the use of the plaintiff after the making of, &c. (6 & 7 W. 4, c. lxx.), intituled, &c., and after the making of, &c. (5 & 6 W. 4, c. 97), intituled, &c.; and that the money so had and received by the pasture-masters to the use of the plaintiff was and is the proceeds of the sale of a certain heifer of the plaintiff by the pasture-masters after the passing of the said first-mentioned act, and before the commencement of this suit, to wit, on the 28th of September 1842, sold *bonâ fide* in the execution of the powers and authorities to the pasture-masters given by the first-mentioned act; and that the said receipt of the said money by the pasture-masters to the use of the plaintiff, was a thing by them *bonâ fide* done, and also that the detention thereof by the pasture-masters from the plaintiff, and for which the plaintiff has above complained against the defendant, was and is a thing by them *bonâ fide* done in pursuance of the first-mentioned act and in execution of the powers and authorities thereof: yet the plaintiff did not, previously to the commencement of the action, give to the defendant, or to the pasture-masters, or any of them, one calendar month's notice, &c.

To this plea the plaintiff demurred specially, and the defendant joined in demurrer; but, before argument, a compromise took place between the parties.

[732] IN THE MATTER OF SARAH HARPER AND OTHERS. Nov. 11, 1843.

[S. C. 7 Scott, N. R. 431.]

The court directed the officer to file an acknowledgment of a married woman, it appearing by affidavit, and also upon the certificate, that she was deaf and dumb, the nature of the transaction having been duly explained to her by signs, and that she had, in like manner, signified her assent.

Talfourd Serjt. moved for an order, that the proper officer appointed for that purpose, might file the certificate of acknowledgment in this case and the affidavit of the due taking thereof, pursuant to the stat. 3 & 4 W. 4, c. 74.

The affidavit on which the motion was founded was made by John Owen, an attorney, and William Wilson. The former stated that Sarah Harper was deaf and dumb, and that, previously to her making the acknowledgment, he explained to Wilson the nature and purport of the said deed, and requested him to inquire, by signs, of her the said Sarah Harper, whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu, or in consequence of, or in return for, her so giving up her interest in such estates; and that the said W. Wilson by signs made such inquiry, and in answer thereto the said Sarah Harper by signs signified that she did intend to give up her interest in the said estates without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest; of which declaration of the said Sarah Harper the deponent had no reason to doubt the truth, and he verily believed the same to be true. The deponent Wilson stated that he was the nephew of Sarah Harper, and that she could neither read nor write; that he had long been accustomed to communicate and converse with, and convey informa-

(*a*) As to the distinction between matters of law and of fact, see Law Review, part iii., "Of the Functions of the Judge as distinguished from those of the Jury."

tion to, and receive information from, the said Sarah Harper by signs; and that he did, at the request of the said John Owen, explain by signs to the said Sarah Harper, [733] the nature and purport of the said deed, and inquired of her by signs, whether she understood the same, and whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates; and in answer to such inquiries so made by signs as aforesaid, the said Sarah Harper signified that she did understand the said deed, and that she did so intend to give up her interest in the said estates, without having any provision made for her, in lieu of, or in return for, or in consequence of her so giving up such her interest; and that he communicated to the said John Owen, and also to the said commissioners the real, true, and bonâ fide answers and meaning of the said Sarah Harper to such their aforesaid inquiries.

At the foot of the certificate of acknowledgment the following addition was made by the commissioners: "And we further certify, that, the said Sarah Harper being deaf and dumb, the nature, purport, and contents of the said deed, previously to her acknowledgment thereof, were fully explained to her in our presence by W. Wilson, being a person accustomed to, and competent to hold conversation by signs with, the said Sarah Harper; and from such explanation and interpretation thereof to us by the said W. Wilson, we further certify that the said Sarah Harper freely and voluntarily consented to the same."

TINDAL C. J. Enough seems to have been done. The explanation and assent appear to have been communicated in the only possible way.

The rest of the court concurred.

Rule granted.

[734] MUNTZ v. FOSTER AND OTHERS. Nov. 22, 1843.

[S. C. 7 Scott, 471; 1 D. & L. 737, 942; 13 L. J. C. P. 1; 7 Jur. 1110; 6 Man. & G. 1017; in Chancery, 7 Jur. 121; 8 Jur. 206.]

In case for infringing a patent, the declaration, after setting out the letters patent, with the usual proviso for making it void in case of the non-inrolment of a specification within six calendar months, alleged that the plaintiff did, in pursuance of the said proviso and of the said letters patent, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention and in what manner the same was to be and might be performed, and afterwards and within six calendar months next after the date of the letters patent, cause the said instrument in writing to be inrolled in Chancery. The plea averred that the plaintiff caused to be inrolled in Chancery, within six calendar months after the date of the said letters patent, to wit, on, &c., a certain instrument in writing in the words and to the effect following—setting it out in hæc verba—and that the plaintiff caused to be inrolled in Chancery, within six months after the date of the letters patent, no instrument in writing other than and except the said instrument in writing thereinbefore set forth and contained, whereby, and by reason of the premises, the said letters patent in the declaration mentioned ceased and determined and became and were and still are of no force and effect—concluding with a verification. On special demurrer, the plea was held bad on the ground that it was an argumentative traverse of the inrolment alleged in the declaration.

Case, for infringing a patent granted to the plaintiff for "an improved manufacture of metal plates for sheathing the bottom of ships or other such vessels."

The declaration—after setting out the grant of the letters patent, on the 22d of October 3 W. 4 (1832), subject to the usual proviso, "that, if the plaintiff should not particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in the high court of Chancery, within six calendar months next, and immediately after the date of the said letters patent, then those letters patent, and all liberties and advantages whatsoever thereby granted should utterly cease, determine, and become void, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding"—alleged that the plaintiff [735] did

afterwards, to wit, on the 22d of April, 1833, in pursuance of the said proviso and of the said letters patent, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, and afterwards, and within six calendar months next and immediately after the date of the said letters patent to wit, on the day and year last aforesaid, did cause the said instrument in writing to be inrolled in the high court of Chancery: Averment, that the defendants, well knowing the premises, but contriving and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might, and otherwise would, have derived and acquired from the making, using, and vending of the said invention, after the making of the said letters patent, and within the said term of years therein mentioned, to wit, on the 1st of May, 1842, and on divers other days and times between that day and the commencement of the suit, and before the expiration of the said term of fourteen years, in that part of the united kingdom of Great Britain and Ireland called England, unlawfully and unjustly, and without the leave and licence, and against the will, of the plaintiff, did make and exercise and put in practice the said invention of the plaintiff, in breach of the said letters patent, and against the privilege so granted to the said plaintiff; whereby the plaintiff had been and was greatly injured and had been and was deprived of a great part of the profits and advantages which he might, and otherwise would, have derived and acquired from the said invention; and that the defendants, further contriving and wrongfully intending as aforesaid, after the making of the said letters patent, and within the said term of years therein mentioned, to wit, on the 1st of May, 1842, and on divers other days and times between that day and the expiration of the said term of years as [736] aforesaid, and before the commencement of the suit, in that part of the said united kingdom called England, unlawfully and unjustly, without the leave or licence, and against the will, of the plaintiff, made, vended, and sold divers, to wit, 10,000 metal plates, &c. &c., in imitation of the said invention of the plaintiff, in further breach of the said letters patent, and against the privileges so granted to the plaintiff as aforesaid; whereby the plaintiff had been greatly injured, and deprived of a further great part of the profits and advantages which he might, and otherwise would, have derived and acquired from the said invention.

Sixth plea: that, in and by the letters patent in the declaration mentioned, it was, amongst other things, provided, that, if the plaintiff should not particularly describe and ascertain the nature of the said invention and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be inrolled in the high court of Chancery within six calendar months next and immediately after the date of the said letters patent, the said letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease and determine, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding: that the plaintiff caused to be inrolled in the said high court of Chancery, within six calendar months next and immediately after the date of the said letters patent, to wit, on the 22d of April, 1843, a certain instrument in writing, in the words and to the effect following; that is to say, &c. The plea then set out the specification, and concluded with an allegation that the said plaintiff caused to be inrolled in the said high court of Chancery, within six calendar months next and immediately after the date of the said letters patent, no instrument in writing other than and except the said instrument in writing thereinbefore set [737] forth and contained; whereby, and by reason of the premises, the said letters patent in the declaration mentioned ceased and determined, and became and were, and still are, of no force and effect. Verification.

Special demurrer to this plea, assigning for causes, that it did not shew or state with sufficient or any certainty, how, or in what particulars or respects, or on what grounds, the plaintiff failed in particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, by the said instrument in writing set out in the said plea, or how otherwise he made default in complying with, or did not observe or comply with, the supposed proviso in that plea mentioned, or that he made any default in complying therewith—that it did not shew or state with sufficient or any certainty, any fact on which issue could be taken, so as to submit to the jury whether the plaintiff had observed or complied with the said proviso; and that it submitted to the court the question, whether the plaintiff had or had not observed, or complied with, the said proviso, without stating or shewing any

facts or circumstances, whereupon or whereby the court could perceive or determine the question with certainty, or whether the plaintiff had, in any, and what, respects omitted so to observe or comply—that it was bad for not traversing the averment in the declaration that the plaintiff did, in pursuance of the said proviso, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, as therein was particularly alleged—that, if the plea was intended to be such traverse, it was a circuitous and bad traverse thereof—that it was a negative pregnant, and a plea in confession, without any, or with an improper and bad, avoidance; for that it appeared that it was intended by the pleas to shew that the plaintiff had not complied with the proviso in the said plea and in the declaration mentioned, and yet did not aver that he did not so comply, but shewed that he intended and purported so to comply by means of the said instrument set out in the plea, and did not shew that he did not in fact by the said instrument so comply, and that the said plea led to great uncertainty, inunity, and prolixity in pleading, and was in other respects informal and insufficient, &c.

Joinder in demurrer.

Sir T. Wilde Serjt. (with whom was Cowling), for the plaintiff. This plea is clearly defective. It neither traverses any allegation in the declaration, nor tenders any precise issue. It is averred in the declaration that the plaintiff duly filed a specification. If the defendants meant to traverse that allegation, they should have done so in direct terms. The plea states, that the plaintiff filed a certain specification, and no other: it does not say that such specification is the same as that mentioned in the declaration. If it is intended by the plea to deny the inrolment of the plaintiff's specification, it is a circuitous and argumentative denial of the fact. It is impossible for the plaintiff to know, whether he will be called upon to answer objections to the specification of law or of fact. The specification may be bad on the face of it as a matter of law, or it may be so imperfect that no workman can carry it out, and thus become matter of evidence before a jury. It is not possible to discover the exact meaning of the plea; and the uncertainty in which it involves the case shews the necessity of adhering strictly to the rules of pleading. The presumed object of this plea is to place the specification upon the record so as to avoid the difficulty that arose in the case of *Wallon v. Potter* (3 Mann. & Gr. 411, 4 Scott, N. R. 91. And see *Derosne v. Fairie*, Webster's Patent Cases, p. 161). There, to a declaration for an infringement of the plaintiff's [739] patent for "an invention of improvements in cards for carding wool, cotton, silk, and other fibrous substances, and for raising the pile of woollen and other cloths," the defendants pleaded, amongst other pleas, one in which, after setting out the specification, they alleged that certain cards, that is to say, sheet cards and top cards, were, before and at the time of granting the letters patent, cards for carding cotton and other fibrous substances, within the meaning of the letters patent and specification, and during all that time were ordinary cards within such meaning, and in general and known use; and that the said invention was and is unfitted and useless for the purpose of the construction of sheet cards and top cards, or either of them, as claimed and described in and by the letters patent and specification; wherefore the said letters patent were void. After verdict for the plaintiff, the court held that the specification, as set out in the introductory part of the plea, was merely matter of inducement, and was not upon the record so as to warrant a motion in arrest of judgment, founded on the supposed insufficiency of the invention therein described to form the subject-matter of a patent. The proper mode of getting the specification before the court is by tendering a bill of exceptions. Whether any mode can be devised, whereby the defendants can bring it before the court on the pleadings, it is unnecessary to consider; for, at any rate, this plea is an informal mode of doing so. There is nothing on which the plaintiff can take issue; for he cannot take issue on the conclusion, that by reason of the premises the patent became void. [Coltman J. If the defendants had pleaded that the specification mentioned in the declaration was a certain specification in the words and figures following, and had averred that no other specification had been filed, would the plea have been objectionable?] It would still have been bad. [Coltman J. An argumentative traverse is bad, but an argumentative confession is another matter. This may be considered an argumentative confession and avoidance. Whether the avoidance is sufficient will depend upon how far we can collect from the face of the specification whether it is good.] There is no case in which the court has recognized an argumentative confession. If the plea

confesses that the plaintiff inrolled a good specification, how is that avoided? The avoidance is of that which is previously confessed. Assuming that an argumentative confession would be good, there is here no confession at all. [Maule J. The plea is an argumentative denial of the inrolment.]

Channell Serjt. (with whom was Webster) was now called upon by the court. The plea is good in form, and, although no precise authority can be cited for it, such a plea ought, for the purposes of justice, and from the necessity of the case, to be allowed. The letters patent are granted subject to a proviso or condition that the grantee shall, within a limited time, inrol in Chancery a specification of his invention, describing its nature and the manner in which it is intended to carry it into effect. In declaring, however, on the letters patent, the plaintiff is not bound, nor is it usual, to set out the specification, or to allude to it at all. That being so, the only course for the defendants is, to bring it before the court by plea: and there are many cases to shew that its construction is entirely a question of law. *The King v. Wheeler* (2 B. & Ald. 345), *Neilson v. Harford* (8 M. & W. 806, 1 Webster's Patent Cases, 331). Being matter for the opinion of the court, the defendants wish to place it before such court at an early stage of the proceedings, and no other mode of doing so than that adopted here has been suggested, [741] except by a bill of exceptions at the trial. [Tindal C. J. That may be said of every issue where a written instrument forms part of the evidence.] The defendants have a right to raise a question of law alone. [Maule J. I am disposed to think that may be done. The question is, whether this mode of doing it is correct.] The specification, it is said, is not identified; but it is, in effect, shewn to be the same; and there is no special demurrer on this point. [Maule J. Suppose the declaration to have set out a good specification, and to have averred that the plaintiff had caused the same to be duly inrolled, and that the plea had set forth another specification, and to have alleged that the defendants had inrolled the latter specification and no other, would not the plea clearly have been bad?] The general rule of law is, that where a plaintiff takes an interest which may be defeated on a given event,—as by this proviso,—the matter of defeasance must come from the defendants (vide *Wynne v. Wynne*, ante, vol. ii. 8). It is conceived that, all that this declaration says about the proviso, may be treated as surplusage, and that the matter of defeasance stated by the defendants is to be considered as coming substantially from them in their plea, and that it is matter of confession in point of fact, but of avoidance in point of law. The obligee of a bond does not usually state the condition in his declaration; but there, the defendant has an advantage—which the present defendants do not possess—of having the condition set out on oyer; upon which it becomes part of the declaration. [Tindal C. J. The cases are not parallel; for the condition in a bond is to be performed by the defendant; but here the proviso is to be observed by the plaintiff. Maule J. The simple course would have been to say, that the plaintiff's specification was as follows.] That the plea intended to do, and it is submitted that, in substance, it has done so. [742] If the plaintiff had set out the specification, perhaps the defendants might have demurred to it. Not having done so, it is for the defendants to bring it before the court. If this plea does not sufficiently identify the specification, there is, of course, an end of the case; but if it is shewn to be the same, then the court must look at the whole of the plea. It is submitted that it is good, on the ground that the defendants are bound to set out the proviso, and to state that the specification set forth, and no other, was inrolled within the specified time. By these means the court has all the materials brought before it, in order to enable it to come to a decision. The plea confesses the patent in point of fact, but avoids it in point of law, by saying that there was no inrolment of a sufficient specification; in other words it confesses an inrolment in fact, but avoids it as a matter of law. [Maule J. It confesses an inrolment of the instrument mentioned in the plea, but not of that stated in the declaration.] There is no ground of demurrer as to this. [Maule J. One ground of demurrer is, that the plea is an argumentative denial of the inrolment; and is it not so? The declaration might possibly have been good without referring to the proviso, but it is going a long way to say, that, if the declaration does set out the proviso, it is surplusage.] This plea was intended to be framed with reference to the observations and decisions of this court in *Walton v. Potter* (3 Mann. & Gr. 411, 4 Scott, N. R. 91, 1 Webster's Pat. Cases, 598-613), and *Gibson v. Brand* (4 Mann. & Gr. 179, 4 Scott, N. R. 844, 1 Webster's Pat. Cases, 631); and, in order to raise the question as to the sufficiency

of the specification on the record, it is submitted, supposing the specification mentioned in the plea to be sufficiently identified with that named in the declaration, that this plea is good both in point of form and substance.

[743] Wilde in reply, was stopped by the court.

TINDAL C. J. It appears to me that this plea is insufficient, on the ground that it amounts at the most to an argumentative denial that the plaintiff had caused to be inrolled in Chancery, within the limited period, a specification properly describing the nature of his invention, and in what manner the same was to be performed. The declaration commences, in the usual mode of declaring on letters patent, by setting out the letters patent with the proviso subject to which they are granted. I apprehend, that, if the plaintiff had not set out the proviso in his declaration, the defendants might have set it out on oyer. That it is requisite to set out the proviso in order to give the plaintiff a title to sue, appears from the letters patent themselves. The making and inrolment of a specification are required to be performed by the patentee as a condition of the grant; he is bound, by the ordinary rules of pleading, to allege performance. It bears some resemblance to the pleading of a bargain and sale under the 27 H. 8, c. 16. That statute declares that no manors, lands, &c., shall pass by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled, within six months of the date thereof, in one of the King's courts of record at Westminster, &c. It has always been considered to be necessary that a party who pleads a conveyance by bargain and sale, should allege that the deed was inrolled within the six months limited by the statute; and a plea omitting that allegation, has been held bad (a). In the present declaration the plaintiff distinctly alleges that he did, in pursuance of the proviso and of the letters patent, by an instrument [744] under his hand and seal, particularly describe and ascertain the nature of his said invention and in what manner the same was to be and might be performed; and that he did afterwards, and within six calendar months next and immediately after the date of the said letters patent, cause the said instrument in writing to be inrolled in the High Court of Chancery: that is, he caused to be inrolled the said instrument in writing in which he had particularly described and ascertained the nature of his invention and the manner in which it was to be carried into effect; and that part of the allegation ought to have been included in the traverse of the defendants. Instead of taking a distinct traverse, that which they set up, however, amounts only to affirmative matter, and is no denial at all of the allegation in the declaration. They say that the plaintiff caused to be inrolled in Chancery, within six calendar months after the date of the said letters patent, a certain instrument in writing, in the words and to the effect in the plea set forth; and then proceed to aver that the plaintiff caused to be inrolled in Chancery, within six calendar months next and immediately after the date of the said letters patent, no instrument in writing other than and except the said instrument in writing thereinbefore set forth and contained. What is that in effect but bringing together two affirmatives, the one on the part of the plaintiff, the other on the part of the defendants, which is bad without a special traverse? If the plea had gone on to say "without this that the plaintiff did, within six calendar months next and immediately after the date of the said letters patent, by an instrument under his hand and seal, particularly describe and ascertain the nature of his said invention and in what manner the same was to be and might be performed, and cause the said instrument in writing to be inrolled in the said High Court of Chancery," the plea might have been a good one; but that would not have answered the object which the defendants had in view. On the ground, therefore, that this plea amounts only to an argumentative denial that the plaintiff did, within the time limited, cause the specification to be inrolled in Chancery, I am of opinion that it is bad. It also appears to me that the objection is sufficiently pointed out by the demurrer.

COLTMAN J. It is a rule in pleading, that, where there is a material allegation on the one hand, and an allegation on the other that is inconsistent therewith, the plea must conclude with a special traverse. In the present case, the defendants ought I think to have concluded their plea in that manner. But instead of expressly denying the inrolment of the specification the denial is an argumentative one. It is said that

(a) So, unless it state in what court it was inrolled; *Warley v. Purley*, Cro. Jac. 291, *Yelv.* 213.

none of the grounds of special demurrer precisely hit this objection. It is true that the causes of demurrer assigned do not do so in express terms; but I think they sufficiently intimate to the court and to the defendants, that the objection was intended to be taken.

ERSKINE J. The plea in question is nothing more than an argumentative and circuitous traverse of the allegation in the declaration that the plaintiff caused to be inrolled in Chancery, within six months after the date of the letters patent, a specification of his invention. The defendants in their plea, after setting out the proviso, aver that the plaintiff caused to be inrolled in Chancery within the period limited, a certain instrument in writing in the words and to the effect following. And after setting out the specification, the plea proceeds to allege that the plaintiff caused to be inrolled in Chancery no instrument in writing other than and except the said instrument in writing thereinbefore set forth and contained—"whereby and by reason of the [746] premises the said letters patent in the declaration mentioned ceased and determined, and became and were and still are of no force and effect." Why is it averred that the plaintiff inrolled no other instrument than that set forth? Because it is intended to be said that the instrument in writing inrolled by the plaintiff, was not a sufficient compliance with the proviso contained in the grant. The plea, therefore, argumentatively and circuitously, traverses the allegation that the plaintiff caused to be inrolled in Chancery an instrument in writing in compliance with the terms of the proviso. It has been argued on the part of the defendants that this allegation in the declaration may be rejected as surplusage, but, for the reasons given by my lord, it is impossible so to treat it. The plaintiff has set out in his declaration the proviso, by which the letters patent are declared void if he shall not particularly describe and ascertain the nature of his invention, and in what manner the same is to be performed, by an instrument in writing, and cause the same to be inrolled in Chancery within six months after the date of the said letters patent. It appears by the declaration, that more than six months had elapsed since the grant of the letters patent, and, consequently, the averment is an essential one, for the grant would have been void if the condition had not been complied with. The averment, therefore, that the plaintiff had duly inrolled a specification was essential to his right to maintain the action. I also agree that this objection is sufficiently pointed out as a ground of special demurrer.

MAULE J. I also am of opinion that this plea is bad in point of form, for one of the causes of demurrer specially assigned. The plaintiff declares on certain letters patent which grant to him an exclusive privilege not absolutely, but only on condition that he, within a given [747] time, cause to be inrolled in Chancery, a specification of his invention, and in what manner the same is to be performed. It was therefore necessary for him to aver in his declaration that he had complied with that condition. That being a material allegation of the declaration, how has it been met by the defendants? They say, that, within the time limited by the proviso, the plaintiff inrolled a specification, which is set out; and then aver that he inrolled no instrument in writing other than that thereinbefore set forth. In order to raise the question whether the plea is good, it must be assumed that the specification is bad. Assuming, therefore, that it is meant by the plea to allege that the plaintiff inrolled a specification not sufficiently describing his invention, that is clearly inconsistent with the material allegation in the declaration that the plaintiff did inrol a specification in compliance with the proviso. It is clearly a denial, and an argumentative denial, of that allegation in the declaration. All traverses ought to conclude to the country (a), and ought to be direct and not argumentative or circuitous. The next question is, whether this objection is sufficiently pointed out as a cause of demurrer? It seems to me it is. Among the causes of demurrer assigned are these—that the plea is bad for not traversing the averment in the declaration that the plaintiff did, in pursuance of the said proviso, particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, as therein is particularly alleged—and that, if the plea is intended to be such traverse, it is a circuitous and bad traverse thereof.

Judgment for the plaintiff.

(a) Vide 1 Wms. Saund. 103 b. c. as to concluding traverses to the court or to the country.

[748] CUMBERLEGE AND OTHERS v. CARTER. Nov. 15, 1843.

The defendant takes out a summons for time to plead, returnable at 3 o'clock in the afternoon; by mistake, the copy served states it to be returnable "at 11 o'clock in the afternoon." The plaintiff signed judgment before 3 o'clock. The judgment was held to be regular, and only to be set aside upon payment of costs and an affidavit of merits.

Dowling Serjt., on a former day, obtained a rule nisi to set aside the judgment and execution in this cause for irregularity.

It appeared by the affidavit, on which his motion was founded, that the declaration was filed and a rule to plead given on the 28th of October last. On the 31st, the defendant obtained a summons for time to plead returnable at 11 o'clock in the forenoon of the 1st of November. The plaintiffs' attorney not having attended this summons, a second summons was taken out, which was returnable at 3 o'clock in the afternoon of the 2d of November. Under this second summons, which was not attended on behalf of the plaintiffs, the defendant obtained an order for a week's time to plead. Judgment was signed for want of a plea before 3 o'clock on the 3d of November, and the defendant was taken in execution on the 7th.

Channell Serjt. now shewed cause. His affidavits stated that the second summons, according to the copy left at the office of the plaintiffs' attorney (which copy was annexed), was returnable "at 11 o'clock in the afternoon" of the 2d of November; that the clerk who had the management of the cause, believing that 11 o'clock in the forenoon was the time meant, attended at that hour, but no one appeared on behalf of the defendant; and that shortly after 12 o'clock on that day judgment was signed for want of a plea. The learned serjeant submitted that, as there was no service of a true copy of the second summons, it did not operate as a stay [749] of the plaintiffs' proceedings, and consequently that the judgment was properly signed.

Dowling Serjt., in support of his rule. The first summons, being returnable within the original time for pleading, was a stay of proceedings; and no authority can be found that a second summons is necessary in order to stay the proceedings; although that course is usually adopted. [Tindal C. J. The defendant did not rely on the first summons. He seems to have thought the second requisite. Maule J. If the first summons is allowed to expire without any order being made thereon, the possibility of time being granted,—which forms the ground on which the summons is held to be a stay of proceedings,—fails.] The attorney of the plaintiffs could not have been misled by the mistake in the copy of the second summons; and even if he had been, a summons to attend at 11 in the afternoon, would have been good; for the fact that it is an hour at which no judge attends at chambers, makes no difference. This appears from *Byles v. Waller* (5 Dowl. P. C. 232. Et vide supra, 712); where a summons for time to plead, returnable at 10 o'clock in the morning in term time at chambers, was held to operate as a stay of the plaintiff's proceedings, although no judge attends at chambers at that hour.

TINDAL C. J. In that case a summons was served. Here, the plaintiff has a right to say, that there is no second summons at all. I do not see how you can eke out a summons which has expired, with a piece of paper which is no summons at all.

MAULE J. The plaintiff signs judgment at his peril. If it turns out there is not a second summons, or that [750] he has not been served with a second summons, the judgment is regularly signed.

The rest of the court concurred.

Dowling obtained leave, upon payment of costs, to plead—on producing an affidavit of merits; otherwise, the rule to be discharged with costs.

Per curiam. Rule accordingly.

BROMLEY v. GERISH. Nov. 25, 1843.

[S. C. 7 Scott, N. R. 516; 1 D. & L. 768; 13 L. J. C. P. 16; 7 Jur. 1136.]

An affidavit by a clerk who has the conduct of the defendant's case, stating that "he was apprised and believed that the defendant had good grounds of defence upon the merits," is insufficient.

Assumpsit on a bill of exchange. The defendant having delivered a frivolous special demurrer, signed by a barrister, the plaintiff signed judgment. An application

having been made to set aside the judgment, the court required an affidavit of merits; whereupon the clerk to the defendant's attorney made an affidavit, in which he stated that he had had the conduct and management of the cause, and that "he was apprised and believed that the defendant had good grounds of defence upon the merits."

Dowling Serjt., for the plaintiffs, took an objection to the sufficiency of the affidavit, and cited *Tate v. Bodfield* (3 Dowl. P. C. 218); where an affidavit that the defendant has a good and sufficient defence on the merits, without words applying such defence to the particular action, was held to be insufficient.

[751] TINDAL C. J. The step taken by the defendant of demurring specially to the declaration leads to the supposition that he has no merits; for, no one would adopt that course if he had. When told that he must swear to merits, the clerk prepares an affidavit in a singularly loose and unusual form. Had we known that the demurrer was a special one, I doubt whether the rule would have been granted. If parties are not held to the ordinary forms, a discussion will arise on every affidavit brought before the court.

ERSKINE J. The ordinary form of affidavit is that the defendant has "a good defence to this action on the merits." Where it is made by the party the words, "as he is advised and believes," are added; where by the attorney or managing clerk to the attorney, the form is "as he is informed and verily believes."

The rest of the court concurred.

Rule discharged.

HUGHES v. BROWNE. Nov. 25, 1843.

An affidavit of service of a rule for payment of money, alleging a service "on the day of the date hereof," no date being stated, except by reference to the date of the jurat—is insufficient.

Channell Serjt. moved to make a rule for payment of a sum of money absolute. The officer had objected to the affidavit of service, on the ground that it did not state when the rule was served. The deponent swore that he did, "about 10 o'clock in the forenoon of the day of the date hereof, serve the defendant with a true copy of the rule hereunto annexed." The learned serjeant contended, coupling the word "hereof" with the date of the jurat, that there was a sufficient statement of the day of service.

[752] MAULE J. The jurat clearly is no part of the affidavit. It is usually written by the officer; the deponent may never see it.

Per curiam. The affidavit may be amended and resworn, and the rule enlarged, and cause may be shewn at chambers.

Rule accordingly.

WATERMAN v. CARDEN. Nov. 25, 1843.

Where the defendant, being under terms to plead issuably, delivered a demurrable plea, which was sworn to be false, the court allowed the plaintiff to sign judgment.

Debt. The first count was for 39l. 13s. 4d., being the balance alleged to be due on the plaintiff's bill of costs as attorney for the defendant in an action brought by him against one Pollard. There were also counts for money paid, and on an account stated.

The declaration was filed on the 25th of October last, and a rule to plead given. On the 2d of November, the defendant obtained a summons for time to plead, and served the same together with a summons for liberty to plead, "1st, general issue, nunquam indebitatus; 2dly, guarantee, stating consideration, as to first count alone." The plaintiff's agent consented to a week's time to plead on the usual terms, and also to an order to plead the several matters mentioned in the abstract annexed to the summons. The defendant accordingly delivered a plea of nunquam indebitatus to the whole declaration, and the following plea to the first count, which stated that, "after the defendant became indebted to him the plaintiff in the sum of 39l. 13s. 4d. in the first count of the declaration in this cause mentioned, the defendant then requested one Pollard to guarantee the due payment of the same to him the plaintiff, and that the said [753] Pollard, thereupon, at the request of the defendant, then consented so to do, in consideration of the forbearance of him the plaintiff to the

defendant, and thereupon, for the consideration aforesaid, gave him the plaintiff a certain guarantee in writing for the due payment of the same; and that he the plaintiff then accepted and received the said guarantee in full satisfaction of the said sum of 39l. 13s. 4d. in the said first count of the declaration mentioned, and then released the defendant from the payment of the same. Verification."

Talfourd Serjt., on a former day in this term, upon an affidavit that the second plea was false, obtained a rule calling upon the defendant to shew cause why the plaintiff should not be at liberty to sign judgment, upon the ground that the plea was not issuable.

Channell Serjt. now shewed cause, contending that the second plea was an issuable plea, being in the nature of a plea of accord and satisfaction.

MAULE J. A complicated and a sham plea, like the present, is not an issuable plea. It is quite impossible that what is here suggested in the plea, can have been taken as full satisfaction. The plea not being issuable, the plaintiff is clearly entitled to sign judgment; *Waterfall v. Glode* (a)¹.

The rest of the court concurred.

Rule absolute (b).

[754] DOE DEM. OVERY v. ROE. Nov. 22, 1843.

An affidavit alleging service of the declaration and notice upon a son of the tenant, and that the son afterwards stated that he had handed them to his father, must shew that the deponent believed the statement to be true.

Channell Serjt. moved for judgment against the casual ejector. His affidavit alleged service of the declaration and notice on the son of the tenant in possession, upon the premises, on the 1st instant, and that on the 20th the son informed the deponent that he had handed them to his father on the former day; but it contained no averment that the deponent believed the statement made by the son to be true. The learned serjeant referred to *Doe dem. Cockburn v. Roe* (1 Dowl. P. C. 692).

The court considered the affidavit insufficient; but on its being amended in this particular,

The rule was granted.

DOE DEM. SMITH v. ROE. Nov. 25, 1843.

The omission to entitle a declaration in ejectment of some term is immaterial, where the notice at the foot thereof is properly dated.

Manning Serjt., in moving for judgment against the casual ejector, stated that the declaration was not entitled of any term, but the notice was properly dated. The usual course is, to entitle the declaration of the term preceding the service, which is, in general, a term preceding the alleged demise. When the issue is delivered to the tenant, this is set right by altering the term in the title of the declaration. The omission of a title, which would be error if it remained uncorrected, and which would tend to mislead the tenant if he were, incautiously, to look at it, cannot be material; *Doe d. Phillips v. Roe* (4 Scott, 359. S. C. per nom. *Doe d. Wills v. Roe*, 5 Dowl. P. C. 380), *Doe d. Evans v. Roe* (5 Dowl. P. C. 508).

[755] TINDAL C. J. The declaration undoubtedly is incomplete: but that part which is really material has a date.

Per curiam. Rule granted (a)².

(a)¹ 3 T. R. 305; and see *Hughes v. Pool*, ante, 271.

(b) The plea appears to have been demurrable, and therefore not issuable, by reason of its alleging that the plaintiff released, without shewing how he released. The debt could be effectually released only by deed; and the defendant was bound to set out the deed of release according to its legal operation, and also to produce it (by making profit) in court.

(a)² See *Doe d. Woodroffe v. Roe*, ante, vol. iv. p. 810. And see *Doe d. Brook v. Roe*, 9 Dowl. P. C. 347; *Doe d. Channell v. Roe*, ib. 67.

EALES v. FRASER, TERRY AND TEBBUTT. Nov. 21, 1843.

Judgment is entered up by A. against B., C., and D., upon a warrant of attorney, in which C. and D. are sureties. B. being taken in execution, is discharged on giving to A. a fresh security for the debt. C. and D. are afterwards taken in execution. C. and D. refusing, by their counsel, to undertake to bring no action, the court discharged them out of custody with costs.

A warrant of attorney having been given to the plaintiff, by the first-named defendant as the debtor, and by the others as his sureties, judgment was, on the 26th of June 1843, entered up thereon against the three defendants. A ca. sa. issued upon this judgment on the 28th of June, under which the defendant Fraser was taken in execution. On the 11th of September Fraser was discharged, having come to an arrangement with the plaintiff, who, without the consent of the sureties, took from Fraser a fresh security for the debt. Tebbutt was taken in execution on the 14th of September, and Terry on the 28th.

Bompas Serjt., on the first day of this term, obtained a rule, calling upon the plaintiff to shew cause why Tebbutt and Terry should not be discharged; citing *Clark v. Clement* (6 T. R. 525). [Tindal C. J. referred to *Ballam v. Price* (2 J. B. Moore, 235).]

Talfourd Serjt., for the plaintiff, consented to the parties being discharged, but submitted that the rule [756] should not be made absolute with costs, unless the defendants would undertake to bring no action.

Bompas Serjt. insisted that it was a clear case of irregularity, and that the parties were entitled to the costs of the application. [Tindal C. J. Not if you mean to bring your action.] If we get our costs, we may not bring an action; but if not, we must do so.

TINDAL C. J. (After consulting with the rest of the court.) The rule must be absolute with costs (a). The parties may use their discretion as to bringing an action. Rule absolute accordingly.

NEGRETE v. MARTORELL. Nov. 24, 1843.

A rule for judgment as in the case of a nonsuit, was discharged on a peremptory undertaking to try within two months, if an order to try before the sheriff should be obtained. After the expiration of the two months, the plaintiff gave a notice of trial before the sheriff, which the defendant returned as being too late. On the day for which the notice was given, the cause was tried in the defendant's absence, and a verdict found for the plaintiff. The court set aside the verdict as irregular.

In this case a rule for judgment as in case of a nonsuit, was discharged on the 2d of May last upon a peremptory undertaking to try at the sittings after Trinity term, unless, in the meantime, an order to try before the sheriff should be obtained, in which case the trial was to be had within two months. After the rule was drawn up, the plaintiff obtained an order to try before the sheriff of Middlesex. On the 29th of July, which was subsequent to the expiration of the two months limited by the rule, the plaintiff's attorney served the defendant's attorney with a notice of trial [757] before the sheriff, for the 8th of August. The notice was returned on the same day as being out of time. The plaintiff, however, gave notice that he would notwithstanding try the case, which he did on the 8th of August, when he obtained a verdict, the defendant not appearing to defend. The proceedings were afterwards stayed by a judge at chambers until the fifth day of the present term, in order to give the defendant an opportunity of applying to the court.

Channell Serjt. accordingly obtained a rule nisi to set aside the verdict for irregularity. The plaintiff's proper course was to apply to a judge at chambers to enlarge his undertaking, or to wait until the first day of term, instead of proceeding to trial, of his own authority, in defiance of the rule of court.

Sir T. Wilde Serjt. now shewed cause. It is against all principle to say, that so long as judgment as in case of a nonsuit has not been obtained, the plaintiff is not at

(a) Vide *Adlam v. Noble*, 9 Dowl. P. C. 322.

liberty to try his cause. The object of the peremptory undertaking was to force on the plaintiff; and it is sufficiently complied with if the case be tried before judgment as in case of a nonsuit, has been obtained.

Channell Serjt., in support of his rule. The plaintiff having been guilty of a default, obtained indulgence upon an undertaking to try within a given time; with which undertaking he has failed to comply. The trial after that period was clearly irregular. [Sir T. Wilde Serjt. It does not appear, from the affidavits, that a court was held within the two months, so as to enable the plaintiff to go to trial. Maule J. By the rule the plaintiff undertook that a court should be held within two months.] If the plaintiff was unable, from [758] any reasonable cause, to proceed to trial within the time limited by the rule, he ought to have applied to a judge at chambers for an extension of the time; or he might have come to the court to be released from his undertaking. The defendant may have been materially prejudiced by a trial had after the expiration of the two months, as he may have allowed his witnesses to go abroad.

TINDAL C. J. The words of the statute 14 G. 2, c. 17, s. 1, are very strong:—"Where issue is joined, and the plaintiff shall neglect to bring such issue to trial according to the course and practice of the court, then it shall be lawful for the judges of the court, upon motion made in open court (due notice having been given thereof), to give the same judgment for the defendant as in cases of nonsuit, unless upon just and reasonable terms they shall allow a further time for the trial of such issue; and, if the plaintiff neglect to try the issue within the time so allowed, the court shall give such judgment as aforesaid." Great inconvenience might result to a defendant if the course pursued by the plaintiff in this case were to be allowed; for he might keep his witnesses in town until after the expiration of the two months, and then permit them to go away, under the full persuasion that the trial could not then take place. I am of opinion that the verdict should be set aside.

The rest of the court concurred.

Rule absolute.

[759] ROLFE v. JOHNSON AND ANOTHER. Nov. 24, 1843.

[S. C. 7 Scott, N. R. 496.]

One of two defendants (after appearing and pleading jointly) two days before the trial obtained an order to appoint a new attorney for himself. On taxation the master allowed him separate costs of the trial. It appeared that the defendant had reasonable grounds for changing his attorney. The court refused to interfere with the master's discretion.

Trover, against Patrick Johnson, the official assignee, and George Delacour, the creditors' assignee, under a fiat in bankruptcy issued against one Edwin Twizell Gough, a bankrupt. The defendants appeared by the same attorney, and pleaded jointly, not guilty, and certain other pleas. The cause being called on for trial at the sittings after Easter Term last, was made a remanet on the application of the defendants, upon payment by them of the costs of the day. On the 13th of June, the defendant Johnson obtained an order to change his attorney; which order was served upon the plaintiff's attorney on the 14th. The cause was tried on the 16th, when counsel appeared separately instructed on behalf of Johnson. Cresswell J., however, refused to allow Johnson's counsel to address the jury for him upon the facts (a). A verdict was found for the plaintiff on the first issue, and for the defendants on the other issues.

On the taxation of costs, two distinct sets of costs were produced on the part of the defendants. The master allowed separate costs to Johnson, including charges for instructions for fresh brief, drawing and copy for counsel, a distinct fee to counsel,

(a) Vide *Chippindale v. Masson*, 4 Campb. 174; *Doe d. Fox v. Bromley*, 6 Dowl. & Ryl. 292; *Doe d. Hogg v. Tindal*, Mood. & Malk. 314, 3 Carr. & P. 565; *Perring v. Tucker*, Mood. & M. 391, 4 Carr. & P. 70; *Mason v. Ditchbourne*, 1 Mood. & Rob. 426, n.; *Sparkes v. Barrett*, 8 Carr. & P. 442; *Ridgway v. Philip*, 5 Tyrwh. 131, 1 C. M. & R. 415, 3 Dowl. P. C. 154.

and an additional consultation, a fee for the attendance of the substituted attorney at the trial, and other charges.

[760] Channell Serjt., on a former day in this term, upon an affidavit of these facts, obtained a rule calling on the defendants to shew cause why the taxation should not be reviewed. He submitted that, under the circumstances, the separate costs to Johnson were improperly allowed.

Shée Serjt. now shewed cause, upon affidavits stating that the defendant Johnson had reasonable grounds for believing that his interests would be better represented by his own attorney than by the attorney whose name appeared on the record, and who had been appointed by the other defendant, and denying that the change of attorneys had been made with a view to the increase of costs, as suggested on the other side. The learned serjeant contended that as the defendant Johnson might have committed his defence, in the first instance, to his own attorney, he had an undoubted right, at any stage of the cause, to adopt that course, so long as it was not done vexatiously, or to swell the costs.

Channell Serjt. in support of his rule. The name of the first attorney alone appears upon the record. [Maule J. The nisi prius record only states the name of the attorney who appears for the two defendants.] The record should have been afterwards altered in some way. If the defendants had originally conducted their defences separately, the plaintiff might not have chosen to encounter the double expense; or, he might have elected to enter a nolle prosequi as to one of them. By the course of proceeding adopted, the plaintiff was deprived of the opportunity of so doing. [Tindal C. J. The plaintiff knew of the change of attorney the day before the trial; and he would have had time then, if he had thought proper, to enter a nolle prosequi as to one the defendants.]

[761] TINDAL C. J. It seems to me that the question resolves itself into this,—whether under the circumstances, the expense of employing a second attorney, was reasonably and properly incurred. I am not prepared to say that it was not. A party having reason to be dissatisfied with the attorney whom he has employed, may change his attorney (a) at any stage of the cause (b). It appears from the affidavits, that the defendant Johnson had reasonable ground for being dissatisfied with the attorney to whom he had at first intrusted his defence.

COLTMAN J. The defendant Johnson is entitled to his costs, unless he appears to have acted unreasonably in employing a separate attorney.

ERSKINE J. I am of the same opinion. If there had been any thing to shew that the change of attorneys was colourable,—as in the case of two members of a firm representing different parties,—the question would have been different. I see nothing unreasonable in what has been done, or in the master's allowing the costs of Johnson in appearing by a separate attorney.

MAULE J. I cannot see that the master has done wrong in allowing these costs. Rule discharged, with costs.

[762] ROBINSON v. SEARSON AND REEVE. Nov. 24, 1843.

A defendant who applies to deprive a plaintiff of costs, under a local court of requests act, is bound to bring his case distinctly within the terms of the act.—By a court of requests act, exclusive jurisdiction was given to a local court up to 5l. in certain actions (including trover), where the defendant or defendants, “resided or kept any house or shop, &c., or was in any way working, trading or dealing, within a given

(a) So, the party may discharge his attorney, and, instead of appointing another, appear in person, in any stage of the cause.

(b) Acc. *Sir Richard Hasting's case*, H. 11 H. 6, fo. 23, pl. 22; *Lawson v. Dickinson*, 8 Mod. 306; *Anon.* 12 Mod. 440. And see *Registr. Brev. Orig.* 27 a.; *Ratcliff v. Roper*, 1 P. Wms. 420; *Wood v. Plant, in Error*, 1 Taunt. 44; *Lovegrove v. Dymond*, 4 Taunt. 669.

But the party—who has, by matter of record in the particular action, given authority to the attorney to act for him, ad lucrandum vel perdendum,—cannot withdraw that authority and change his attorney without the leave of the court in which such action is pending. Vide *Macpherson v. Robinson*, 1 Dougl. 217; *Perry v. Fisher*, 6 East, 549; *Ginders v. Moore*, 1 B. & C. 654.

district." By another section, "where any debt or damages shall be due or owing or demanded from two or more persons jointly by reason of their being partners in trade or otherwise jointly concerned," service of the summons may be made upon one of such persons.—In trover against A. and B. brought in C. P., the plaintiff recovered 5l. damages. An application was made on behalf of A. alone, who was resident within the jurisdiction, to deprive the plaintiff of costs. He produced an affidavit from B., which stated that at the time of issuing the writ, he was trading within the jurisdiction. It appeared from the affidavits on the other side, that before action brought B. (who had kept a shop within the jurisdiction) had shut it up and had left the place, but that he returned afterwards. It also appeared that A. had stated that B. had left the place.—Held, that it was not sufficiently made out that B. was trading within the jurisdiction at the time the writ issued.—Held also, that A. was estopped, by his statement, from contending that B. was trading within the jurisdiction.—Held also, that as the plaintiff was not bound to sue A. alone, he was entitled to sue both defendants in one of the superior courts; and, therefore, that A. was not entitled to enter a suggestion as to himself.

Trover, to recover the value of a box of clothes. The cause was tried at the last assizes for Lincolnshire, when a verdict was found for the plaintiff against both the defendants, with 5l. damages.

Clarke Serjt., on a former day in this term (November 6), obtained (on behalf of the defendant Searson only) a rule nisi to enter a suggestion on the roll to deprive the plaintiff of his costs of suit, under the Bolingbroke and Horncastle Court of Requests Act (47 G. 3, sess. 2, c. lxxviii.) (b).

[763] The rule was granted upon the affidavits of both of the defendants. That of Searson stated that he, at the time of the commencement of the suit, and ever since, had inhabited at Tattershall, within the jurisdiction of the said court of requests, and was liable to be summoned thereto. The affidavit of the other defendant, Reeve, stated that he, at the time of the commencement of this suit, was, and still is, the tenant, and in the occupation, of a certain shop situate in Tattershall, and trading therein; and that, at the time he was served, at [764] the city of Lincoln, with the

(b) Sect. 18 enacts, "That it shall be lawful for any person or persons, whether such person or persons shall reside within the jurisdiction of the said court or not, having any debt or debts upon any contract or agreement, or upon the balance of account, &c. &c. not exceeding the value of 5l., due or owing or belonging to him, &c. &c., by or from any other person or persons inhabiting, residing or being within any of the said several sokes, &c. and places thereinbefore mentioned, except, &c., or keeping or using any house, coach-house, warehouse, wharf, quay, lodging, shop, shed, stall or stand; or using or frequenting any market or markets there; or seeking a livelihood, or in any way working, trading or dealing within the same;" to serve a summons upon such debtor personally, or by leaving the same with his servant or other person belonging to him, or at the dwelling-house, &c., of such debtor being within the jurisdiction of the said court, &c.; and the commissioners of the court are thereupon empowered to entertain the case.

Sect. 22 empowers the commissioners to decide and determine all disputes and differences between party and party for any sum not exceeding 5l., in all actions or causes of debt, &c., (including actions of trover).

Sect. 27 enacts, "That where any debt or damages shall be due or owing or demanded from any two or more persons jointly by reason or on account of such persons being partners in trade, or otherwise jointly concerned, service of such summons as aforesaid, on any one of such partners or persons, or left at his, her or their last usual place or places of abode, warehouse, &c., or other place of dealing, trading or working, shall be as good and sufficient as if each of such partners or persons were separately summoned as aforesaid."

Sect. 40 enacts, "That if any action or suit for any debt or damages recoverable by virtue of this act in the said court of requests, shall be commenced in any other court whatsoever, or elsewhere than in the said court of requests, (other than and except in certain courts therein mentioned), then, and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her or them, or otherwise, have, or be entitled to, costs whatsoever," &c.

writ of summons in this action, he was endeavouring to obtain the situation of schoolmaster of the national school of St. Peter's at Arches, in the city of Lincoln, which required his occasional attendance at that place; that he did not succeed in obtaining the said situation, and is still inhabiting in Tattershall, and trading in, and occupying as heretofore during the time aforesaid, the said shop in the said parish of Tattershall, and within the jurisdiction of the said court of requests; and that he has been for and during all that time, and still is, liable to be summoned to the said court.

Byles Serjt. now shewed cause, upon affidavits, which stated that the action was commenced on the 1st of February last; that the defendant Reeve, in the previous January, left his residence at Tattershall, where he had carried on the trade of a shoemaker (after making repeated attempts to dispose of his business), and went to reside in Lincoln, to take charge of the national school of St. Peter's at Arches, in that city, of which he was endeavouring to obtain permanent appointment as master; that he continued to reside in Lincoln (which is not within the jurisdiction of the local court in question) until the month of June following, when, having failed to obtain the appointment, he returned to Tattershall, and resumed his business there: and that the defendant Searson informed the plaintiff's attorney before the writ was served, that Reeve had left Tattershall, and had gone to reside in Lincoln. One of the deponents further stated that he was present at the magistrates' office in Horncastle, on the 11th of February, when Reeve appeared there to answer an information for poaching, and that he then described himself as "late of Tattershall, shoemaker, but now of Lincoln, schoolmaster."

[765] In the first place, it is obvious that at the time the action was commenced, the defendant Reeve neither resided nor traded within the jurisdiction of the court of requests. It is clear he did not reside there; and the trading required, to satisfy the meaning of these local court acts, is, the keeping of some shop or place of business, where the party will be accessible to his creditors; *Miller v. Williams* (5 Esp. N. P. C. 19), *Gray v. Cook* (8 East, 336), *Jefferies v. Watts* (1 N. R. 153). The last-mentioned case is also an authority to shew that where a party gives another reason to believe (d) that he lives out of the jurisdiction, he is not allowed to prove the fact to be otherwise. [Erskine J. This application is made by Searson alone.] But if granted it will accrue to the benefit of both the defendants, as the suggestion cannot be entered as to one alone. Besides, Searson himself has misled the plaintiff's attorney on this point. Reeve, in his affidavit, says that he was the tenant, and in the occupation, of a shop at Tattershall. That is not sufficient. He also states he was trading therein. That would be sufficient, if it were true; but it is shewn not to be so, by the affidavits in answer to the rule. [Maule J. Would any trading be sufficient? A party might trade in a place by an agent, and never be there himself; and he could not therefore be served with a summons within the jurisdiction. The act must mean that the party should be personally trading, to some extent, within the jurisdiction.] That observation will dispose of this branch of the case.

If it be said, on the other side, that the plaintiff was not compelled to sue both of the defendants, it may be answered that there was nothing to prevent him from doing so. If the action had been *ex contractu*, he must [766] have done so. The defendants have been found guilty of a joint tort. [Maule J. As one party was out of the jurisdiction, the plaintiff could not sue him within it.] And it would follow that if he could not sue the other out of the jurisdiction he could not sue them jointly at all. [Tindal C. J. Might he not have sued one in the court of requests, and the other in the superior court?] The court would not be disposed to encourage a multiplicity of actions. And there being a joint conversion, many things might be evidence against one which might not be evidence against the other; the damages against one might be different from those against the other: and indeed the judgment for the plaintiff in the one action, would have vested the property in the one defendant, so that the plaintiff could not have sued the other defendant for the same conversion (a). [Erskine J. referred to *Adams v. Broughton* (2 Stra. 1078).]

Clarke Serjt., in support of the rule. The defendants are entitled to have the suggestion entered as to both, or at least the defendant Searson is entitled to it as to himself. Reeve's affidavit states, in terms, that he was trading at Tattershall; and

(d) *Acc. Price v. Harwood*, 3 Campb. 108. Sed vide ante, vol. v. 787 (c).

(a) The property would have been in the plaintiff at the time of the conversion.

this is not denied by the affidavits on the other side. [Coltman J. The affidavit states the trading in very general terms. Maule J. The plaintiff requires you to shew that Reeve was so trading at Tattershall that he might have been summoned to the court.] A personal service is not necessary. By the 18th section of the act (*suprà*, p. 762) the summons may be left at the shop of the defendant. Reeve may have kept servants at his shop. [Tindal C. J. While he himself may have been living thirty miles off. That is not the sort of trading meant by this act. Erskine J. It appears [767] that the shop was shut up; how could the summons have been left there?] The words of the 18th sect. are not "keeping a shop and trading," they are "or trading."

At any rate Searson is entitled to the suggestion. The case is provided for by the 27th section (*suprà*, p. 763), which enacts that where any debt or damages shall be demanded from two or more persons jointly, being partners in trade or otherwise jointly concerned, the service of the summons upon one shall be sufficient. [Tindal C. J. These defendants are not stated to be in partnership. Maule J. That section affords a strong argument that both parties to be sued must be within the jurisdiction.] There was a joint cause of action in this case. [Maule J. It is not necessary that the cause of action should arise within the jurisdiction. According to your argument, if a joint tort were committed by two, one of whom had never resided within the jurisdiction, but the other did reside within it, the suit could only be brought in the local court.] That may be so. On the other hand, according to the argument on the part of the plaintiff, if two defendants were within the jurisdiction, and one went away, it would follow that the action could not be brought in the court of requests. The 27th section mentions partners; but if only one is within the jurisdiction, he is entitled to the benefit of the act. [Maule J. If there are two partners in a trade, which is carried on within the jurisdiction, it is only reasonable that service on one should be sufficient.] It is not necessary that the joint trade should be carried on within the jurisdiction; it is sufficient if one partner resides there. In this case there was no necessity to sue both the defendants as joint tort-feasors. The defendant Searson ought not to be prejudiced by the statements of Reeve.

[768] TINDAL C. J. I think this rule must be discharged. The first point upon which the defendant Searson relies is, that the cause of action is one as to which the defendants, being both within the jurisdiction of the court of requests, might both have been sued therein. In order to shew this, he contends that Reeve resided within the jurisdiction; for it is not disputed that Searson himself did so. From the words of the act it appears that a party to be entitled to the benefit of it should be "inhabiting, residing or being" within the district mentioned; "or keeping or using a house or shop, &c., or seeking a livelihood, or working, trading, or dealing within the same." Now from the facts it appears that Reeve had been a shoemaker, and had kept a shop within the jurisdiction; but before the writ in this action was sued out, he had left his shop at Tattershall and had gone to Lincoln, to seek a situation there. This appears from the statement of Searson himself, as well as from that of Reeve. And it further appears that Reeve did not return to Tattershall till after the writ had been sued out and served upon him in Lincoln. It is true that Reeve states in his affidavit that at the time the writ issued he was trading at Tattershall; but the word trading is a term of very general import; it may include trading by an agent, and does not necessarily imply a local trading by the party himself, which I think is what is contemplated by the act. It seems to me, therefore, that it has not been sufficiently shewn that Reeve was within the jurisdiction of this court of requests.

But then it is said that, at any rate, the other defendant Searson has a right to have a suggestion entered with regard to himself. That, however, will depend upon the question, whether where an action of tort is brought against two parties, the plaintiff is to be removed from his common-law right of suing them both in the superior [769] courts, because one of them resides within the jurisdiction of this local act. And I can see nothing in the act to take away that right. The words indeed of the 27th section seem to imply the contrary; for when it speaks of "two or more persons," I think it must mean two or more persons within the jurisdiction of the court.

COLTMAN J. The first question in this case is, whether, at the time when the action was brought, Reeve was resident, or trading, within the jurisdiction of the court of Requests. If he was so,—as it is admitted that the other defendant was,—the rule should be made absolute, unless Searson is estopped by the statement he has made.

But I think that it is clearly made out that Reeve was not resident or trading, at the time in question, in Tattershall, within the meaning of the act. The party who applies to enter the suggestion is bound to make out his case clearly and conclusively. Now it appears that Reeve was absent from the place, and that his shop was shut up. It is very doubtful, therefore, to say the least of it, whether there was any thing like trading going on, during his absence, upon his behalf. But at any rate the trading is not made out; and, as to him, I think the rule ought to fail.

But it is said that although Reeve had left the place, as this was a joint tort, the plaintiff, by virtue of the act, was bound to sue both of the defendants in the court of Requests, Searson being within the jurisdiction. That argument however, I think, fails, when the clauses of the act are considered. For the twenty-seventh section does not make two or more persons liable to be sued jointly if they are not both or all within the jurisdiction. It seems to me, that when one of two defendants resides within, and one without, the jurisdiction, they cannot both be sued in that court. Then, was the plaintiff bound to sue one only in the inferior [770] court, and lose his remedy against the other? I cannot see it was the intention of the act in such a case to take away the common law right of a plaintiff to sue both the parties in one action; which he can only do by proceeding in the superior courts.

ERSKINE J. I also think this rule must be discharged. The question in the first place is, whether Reeve was within the jurisdiction at the time the action was commenced. It is for the party applying for the suggestion to shew that such was the fact. Now it appears that at one time Reeve inhabited and kept a shop within the jurisdiction, but that before the writ issued he had gone from Tattershall to Lincoln, out of the jurisdiction. Supposing, however, that Reeve had still not ceased to be an inhabitant at Tattershall, he would come within the act. But there is no statement that he had any intention of ever returning to Tattershall. If he had had such an intention, he would have remained an inhabitant; but he ceased to inhabit the place as soon as he left it without such an intention. The next question is, does he come within the description of a person trading within the jurisdiction? He says, generally, in his affidavit that he was trading at Tattershall; but he does not say in what manner. It is therefore necessary to see whether any sort of trading is within the act. And I think it is not; but that some personal trading or dealing is intended—what Lord Ellenborough C. J. described in *Gray v. Cooke* as a virtual domicile. The word “trading” is used in the section of the act now under consideration, in conjunction with the words “working” and “dealing”; which seem to me to shew that some personal superintendence of the trade was contemplated; and nothing of that kind is stated to have been the case here. It further appears from the affidavits against the rule, that Reeve had shut [771] up his shop when he went to Lincoln. Searson's own statement—that Reeve had left Tattershall,—is also strong evidence against him, and would amount to an estoppel, within the authority of *Jefferies v. Watts*. I lay no stress upon the statement by Reeve, as perhaps that ought not to estop the other defendant. Upon the whole it appears to me that the defendant Searson has not made out the first branch of the case.

It is then contended that, at all events, Searson is entitled to have the suggestion entered, in order to relieve himself. But that does not appear to me to be so. For although this is an action of tort, and the plaintiff therefore was not bound to sue both the defendants jointly, yet neither was he bound to sue them separately; and it would be a great hardship should he be compelled to sue only one. I think, therefore, he was entitled to sue the defendants in the court in which he had the power of joining them both in one action.

MAULE, J. concurred.

Rule discharged.

BECKHAM ET UX., Administratrix of G. Ball, Deceased, v. OSBORNE. Nov. 25, 1843.
[S. C. 7 Scott, N. R. 520.]

Where the plaintiff's case was clearly supported by a qualified admission made by the defendant: Held, no misdirection that the judge did not distinctly tell the jury that the whole admission must be taken together.

Assumpsit for goods sold and delivered by, and upon an account stated with, the intestate.

Pleas; first, except as to 1l. 17s., non assumpsit; secondly, except as aforesaid, a set-off for goods sold and delivered by, and upon an account stated with, [772] the defendant; thirdly, except as aforesaid, payment; fourthly, payment into court of 1l. 17s.

At the trial before the judge of the sheriff's court, London, on the 22d of last September, the only evidence adduced by the plaintiffs was that of their attorney's clerk, who stated that he had delivered a letter from the plaintiffs to the defendant containing extracts from the intestate's books, with an account claiming the sum of 17l. 17s.; that the defendant said the charge was incorrect, being one guinea too much; that the witness asked him to produce any receipt against the charge; but that he did not do so, though he shewed a cash-book. This book was produced at the trial, and contained an account shewing a set-off for 6l. 5s., the price of five boxes of cheroots, sold by the defendant to the intestate, and a payment of 10l. in money. The sale of the cheroots and the payment of the 10l. were proved on the part of the defendant.

The learned judge of the sheriff's court told the jury that the only evidence of the defendant's debt was his admission to the attorney's clerk, which was for 16l. 16s.; that if they thought the set-off and payment proved by the defendant together amounted to the plaintiff's demand proved (less the 1l. 17s. paid into court), they should find for the defendant; otherwise for the plaintiffs, for so much beyond the 1l. 17s. as was not met by the set-off and payment proved by the defendant.

The jury found a verdict for the plaintiffs, damages 16l.

Sir T. Wilde Serjt., on a former day in this term, obtained a rule nisi for a new trial on the ground of misdirection, and also that the verdict was against evidence. Upon the former point he submitted that as the admission of the defendant was qualified, the jury ought to [773] have been told it must be taken entire. He referred to *Randle v. Blackburn* (5 Taunt. 245).

Channell Serjt. now shewed cause, and cited *Rose v. Savory* (2 N. C. 145, 2 Scott, 199).

Sir T. Wilde was heard in reply.

Per curiam. The case was tried by a gentleman at the bar, and there does not appear to have been any misdirection. The whole admission was before the jury, and it is clear they took the whole into their consideration. There may be a new trial upon the ground of the verdict being against the evidence, upon payment of costs.

Rule absolute accordingly.

[774] GRANT QUI TAM v. BROWNE. Nov. 25, 1843.

[S. C. 7 Scott, N. R. 508; 1 D. & L. 799; 13 L. J. C. P. 23; 8 Jur. 177.]

A statute requires the delivery of a certificate setting forth certain matters, and imposed a penalty upon the non-delivery of such a certificate. A subsequent statute directs that no action shall be brought to recover penalties in respect of the omission of some of the matters, and that no action already commenced in respect of such omission, shall be prosecuted. An action is brought for the penalty incurred by delivering a certificate omitting all the matters required to be inserted by the first statute, and the declaration and plea are delivered before the passing of the second act. Upon the passing of the second act the plaintiff is bound to amend his declaration by striking out such omissions as are cured by that act; and if instead of so doing, he deliver a replication and issue, such replication and issue will be set aside.

Debt. The declaration stated that the defendant, after the passing of a certain act, intituled, &c. (1 & 2 W. 4, c. lxxvi.) (a), and within three calendar months before the commencement of this suit, to wit, on, &c. vended and delivered, to wit, at

(a) Sect. 75 enacts, "That every fitter, or other person, vending or delivering coals for the port of London, shall send in a letter, directed to the clerk of the coal-market, and put into the general post office on the day on which the ship or vessel containing any coals shall sail on any such voyage, or shall give to the shipmaster of such ship or vessel before the same shall sail on every or any such voyage, a certificate, signed by such fitter, containing the day of the month and year of such loading, the

Warkworth in the county, &c., divers large quantities, to wit, &c. of coals for the port of London, to wit, on board a certain vessel called the "Union," and which vessel so con-[775]-taining the said coals, afterwards, to wit on, &c., sailed with the said coals on her voyage from Warkworth aforesaid to London aforesaid; whereof the defendant then had notice; but the defendant, not regarding the provisions of the said statute, did not send by the general post office, on the day on which the said vessel containing the said coals sailed on her said voyage or give to the shipmaster of the said vessel before the same sailed on the said voyage, a certificate signed by the defendant, containing the day of the month and year of such loading, the name of the master of the said vessel, and of the said vessel, and the quantity of tons so delivered as aforesaid, and the usual names of the several and respective collieries out of which the said coals were wrought and gotten, and the price paid by the master for each and every sort of coals; that the defendant so vending and delivering coals as aforesaid then sold and loaded on board the said vessel, contrary to the form of the statute, &c.; whereby, and by force of the said statute, the defendant then forfeited for his said offence the sum of 100l., &c.

The plea (not guilty) was of the 24th of June 1843.

The replication, adding the similitur, was entitled of the 7th of November 1843.

Sir T. Wilde Serjt., on a former day in this term, obtained, on behalf of the defendant, a rule to shew cause why the replication and issue should not be set aside without costs; or why the plaintiff should not discontinue the action on payment of costs up to the time of the application. The affidavits upon which the motion was made, set forth the seventy-fifth section of the 1 & 2 W. 4, c. lxxvi., and alleged that the fitter's certificate was given to the shipmaster of the "Union" before she sailed on her voyage, and was, in the belief of the deponent, delivered to the clerk of the coal-market of the [776] city of London; that such certificate contained a just, true, and faithful account of all the particulars required by the said act, save only and except that the usual names of the several and respective collieries, out of which the said coals were and had been wrought and gotten, were accidentally and inadvertently omitted to be inserted in such certificate: that the action was commenced before the passing of the 6 & 7 Vict. c. ci.(a) for the recovery of the penalty imposed by the

master's and ship's names, and the quantity (sic) of tons, and the usual names of the several and respective collieries out of which the said coals were and shall be wrought and gotten, and the price paid by the master or masters for each and every sort of coals that each and every fitter, or other person, vending or delivering coals as aforesaid, his or their agent or servant, had sold and loaded on board each and every ship or vessel; and in case any person or persons shall omit or refuse to give such certificate as aforesaid, or shall give or make any false certificate, every person so offending shall, for every such offence, forfeit and pay the sum of 100l."

By another section the action is required to be brought within three calendar months.

(a) Sect. 45 enacts, "That no action for any penalty imposed by the 1 & 2 W. 4, c. lxxvi. for not inserting in the fitter's certificate the day of the month and year of the loading, or the usual names of the several and respective collieries out of which the coals should be wrought and gotten, or the price paid for the same, shall be commenced, or, if now commenced, shall be prosecuted or carried on, by any common informer, or by any other person except the solicitor of the corporation of London, or some person interested in such certificate, without the consent in writing of some judge of one of the superior courts at Westminster; and that, immediately from and after the passing of this act, it shall be lawful for any person or persons against whom any action shall have been commenced for the recovery of any such penalty, except as aforesaid, without such consent as aforesaid, to apply to the court in which such action shall have been commenced, or to any judge, &c., for an order that such action shall be discontinued, upon payment of the costs thereof incurred to the time of such application being made; and upon the making of such order and payment or tender of costs, such action shall be forthwith discontinued: provided always, that if it shall appear to the satisfaction of the said court or judge that any penalty sought to be recovered in any such action has been incurred by the fraud of the defendant, then it shall be lawful for such court or judge to refuse to make such order as to such penalty, and thereupon to make such order as the said court shall deem expedient."

former act for not inserting in the aforesaid fitter's certificate the usual names of the several and respective collieries out of which the said coals were and had been wrought and gotten, and for no other fine, penalty, forfeiture, or cause of action whatsoever, according to the belief of the deponent: that the plaintiff was an attorney's clerk and a common informer, and had brought upwards of [777] eighty actions for penalties imposed by the former act, and that he was not, nor was his attorney in the action, the solicitor of the corporation of London, nor, to the deponent's belief, in anywise interested in such certificate; and that after the passing of the latter act the action had been prosecuted and carried on, without the consent of any judge, by delivering the replication and making up and delivering the issue; and that the penalty sought to be recovered in the action was not incurred by the fraud of the defendant.

The certificate, which was annexed to the affidavits, was as follows:—

“Warkworth Harbour, April 15th, 1843.

“Sold, and delivered on board the ‘Union’ of Whitby, John Harforth, master, one hundred and sixty nine tons twelve cwts., Derwentwater's Hartley first class steam coals,

“at 6s. 6d. per ton.

“(Signed) THOMAS BROWNE, Collector,
“MILLS.

“Custom House.”

64 chaldrons 8 keels.

Shee Serjt. now shewed cause. He submitted that the court had no jurisdiction to entertain the application, inasmuch as the declaration stated a non-compliance with all the requisites mentioned in the 1 & 2 W. 4, c. lxxvi. s. 75, and the 6 & 7 Vict. c. ci. s. 45, applied only to some of those requisites. [Tindal C. J. It appears that the action is brought for not inserting in the certificate the names of the collieries, and also for other omissions; so that it is brought for an omission as to which the court may stay the proceedings under the latter act. The latter act empowers us to stay proceedings in actions for penalty A.; the action is brought for penalty A. and also for penalty B. Maule J. We [778] have certainly power to stay the action in respect of the omissions mentioned in the later statute. If a plaintiff might put in his declaration other omissions, and so prevent the court from exercising their power under the latter statute, its provisions would be rendered nugatory. If this rule were discharged it might turn out that the action was brought only in respect of a misdescription or omission of the name of the colliery, and the plaintiff might recover the penalty of 100l. notwithstanding the act of Victoria. Erskine J. The action must be stayed altogether unless the plaintiff consents to strike out of his declaration those omissions to which the statute of Victoria applies.] The defendant merely swears that the penalty sought to be recovered was not incurred by his fraud; something more definite ought to have been stated, shewing how the omission occurred. It could hardly have happened through inadvertence, as the form of the certificate is given in the schedule to the act. At any rate if the rule is made absolute, it ought to be on the terms of paying the plaintiff's costs.

Sir T. Wilde Serjt. was heard in reply.

TINDAL C. J. I do not see how the first branch of this rule can be answered. The forty-fifth section of the 6 & 7 Vict. c. ci. is express, that no action in respect of the omissions therein mentioned shall be commenced, or, if commenced, shall be prosecuted or carried on, except under certain circumstances, without the consent of a judge. Now the present action, which has been brought in respect of the omissions mentioned in the later act, together with others, has been continued without the consent of a judge, and is therefore in contravention of the act. Perhaps the better course would be for the plaintiff to apply for leave to amend his declaration by striking out that part which relates to the causes of action included in the second act, if he has other [779] grounds upon which he can proceed with the action. But at present the rule must be made absolute to set aside the replication and issue, with the costs occasioned thereby, and the costs of the present application.

The other judges concurring,
Rule absolute accordingly.

AUGUSTUS NEWTON AND WIFE v. ROWE AND ANOTHER. Nov. 25, 1843.

On the 4th of November A., being in custody under a habeas corpus ad satisfaciendum for costs, removes himself by habeas to the Queen's Prison. He obtains his discharge under the insolvent debtors' act, from this amongst other debts. This is an admission of his having been in legal custody under process regularly issued; semble. A motion on the 22d of November to set aside the writ, is too late.

The plaintiff Augustus Newton on a former day in this term obtained a rule calling on the defendants to shew cause why the writ of execution in this case should not be set aside for irregularity.

It appeared from his affidavit that the action was for libel published in the *Cheltenham Examiner*. At the last spring assizes for the county of Gloucester a verdict was found for the defendants. In Easter term the plaintiffs obtained a rule nisi for a new trial, which was discharged in Trinity term. Judgment was signed on the 24th of June. On the 5th of July the plaintiff Augustus Newton was taken in execution by the sheriff of Gloucestershire at the suit of another creditor. On the 19th of July a writ of habeas corpus ad satisfaciendum issued against the plaintiff Augustus Newton, tested the 15th of June. On the 27th of July he was brought by habeas corpus before a judge on circuit, committed to the Queen's Prison charged with (inter alia) the execution in this cause. On the 4th of November he obtained his final discharge under the insolvent debtors' act, the sum for which he [780] was charged in execution in this action being included among the debts in his schedule.

He submitted that the habeas corpus ad satisfaciendum ought to have been tested on the day on which it issued, and contended that this was an irregular writ of execution, being tested on the 15th of June, whereas the judgment was not signed until the 24th. He cited *Peacock v. Day* (3 Dowl. P. C. 291), where it was held that a ca. sa. is irregular if tested before the time of signing judgment.

Talfourd Serjt. now shewed cause. The writ is perfectly regular, though it might, under the 3 & 4 W. 4, c. 67, s. 2, have been tested on the day of issuing. In *Green v. Foster* (2 Dowl. P. C. 191), it was held that, where a part of a debt is levied under a fi. fa. and the defendant is detained on a habeas corpus ad satisfaciendum for the residue, it is not necessary to refer, in the latter writ, to the amount levied. Supposing, however, an irregularity to exist, the application comes too late. The plaintiff should have applied to a judge at chambers during the vacation. Instead of doing this he has allowed eighteen days in term to elapse since his discharge. Besides which, the plaintiff, by causing himself to be removed by habeas and to be charged as to this execution, admitted that he was legally in custody under this writ.

Newton, in support of his rule. The petition is founded upon actual custody: it is no admission in the insolvent debtors' court that the petitioner is legally in custody. [Tindal C. J. By removing yourself by habeas, charged with this execution, you impliedly admit that you were in actual and in legal custody under it. Then what say you to the delay?] Until the return was filed no copy of the writ could be obtained. [Erskine J. Does it appear by your affidavits on what day you first became [781] aware of the irregularity of which you now complain?] That is not stated.

TINDAL C. J. The short answer to this objection which is inter apices juris, is that the plaintiff has, by his own laches, precluded himself from setting it up.

Per curiam. Rule discharged, without costs.

MOSS v. JAMES. Nov. 21, 1843.

A testatum ca. sa., tested the 22d of June 1843, was sued out against the plaintiff into London, under which he was taken on the 7th of July. On application to discharge the plaintiff out of custody on the ground that no original ca. sa. had issued into Middlesex (where the venue was laid), the defendant produced a ca. sa. tested the 15th of June, but appearing from the seal to have issued on the 12th of July: Held, no irregularity.

On the 7th of July 1843, the plaintiff was taken in execution by the sheriffs of London under a writ of testatum ca. sa., tested the 22d of June, sued out by the

defendant for the costs of a nonsuit. On the 17th the plaintiff applied to Coltman J. to be discharged out of custody upon an affidavit, stating "that no writ of ca. sa. in this cause had been issued and returned and filed in the county of Middlesex, where the venue was laid, as by the practice and rules of the court ought to have been done, before the issuing the testatum ca. sa." The learned judge made an order for the discharge of the plaintiff, on giving security for payment of the amount of the levy, in case the court should be of opinion that he was not entitled to be discharged out of the custody of the sheriffs of London as to the action, or, in case he failed to apply to the court within the first four days of Michaelmas term, &c. The plaintiff having found the required security was set at liberty on the 21st of July. A writ of ca. sa. was produced before the learned judge, [782] tested the 15th of June, but not sealed until the 12th of July.

Talfourd Serjt. on the part of the plaintiff, on the fourth day of the term, accordingly obtained a rule nisi to set aside the execution, and for the delivery up of the bond; citing *Frost v. Daniell* (4 Q. B. 880, Gale & Davison).

Shee Serjt. now shewed cause. It is not requisite to issue and return a ca. sa. before suing out a testatum ca. sa.; it is sufficient if it be issued before the making up of the roll (see *Milstead v. Coppard*, 5 T. R. 272). In *Warne v. Haddon* (9 Dowl. P. C. 960) Mr. J. Wightman held that the omission to sue out an original writ of ca. sa. previously to issuing a testatum ca. sa. was a mere irregularity, which might be amended (see *Towers v. Newton*, 9 Dowl. P. C. 576, 1 Q. B. 319). In *Greenshields v. Harris* (9 M. & W. 774, 2 Dowl. N. S. 272), the venue being laid in Surrey, final judgment was signed on the 22d of April 1840, and on the same day a testatum ca. sa. issued into Oxfordshire, upon which the defendant was arrested on the 19th of June 1841; and an original ca. sa. issued into Surrey, bearing date the same day as the testatum writ, and was returned generally non est inventus: this was held to be no irregularity. Lord Abinger there said: "Under the old practice, if the party produced an original ca. sa., with the sheriff's return, that was sufficient to warrant the testatum. In this case the writs may be regularly entered on the roll; and, if there are materials to make up the roll, that is enough. The production of the writ with the sheriff's return thereon, is an authority for the officer to make up the roll." And Parke B. said: "We ought to assimilate the new practice [783] to the old so far as we can, and not interpose difficulties to invalidate writs of this nature. Here, we have an original writ of capias issued into the proper county, bearing date the same day with the judgment and testatum writ, and returned generally non est inventus; we may therefore presume that writ to have been issued and returned on the same day. The plaintiff has, therefore, materials for making up the roll, viz. a writ of ca. sa. issued into Surrey and returned the same day non est inventus, and a testatum ca. sa. awarded thereupon by the court on the same day. In *Towers v. Newton* (2 Q. B. 319, 9 Dowl. P. C. 576) that could not be done; because there, the testatum bore date on an earlier day than the original writ upon which it professed to be founded." In Lush's Practice, p. 502, it is said that, "in strictness, every writ of execution must in the first instance be issued into the county in which the venue is laid;" but that, "in practice, an original writ never issues." *Frost v. Daniell* is distinguishable from the present case. There, final judgment was signed on the 2d of May 1842, the testatum ca. sa. was tested on the 11th of May 1842, and the original ca. sa. not until the 10th of May 1843. It was held that the process was irregular, apparently on the ground that the ca. sa. issued more than a year and a day after the date of the judgment. It may be said that here, it appears on the face of the ca. sa. that it issued at a day subsequent to its teste. But the only date set out upon the record is the teste, and the court can look at nothing else.

Talfourd Serjt. in support of his rule. By the 3 & 4 W. 4, c. 67, s. 2, all writs of execution must be tested on the day on which the same are issued, and made returnable immediately after the execution thereof. [784] [Erskine J. In *Brocher v. Pond* (2 Dowl. P. C. 472) it is observed by Mr. J. Parke, "The act of parliament says that 'all writs of execution may be tested on the day on which the same are issued.' It does not say that they must be tested on that day."] Possibly they may be tested before they are issued; but a testatum ca. sa. cannot regularly issue until the original ca. sa. has been issued and returned. [Tindal C. J. According to your argument an original ca. sa. would never be amended, as the seal would always shew the real date.] It is not denied that the court has power to amend: but it is submitted that the party

himself cannot make the amendment without applying to the court. [Maule J. I have heard no authority cited to shew that he may not.] If the court is of opinion that an original writ of ca. sa. may issue after a testatum ca. sa., there can be no necessity for issuing a ca. sa. at all.

TINDAL C. J. The effect of issuing a ca. sa. into the county where the venue is laid, before the suing out of the testatum writ, would be, to give the party notice to get out of the way. It seems to me that the rule must be discharged; but without costs, as it is not moved with costs.

The rest of the court concurred.

Rule discharged accordingly.

[785] WARD v. LLOYD. Nov. 24, 1843.

[S. C. 7 Scott, N. R. 499; 1 D. & L. 763; 13 L. J. C. P. 5. Followed, *Flower v. Sadler*, 1882, 10 Q. B. D. 575. Referred to, *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 182.]

The court will not set aside a warrant of attorney given to secure a debt, on the ground that it was obtained from the defendant by a threat of prosecution for felony, unless it distinctly appear that there was an agreement by the plaintiff, either express or necessarily implied, to abstain from prosecuting upon the security being given.

Bompas Serjt., on a former day in this term, on behalf of Read, one of the assignees of the defendant, under a fiat in bankruptcy, obtained a rule calling upon the plaintiff to shew cause why the warrant of attorney executed in this case, and all proceedings thereon, should not be set aside, on the ground that it was given upon an illegal consideration, namely, a corrupt agreement to compromise a felony.

It appeared from his affidavits that the plaintiff, who was a coal-merchant in Denbighshire, had also an establishment at Newton, Montgomeryshire, of which the defendant had the charge, as his clerk. The defendant's duty, as such clerk, was, to collect and receive money on the plaintiff's account, and to remit it to him, together with monthly accounts. In December 1841, the plaintiff having ascertained that the defendant had received upwards of 900l. more than he had accounted for, sent for him, and told him, that, "unless he went to his (plaintiff's) attorneys, and gave satisfactory security, he would prosecute him for unlawfully making use of his money,"—thereby meaning, "for unlawfully embezzling or appropriating to his own use moneys he had received as his clerk." The defendant thereupon went to the plaintiff's solicitors, and executed a warrant of attorney, dated the 8th of December 1841, authorizing them to appear for him and confess a judgment for 1800l., with a defeazance to secure 900l. On the 9th of December 1841, judgment was entered up on the warrant of attorney and execution issued on the following day. On the 16th of February 1842, the effects of the defendant were sold, and the proceeds paid over by the sheriff to [786] the plaintiff under an indemnity. On the 19th of April a fiat in bankruptcy issued against the defendant, under which he was duly adjudged a bankrupt, and Read was chosen as the creditors' assignee. The act of bankruptcy upon which the adjudication proceeded, was the giving the warrant of attorney in question. The circumstances under which the warrant of attorney was obtained were first made known to the assignee upon the plaintiff's examination before the Liverpool district court of bankruptcy in June 1843.

Sir T. Wilde and Talfourd Serjts., now shewed cause, upon affidavits as well of the plaintiff and his attorney, as of the defendant. The two former denied that they, or either of them, had agreed not to prosecute the defendant for embezzling the money received by the defendant as clerk to the plaintiff, to induce him to give the said warrant of attorney or any security whatsoever. The plaintiff however admitted, that he did tell Lloyd he would prosecute him for embezzlement unless he went to his attorneys and gave such security as would be satisfactory to them; but he denied expressly and positively that he ever made, or intended to make, any agreement with Lloyd to refrain from instituting any criminal proceedings against him in consideration of his giving such security. The defendant, in his affidavit, stated that it was not under fear, or in consequence of any threat, that he would be criminally prosecuted if he did

not give a warrant of attorney or other personal security as the plaintiff's attorneys might require, that he was induced to give, or did give, the warrant of attorney in question; for that he was not subject to or afraid of any prosecution at the instance of the plaintiff or of any other person for embezzlement or any other offence; and that, at the time he gave the warrant of attorney he had not been guilty of any embezzlement.

To give the assignee a place in court, he must be [787] able to shew that there has been a valid bankruptcy. The only act of bankruptcy set up is the giving of this very warrant of attorney. If such warrant of attorney was, as now suggested, obtained from the defendant under a threat of either civil or criminal proceedings, the giving of it was not an act of bankruptcy. In *De Tastet v. Carroll* (2 Rose, Bank. Cas. 462, 1 Stark, N. P. C. 88), a transfer by one of two partners on the eve of bankruptcy, under circumstances which overcame the free will of the party, such as the apprehension of a prosecution for forgery, was held to be valid. [Maule J. referred to *Ex parte De Tastet* (1 Mont. 154), where the same doctrine was supported by Lord Eldon. There is nothing here to shew that the party ever was guilty of felony, or was treated as a felon. Tindal C. J. Why are we called upon to interfere? If the assignee were to bring an action for money had and received, the judgment, if obtained under a threat of prosecution, would not stand in his way. In *Collins v. Blantern* (2 Wils. 341, 347), the court held a bond void ab initio, which was entered into by way of indemnity to one who had given his note for 350l. to a prosecutor on an indictment for perjury, to induce him to withhold his evidence.] The lapse of time also is a bar to the assignee's right to come to the court to set aside this warrant of attorney, the money having been paid over nearly two years ago. If the warrant of attorney was improperly obtained, the assignee may take proceedings for the recovery of the money. The transaction is complete, and the party should be left to his legal remedy. Another objection is, that this assignee cannot come to the court alone; the application should have been by both assignees.

Bompas and Channell Serjts. (with whom was Yardley), in support of the rule. There can be no doubt, that the [788] court has jurisdiction in this case. [Maule J. What do you say to the nonjoinder of the other assignee?] In *Harrod v. Benton* (8 B. & C. 217, 2 Mann. & Ryl. 130), it was held that the court has summary jurisdiction over a warrant of attorney alleged to be fraudulent, on the application of any person interested in impeaching it, although such person may not be a party to the warrant of attorney itself. The same point was decided in *Martin v. Martin* (3 B. & Ad. 934). Whether assignee or not, and even though there be no valid bankruptcy, Read has a sufficient interest to justify his application, he being a creditor of the defendant. [Tindal C. J. You must make out, not merely a threat of prosecution, but an agreement to abstain from prosecuting upon the security being given. That is expressly denied on the part of the plaintiff.] The plaintiff's examination before the commissioner clearly shews that there was such an agreement. In order to establish a charge of compounding a felony, it is not requisite to make an express agreement not to prosecute; it is enough to shew that the transaction substantially amounts to such an agreement. Whether the defendant was guilty of felony or not, if the parties concerned thought he was liable to a prosecution, and the warrant of attorney was given upon an understanding that the plaintiff should abstain from prosecuting him, the security is void.

TINDAL C. J. This rule calls upon the plaintiff to shew cause why the warrant of attorney given in this case should not be set aside, on the ground that it was founded upon an illegal consideration, namely, on an agreement to abstain from prosecuting the defendant for embezzlement. No doubt, if it had been clearly made out that warrant of attorney was given upon such a consideration, [789] it would have been bad in law. Warrants of attorney are peculiarly under the jurisdiction of the court; and wherever they appear to have been obtained by fraud or upon an illegal consideration, the court will set them aside. But, upon the affidavits in this case, I am not satisfied that the charge of embezzlement against the defendant, is made out; for, although in the monthly accounts rendered he appears to have made untrue returns of the money received by him on behalf of his employer, it appears also that he kept an account which would be evidence against him, of the sums actually received; and under these circumstances, I think a jury would have paused before they found him guilty of having acted with a felonious intention. My opinion, however, does not

depend upon that point. Assuming the defendant to have been guilty of embezzlement, do these affidavits, and the examination of the plaintiff before the commissioner, sufficiently shew that the warrant of attorney was executed upon an agreement that the plaintiff should abstain from prosecuting? I am of opinion that they do not. It must be remembered that this is not the case of a security given to induce an uninterested party to withhold a charge of a criminal nature: there is a just debt due from the defendant to the plaintiff. The plaintiff may have held out threats of prosecution in order to induce the defendant to give the warrant of attorney: but there is the positive denial on the part of the plaintiff that he made any such agreement as that suggested. I think, therefore, that upon this ground the rule must be discharged.

COLTMAN J. I do not conceive it material to consider whether or not the defendant was actually guilty of embezzlement; for, if there was reasonable ground to suspect that he was, although the circumstances might not be such as to insure a conviction,—[790] and the warrant of attorney was given to induce the plaintiff not to prosecute, the consideration would, in my opinion, be illegal. But I do not see sufficient ground for saying that this warrant of attorney was given upon any such consideration. It is true that threats were used by the plaintiff, which may have influenced the defendant. It is possible that he may have hoped that, if he gave the security, he would not be prosecuted. In the absence, however, of an agreement, express or necessarily implied, to that effect, there is no ground for setting the warrant of attorney aside. Such an agreement is not to be inferred from hasty expressions used by a man when seeking to obtain security for a just debt.

ERSKINE J. The only ground on which this motion can be supported is, that a corrupt agreement was come to between Ward and Lloyd, that if the warrant of attorney was given, the former would abstain from prosecuting Lloyd for the alleged embezzlement. The affidavits in support of the application do not shew any such agreement. Indeed it would be difficult to prove such an agreement; but, in order to induce the court to entertain this motion, circumstances ought to be shewn clearly leading to the inference that such a compact was in fact made. What the assignee relies on for this purpose is, the examination of Mr. Ward before the commissioner, from which it appears that, when Mr. Ward first discovered the inaccuracies in the defendant's accounts, he threatened to prosecute him for unlawfully making use of his money, unless he would go to his attorneys and give satisfactory security. The fact that the defendant was actually guilty of embezzlement does not appear to me to be important; for, if he was really guilty, and the plaintiff knew it, but abstained from prosecuting him, that would afford some foundation for inferring that the [791] plaintiff had agreed not to prosecute if the required security were given. There is, however, no evidence to shew that a felony had been committed. It is not every employment by a servant of his master's money that, in the eye of the law, amounts to embezzlement. The mere fact that the plaintiff, after threatening, did not prosecute the defendant, is far from being sufficient to warrant us in coming to the conclusion that there was any agreement on his part to abstain from instituting a prosecution.

MAULE J. I also am of opinion that there is nothing on the face of the affidavits, or on the examination of Mr. Ward before the commissioner, to shew that there was any corrupt or illegal consideration for the giving of this warrant of attorney. The plaintiff demanded, what he had a perfect right to demand, viz. money due to him; and the defendant did what he was bound to do, namely, give a security for money which he was bound to pay. In substance the transaction was fair and honest; and there is no necessity to impute to the plaintiff the making of a corrupt agreement which he has expressly denied. Any expectation that the defendant may have entertained, that, if he gave the required security, he might escape prosecution, will not of itself vitiate the transaction. I therefore agree with the rest of the court in thinking there is nothing irregular in this warrant of attorney, and that the rule for setting it aside must be discharged.

Rule discharged with costs.

End of Michaelmas Term (a).

(a) For the registration cases decided during Michaelmas term and vacation, see ante, vol. v. pp. 1-122.

[792] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS VACATION, IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this vacation were, Tindal C. J., Coltman J., Erskine J., Cresswell J.

BENSON v. CHAPMAN. Dec. 6, 1843.

[S. C. in Exchequer Chamber, 5 C. B. 330 : in House of Lords, 8 C. B. 950 ; 2 H. L. C. 696 ; 9 E. R. 1256 (with note to which add *Assicurazioni Generali v. S.S. Besnie Morris Company*, [1892] 1 Q. B. 581 ; [1892] 2 Q. B. 652).]

A. effected an insurance with B. on freight at and from Pernambuco to Liverpool, valued at 2000l. Whilst coming out of the harbour of Pernambuco the vessel struck on a rock, whereby she was so much injured as to render it necessary to put back for repair. The ship was repaired at a cost of 7132l. 3s. 8d., including the charges of landing and reloading the cargo. To raise funds to pay for the repairs, the master executed a bottomry bond, by which the ship, freight and cargo, were pledged for that sum and bottomry premium of 20l. per cent. The ship afterwards sailed for and arrived at Liverpool with her original cargo on board. A., on receiving intimation of the extent of the damage done to the ship, gave notice of abandonment of ship and freight to the respective underwriters, and repudiated the bond ; whereupon the parties claiming under the bond, took possession of the ship, and sold it under an order of the court of Admiralty. The ship sold for 1675l., which, with the freight, was paid over to the obligees. The declaration averred a loss by the perils of the sea. Held, upon a special case, in which the court were to draw all inferences, which ought to be drawn by a jury—that A. was entitled to recover as for a total loss.

Covenant, on a policy of insurance, dated the 12th of July 1839, made by the defendant as chairman of The Neptune Marine Insurance Company of [793] London, upon the freight of the "Lord Cochrane," at and from Pernambuco to Liverpool. The declaration averred that the ship took goods on board at Pernambuco upon freight, and proceeded on her voyage to Liverpool ; that the plaintiff and another were interested in the freight ; and that, while on her voyage, and during the continuance of the risk in the policy mentioned, she struck upon a bank in leaving the harbour of Pernambuco, and thereby, and by the perils of the sea, became disabled from proceeding on her voyage, and became wholly lost ; whereby the freight was wholly lost ; and that the plaintiff, as soon as he was informed of the extent of the loss, abandoned all his interest in the premises to the defendant and the company.

The defendant, by his plea, first traversed the plaintiff's interest ; secondly, the loss of the ship ; thirdly, the loss of the freight ; fourthly, the loss by the perils insured against ; fifthly, the abandonment ; and sixthly, he pleaded a set-off ; upon all of which pleas issue was joined.

The cause coming on for trial at Guildhall, before Erskine J., on the 1st of July 1842, a verdict was taken, by consent, for the plaintiff, subject to the opinion of the court upon the following case, with liberty for either party to turn it into a special verdict—it being agreed, that, upon the argument of the special case, the court [794] might draw all inferences which, in their opinion, ought to be drawn by the jury ; and that, if the case should afterwards be turned into a special verdict, such inferences should be stated therein as facts found by the jury :—

The ship in question, being at Pernambuco, received goods on board on freight for Liverpool in the month of June 1839. The amount of the freight was 2200l. ; in which the plaintiff and the other owners of the ship were interested as averred in the declaration. Thus laden, she sailed from Pernambuco for Liverpool, on the voyage insured against, on the 29th of June 1839. While proceeding out of the harbour of Pernambuco, she struck on a rock and a bank, the damage produced by which rendered it necessary for her to put back to Pernambuco for repair. This was done : but, there being no dry dock there, nor any other means of examining the ship to ascertain the nature and extent of the injury with a view to the requisite repairs,

except by heaving down, it became necessary to take out the cargo, and heave the ship down, in order to make that examination.

This was done accordingly: several surveys were necessarily made; and subsequently the master of the ship, in concurrence with the firm of M'Calmont and Co., of Pernambuco (to whom he had, on going out from England, been directed to apply for a cargo), proceeded to cause the ship to be repaired. She was under repair from the 29th of June 1839, to the 4th of January 1840. Pernambuco is a place very inconvenient and expensive for the repair of ships. The repairs done, the cost of which amounted to 7132l. 3s. 8d., were necessary in order to make the ship navigable and in a condition to proceed on her voyage. To discharge this sum, all due means were taken at Pernambuco to obtain money from persons on loan, by bottomry and [795] otherwise (a). No money, however, could be obtained until M'Calmont and Co. consented to advance the sum of 7132l. 3s. 8d. on bottomry; and accordingly the master, on the 6th of January 1840, at Pernambuco, executed a bottomry bond to them, pledging the ship, freight, and cargo for that sum and bottomry premium at 20 per cent.

On the 30th of December 1839, the plaintiff was shewn a letter from M'Calmont and Co. to their agents in London, which had been received, as follows:—

“Pernambuco, 14th November 1839.

“The ‘Lord Cochrane’s’ expenses are likely to exceed 5000l., with commissions, discharging, and reloading cargo,” &c. &c.

The plaintiff thereupon on the same day gave the following notice, not only to the defendant, but to the underwriters on the ship, which the plaintiff had insured with the several insurance offices described in the notice:—

“London, 30th December 1839.

“My ship, the ‘Lord Cochrane,’ being insured as follows:—ship, 3000l. with the Indemnity Marine Insurance Company; 700l. with the Dundee Marine Insurance Company; 800l. with the Dundee Sea Insurance Company; freight, 2000l. with the Neptune Marine Insurance Company; and having sustained damage since she sailed with her cargo from Pernambuco, and I having received information that the expenses incurred in relation to the accident will exceed the value of the ship and freight, and that the amount will be secured by bottomry, and that the repairs will still be incomplete, I do hereby abandon the said ship and freight to the said respective insurers, according to their respective rights under the circumstances.

[796] “I have further to acquaint the underwriters that I am informed that a bill will be drawn upon me for the amount, which will exceed 5000l., by the payment of which the bottomry premium may be avoided; and that I shall not accept such bill on my own account, but shall be ready to pay same for their account, upon their putting me in funds for that purpose.

“For self & Co.”
(Signed) “THOS. BENSON.

“William Ellis, Esq.	} Underwriters on the ship
Indemnity Mutual Marine Insurance Company	
A. Crighton, Esq.	} for 3000l.”
Dundee Sea Insurance Company, Dundee.	
To the Manager of	} Ditto for 800l.”
The Dundee Marine Insurance Company, Dundee.	
James Mackie, Esq.	} Ditto for 700l.
Neptune Marine Insurance Company	
	} Underwriters on

The plaintiff did not interfere in any way afterwards in respect of either ship or freight. The ship, having received the cargo again on board (in respect of the re-load-

(a) Either party was to be at liberty to refer to the depositions annexed to the case, to shew what means were adopted for that purpose.

ing of which certain expenses included in the 7132*l.* 3*s.* 8*d.* were incurred), sailed again from Pernambuco on the 6th of January 1840, and arrived with the whole of the original cargo, which was of the value of 19,139*l.*, on board, at Liverpool, on the 19th of March 1840.

Upon the arrival of the ship, proceedings to enforce payment were taken by the obligees of the bottomry bond, in the court of Admiralty; under the order of which court the ship was sold for the sum of 1675*l.*, and the freight (as appears from the certificate of registry in the Admiralty Court, annexed to the case) [see the opposite page] collected from the consignees of [798] the goods; and the amount of both, under an order of that court, was paid to the obligees. Upon making up the accounts of the disbursements at Pernambuco, according to the practice between assured and underwriters in London, the amount of the proportion of the 7132*l.* 3*s.* 8*d.* and of the bottomry premium which ought to be borne on account of the freight, was 569*l.* 11*s.* 3*d.*

The questions for the opinion of the court are—

Whether the assured is, under the pleadings, entitled to recover in this action. If he is so entitled, the verdict is to be entered for such sum as the court shall direct. If he is not, a nonsuit is to be entered.

Appended to the case were the following extracts from evidence taken at Pernambuco upon interrogatories:—

Frederick Saunders, of Pernambuco, merchant, states that he is acquainted with the nature and state of mercantile and pecuniary transactions and credit in Pernambuco, and that, to the best of his judgment, knowledge, and belief, it was not practicable for the master of, or agent for, an English ship, to procure at Pernambuco in the years 1839 or 1840, the means of defraying the expenses of repairs and otherwise relating to such ship, to the amount of 5000*l.* or upwards, upon the captain's bill on his owner, or in any other way than upon bottomry; and that, in the deponent's judgment and belief, the fair reasonable bottomry premium at Pernambuco in the years 1839 or 1840 on an English ship from Pernambuco to Liverpool was 20 to 30 per cent.: that several attempts were made by the firm of M'Calmont and Co., agents acting for and on behalf of Luke Hall Smith, master as aforesaid, in the years 1839 and 1840, to obtain a loan of money on bottomry or upon the captain's bill on his owner; that the said [799] M'Calmont and Co. personally applied to all the British and foreign merchants at Pernambuco, publicly advertised for the same in the newspaper circulating at Pernambuco, and had a notice, to the same effect, posted up in the Commercial Rooms, which is the daily resort of all the merchants, British and foreign; but without effect; they had no application.

George Deane, of Pernambuco, merchant, stated that he was acquainted with mercantile and pecuniary transactions and credit at Pernambuco; and, to the best of his judgment and belief, he considered it would have been impracticable for the master of, or agent for, a British ship to procure money at Pernambuco in the years 1839 or 1840 for the purpose of defraying the expenses of repairs and otherwise relating to such ship, to the extent of 5000*l.* or upwards upon the captain's bill on his owner, or in any other manner than by bottomry; and that, in the deponent's judgment and belief, the fair and reasonable bottomry premium on an English ship from Pernambuco to Liverpool was from 20 to 30 per cent.; that applications were made to him for a loan of money on bottomry on ship, freight, and cargo of the "Lord Cochrane," which he declined granting; that he likewise was aware of similar applications having been made to other merchants; and that it was publicly advertised in the newspaper and in the Commercial Rooms at Pernambuco, without effect.

Similar evidence was given by Edward Comber, Edward Fenton, and Ernest Schramm, merchants of Pernambuco.

The points marked for argument were as follow:—

For the plaintiff—that he is entitled to recover for a total, or, in any event, for a partial loss; and that the facts do not disclose any cause of set-off.

For the defendant—that the plaintiff is not entitled [800] to recover, under the pleadings and facts stated in the special case, either for a total or for a partial loss; and that, if the court shall be of a contrary opinion, the defendant will then contend that the facts stated disclose a sufficient cause of set-off.

The case was argued in Michaelmas term last.

Sir T. Wilde Serjt. (with whom was Barstow), for the plaintiff. The plaintiff is

[797]	Dr.	"Lord Cochrane," Smith, Master.	Contrā.				Cr.				
			£	s.	d.			£	s.	d.	
1840 Sept.	23.	To cash paid S. Coombes, late chief mate on board the said ship, being the balance of wages pronounced to be due to him, by decree of the 9th instant . . .	39	10	0	1840 July	7.	By cash received of Mr. Tebbes, on behalf of the owners of part of the cargo of the amount of freight due on goods decreed to be released to the parties . . .	1685	18	0
Oct.	14.	To cash paid Mr. H. V. Tebbes, as procurator, and for the use of Charles Becket, late seaman on board the said ship, being the balance of wages pronounced to be due to him, by decree of the 7th instant. . .	23	5	6	Sept.	5.	By cash received of Mr. Bowdler, on behalf of the commissioners of sale of the ship, as the net proceeds thereof . .	1526	12	2
Nov.	7.	To cash paid Mr. H. V. Tebbes, the amount of his taxed bill of costs, as proctor for S. J. Coombes and C. Becket, late chief mate and seaman on board the said ship . . .	37	6	8						
1841 Jan.	5.	To balance carried down . . .	3112	8	0						
			3212	10	2				3212	10	2
1842 Feb.	15.	To cash paid Mr. Robert M'Calmont, the legal holder of a bottomry bond on the ship, cargo and freight, being the amount of the proceeds of the sale of the ship and freight remaining in the registry in part satisfaction of the said bottomry bond, pursuant to decree of this day . . .				1841 Jan. 1842 Feb.	5.	By Balance brought down . . .	3112	8	0
							15.	By cash received of the commissioners of sale of the ship, as the balance of the net proceeds of sale thereof . . .	78	17	3
			3191	5	3				3191	5	3

I, Henry Birchfield Swabey, Registrar of the High Court of Admiralty of England, do hereby certify, that it appears by the accounts kept in the registry of the said Court, that the several sums mentioned on the credit side of the above account were brought in as the proceeds of sale of the said ship "Lord Cochrane," and cargo, and that the several sums stated on the debit side of the said account were paid out to the several persons and at the several times therein expressed

Admiralty Registry, Doctors' Commons,
22nd day of May, 1843.

H. B. SWABEY,
Registrar.

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H. B. SWABEY,
Registrar.

entitled to recover upon the policy as for a total loss. It appears by the special case that the ship in question sustained a damage by a peril of the sea which rendered an expenditure of upwards of 7000l. requisite in order to make her available as a ship; and that, on her arrival in this country, she was sold for 1675l. It is not necessary to cite authorities to shew that the loss, under the facts proved, amounted to a total loss of ship and freight. The vessel, after her accident, was rather a congeries of planks than a ship. A ship means, a vessel capable of being navigated in its then state. When the repairs would exceed what a reasonable and prudent man, exercising ordinary discretion, would expend upon the ship for the purpose of rendering her capable of pursuing her voyage, she exists no longer as a vessel. Here, the difference between the value of the ship when repaired and the expenditure was so great as to bring the case clearly within the category of a total loss. Having once amounted to a total loss, the case was never altered, so far as regards the plaintiff. It remained a total loss to the end. For it is clear that the plaintiff never was in a situation to regain the ship without paying 7000l. and 20 per cent. bottomry. The plaintiff abandoned the vessel as soon as he was informed the repairs would exceed 5000l., which was quite sufficient to warrant him in giving notice of abandonment. Although such notice was given, it was, in strictness, unnecessary; [801] *Roux v. Salvador* (3 N. C. 266, 4 Scott, 1). Never being available as a vessel, down to the time of action, without resorting to means which no prudent man would adopt, the plaintiff ceased to be liable in respect of the ship. Neither was he bound by the acts of the captain (who assumed to hypothecate ship, freight, and cargo) so as to lose any rights to which he was entitled. For, such acts of the captain, when repudiated by the owner, cannot at all affect the latter. The captain cannot be considered as the authorized agent of the plaintiff. He was the agent of the parties to whom the ship, at that time, belonged. It is true that the ship brought home the original cargo; but not in her original state. If the captain chooses to rebuild the vessel against the will of the owner, his so doing does not continue the original adventure. It is not enough to tell the plaintiff, when he has rightfully abandoned the ship, that some person, unauthorised by him, has, by an enormous expenditure, made a congeries of planks into a vessel. This is not like the case of a mere retardation of the voyage—of a ship meeting with a temporary damage, and, on being repaired, performing the rest of the voyage. It was the ship of the underwriters that took goods on board and earned freight, and not the plaintiff's. The principle is indisputable, that freight is dependent on the ship. What will prevent the owner earning freight is, the ship being lost, either absolutely, or under circumstances which entitle him to abandon. An abandonment sometimes is contingent. Here, if it had been found that the ship might have been repaired for a small sum, the effect of the abandonment would have depended on what ultimately might appear to be the state of the case. But the facts that occurred afterwards shew that the plaintiff acted legally and prudently in abandoning. The question is, [802] whether there was not a total loss at Pernambuco, which gave the plaintiff a right to abandon the vessel and to repudiate the repairs? The want of a correct judgment in the captain is not a matter for which the plaintiff is responsible. No case can be cited in which an owner has been compelled to resume the possession of his ship where the outlay would have exceeded the value of the vessel when repaired. In every case of loss, so long as a single plank is left, you may reinstate the vessel if you are regardless of expense. It is submitted that this was from the beginning to the end a total loss; and that the ship, when repaired, became a new adventure. The authorities on the subject are decisive, and shew that the mere reinstatement of the vessel does not affect the question of total loss; *Milles v. Fletcher* (1 Dougl. 231), *Cologan v. The London Assurance Company* (5 M. & Sel. 447), *Read v. Bonham* (6 J. B. Moore, 397, 3 Bro. & B. 147), *Cambridge v. Anderton* (4 D. & R. 203, R. & M. 60, 1 C. & P. 213), *Robertson v. Clarke* (1 Bingh. 445, 8 J. B. Moore, 622), *Green v. The Royal Exchange Assurance Company* (6 Taunt. 68, 1 Marsh. 447), *Holdsworth v. Wise* (7 B. & C. 794, 1 Man. & Ryl. 673), *Allen v. Sugrue* (8 B. & C. 561, 3 Man. & Ryl. 9).

If it should be held that there has not been a total loss, the plaintiff is, at any rate, entitled to recover, as upon an average loss, the expenses incurred at Pernambuco in landing, housing, and reloading the goods. *Sharp v. Gladstone* (7 East, 24, 3 J. P. Smith, 39), *Leatham v. Terry* (3 B. & P. 479), *Williams v. The London Assurance Company* (1 M. & Sel. 318), *Stevens on Average*, 23, 56, 175; *Phillipps on Insurance* (American), vol. i. 367, 373, 374, 426-429; vol. ii. 354, 373; *Benecke on Insurance*, 213, 223,

473. On principle, as well as on [803] authority, supposing the voyage to England to be a continuation of the original adventure, the charges that relate to the freight are charges to which the underwriters are liable; for the rule "no average loss on freight" is not applicable to the present case.

Channell Serjt. (with whom was Ogle), for the defendant. The plaintiff is not entitled to recover as for a total loss. It must be remembered that this policy is on freight. The position of a party holding such a policy is essentially different from that of the assured upon a policy on the ship. Here, not only did the ship arrive in specie at her port of destination, but she brought home her original cargo, and thereby earned the freight; which has in fact been paid. *M'Carthy v. Abel* (5 East, 388, 1 J. P. Smith, 524), in principle, closely resembles the present case. There, upon a hostile embargo in a foreign port, the owner, who had separately insured ship and freight, abandoned them to the respective underwriters, which abandonment was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight. It was held that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment. "If," said Lord Ellenborough, "the question which arises upon this case, be stripped of all extraneous circumstances and considerations, it appears to us to resolve itself into this single point, viz. whether the freight has been in this case lost or not. If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and [804] entirely earned and received by or on the behalf of the plaintiffs, the assured: and, if so, no loss can be properly demandable against the underwriters on freight, who merely insure against the loss of that particular subject by the assured. But, if it has been, or can be considered as having been, in any other manner or sense, lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship; which abandonment was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us therefore quâcunque viâ datâ, that is, whether there has been no loss at all of freight, or, being such, it has been a loss only occasioned by the act of the plaintiffs themselves, they are not entitled to recover." If the master had sold the ship at Pernambuco in her damaged state, it would have been difficult to contend that the plaintiff was not entitled to treat the case as amounting to a total loss. But the vessel was not sold; money was obtained on a bottomry bond, and she was repaired, and ultimately performed the voyage to England. It is material to consider what are the rights acquired by the holder of a bottomry bond. He acquires no absolute property in the ship; neither has he the limited property transferred to a mortgagee. This ship, therefore, notwithstanding the bottomry bond, has never been out of the possession of the authorized agent of the owner. Here, if the freight has been lost, it is owing to the owner's not choosing to recognise the bond executed by his agent, the captain, at Pernambuco; for if he had, he might have prevented the interception of the freight. In *Johnson v. Shippen* (2 Ld. Raym. 983), Lord Chief Justice Holt puts it, that it is because no property passes by it, that the court will not notice the [805] bottomry bond. The value of the freight earned was 2200l., and the ship sold for 1675l. If the plaintiff had paid the bottomry bond, the whole amount would not have fallen upon the plaintiff: he would have got contribution from the owners of the cargo. [Maule J. There is no pretence for saying that the money paid for repairs was laid out upon the cargo.] If the freight can be considered as received by the plaintiff, or on his behalf, there is an end of the case; for all the underwriters undertake is, that the plaintiff shall earn the freight. This case is identical with *M'Carthy v. Abel*. [Tindal C. J. Is not the difference between that case and the present this: in *M'Carthy v. Abel* there never was any actual loss; whereas here, it may be contended, there was?] If the ship was repaired by the owner's agent under circumstances which justified him in giving the bottomry bond, it is a fallacy to say this is a total loss. Even although the outlay was injudiciously incurred, no case has been cited to shew that the plaintiff is entitled to treat this as a total loss, and still less as against the underwriters on freight. In *Everth v. Smith* (2 M. & S. 278), the doctrine laid down in *M'Carthy v. Abel* was fully recognised. Here, it is said that the freight was not

earned, because the plaintiff could not obtain it without paying the bottomry bond. But in *Everth v. Smith* there was no beneficial earning of freight; for the expenses of detention exceeded the freight. What is the meaning of the words "earning freight"? It is the right of the owner to receive the freight. Here, the plaintiff might have had it on paying the bottomry bond. In *Thornely v. Hebson* (2 B. & Ald. 513), a ship received considerable damage from tempestuous weather; and the crew, completely exhausted, deserted the ship for the mere preservation of their lives. The ship was afterwards [806] taken possession of by a fresh crew, who conducted her safely into port. The ship was sold under a decree of the Admiralty Court to pay the salvage; and it not appearing that the assured had taken any means to prevent such sale, it was held that they had no right to abandon, and that there was no more than a partial loss. If in that case the assured, not having paid the salvage, were not entitled to treat it as a total loss, so here, the non-payment of the bond disentitles the plaintiff to treat this as a total loss. It may be admitted that, where an owner is warranted in treating a case as a total loss, the underwriters must shew circumstances to convert the total, into a partial, loss; *Holdsworth v. Wise*, *M'Iver v. Henderson* (4 M. & S. 576). All the other authorities cited for the plaintiff are either cases of policies on ships, or, if on freight, it will be found that the vessels never reached their destination and earned no freight.

At all events the plaintiff, in order to recover even for a partial loss, must shew a loss by the perils of the seas. But the facts stated in the special case shew, not that there has been a loss by the perils of the seas, but that the plaintiff has been prevented from receiving the freight earned, by refusing to pay the sum secured by the bottomry bond. No doubt an average or partial loss may be recovered upon a declaration alleging a total loss; but an average loss is not recoverable on these pleadings. The plaintiff may be entitled to call on the underwriters to contribute; but, to meet that view of the case, his declaration ought to have been differently framed.

Sir T. Wilde Serjt., in reply. The main argument on the part of the plaintiff has not been impeached. The ground of the decisions in *McCarthy v. Abel*, *Everth v. Smith*, and *M'Iver v. Henderson*, was, that there had been no total loss, but a mere retardation of the voyage; [807] which does not entitle the assured to abandon; *Anderson v. Wallis* (2 M. & S. 240, 3 Campb. 440). Assuming these decisions to be correct, they do not apply where the damage to the ship is so great that they exceed the value of the ship. *McCarthy v. Abel* is also open to a very clear distinction. There, although the notice of abandonment was properly given, it was a contingent notice. Here, it is not denied that the loss amounted to a total loss if the plaintiff thought fit so to treat it. Suppose a ship captured, and the owner could get it back on paying three times its value, could the underwriters say that there was not a total loss? It is admitted the captain would have been justified in selling the vessel. If so, can the plaintiff be deprived of his rights arising under such circumstances by the unauthorized and repudiated act of the captain? What would be the authority of the master in such a case? He was not the agent of the owner in making the repairs. The whole case on the other side rests on the assumption that he was. If the captain is to be considered as binding the owner by his acts, he might have done so, if only a few planks had been left together. No case has been cited in which it has been held that the captain's authority goes to that extent. When *McCarthy v. Abel* was decided, the courts had not come to a clear view of the rights of assured and assurers. In *Morrison v. Parsons* (2 Taunt. 407) it is laid down that the owner of the ship at the time that the freight is earned, is entitled to it. [Maule J. Suppose that there had been no insurance on the ship, but on the freight alone, would the underwriters have been liable?] The right of the owner cannot be varied by a justifiable abandonment to the underwriters. [Maule J. You say that if there is no policy on the ship it makes no difference, the vessel having been lost by the perils of the seas.] The under-[808]-writers on the freight would be in no way prejudiced. *Holdsworth v. Wise* recognises the principle. It is submitted that the other side have failed to shew that this was not a total loss, or that subsequent events have made it not a total loss.

With respect to the objection as to the loss being averred to be by the perils of the seas, the plaintiff does not complain of the bottomry bond, but says he has nothing to do with it; for that his interest ceased when the ship ceased to be navigable. If necessary to consider this point, it is submitted that the averment is sufficient. [Maule J. The difficulty here is (assuming that there has been a total or a partial

loss), that the whole freight is received.] Although the whole freight is received, 569l. was expended at Pernambuco. The question is, whether this can be considered an average loss. The principle on which the courts permit a partial loss to be recovered under an averment of a total loss, applies equally to an insurance upon freight.

Cur. adv. vult.

TINDAL C. J. now delivered the opinion of the court. This was an action of covenant on a policy of insurance effected with The Neptune Marine Assurance Company, on the ship "Lord Cochrane," on a voyage at and from Pernambuco to Liverpool, declared to be upon freight, valued at 2000l.; and the question that has been raised before us on the argument of this special case, is, whether, under the circumstances, there was at any time such a total loss of freight as to entitle the assured to abandon to the underwriters on freight—the plaintiff contending that there was such a constructive total loss of freight at the same time that there was a constructive total loss of ship; that is, at the time it was found that the ship had suffered so much damage from the perils of the sea that she could not be repaired for the purposes of the voyage, [809] except at an expense considerably exceeding the value of ship and freight: the defendant, on the other hand, contending, that, as the ship ultimately brought the cargo to the port of destination, and the freight was earned, and paid, there could be no total loss of freight, it being immaterial, according to the defendant's argument, whether such freight was earned for the benefit of the assured or for that of another person, or to whom the freight was paid.

It is stated in the case that the damage to the ship was occasioned by perils of the sea; that the cost of the repairs amounted to 7132l.; and that the same were necessary to make the ship navigable and in a condition to proceed on her voyage. And we consider it proved by the evidence annexed to the special case (upon the effect of which we are called on to decide), that there was no other means, after every reasonable effort made for the purpose, of raising at Pernambuco the money necessary for the repairs, except upon bottomry, and at the bottomry premium of 20l. per cent. It is further stated in the special case, that the master executed a bottomry bond, by which the ship, freight, and cargo were pledged for the payment of the sum of 7132l. 3s. 8d. and the bottomry premium; and that the repairs exceeded the value of the ship and freight, the ship having been sold on her return for 1675l., and the whole of the freight earned falling considerably short of the sum of 2000l. It is further stated, that, immediately on receiving intelligence of the extent of damage done to the ship, the plaintiff abandoned, on the same day, to the respective underwriters on ship and on freight, and never afterwards interfered with either.

Upon this state of facts, we are of opinion that there was a total loss of freight at the time of the damage sustained by the ship; and that the plaintiff, having [810] abandoned to the underwriter on freight, is entitled to recover for such total loss.

That there was a constructive total loss on ship, seems not to have been made a question. It is unnecessary to cite authorities to prove, that, where the damage to the ship is so great, from the perils insured against, as that the owner cannot put her in a state of repair necessary for the pursuing of the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss. And there seems to be as little doubt that the assured has the right of abandoning the freight, where there has been a constructive total loss of the ship. The assured has sustained a total loss of the freight, if he abandons the ship to the underwriters on ship, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship. In the present case, when the ship was at Pernambuco, the cargo taken out, and the damage to the ship very far exceeding her value, and such as the owner had no means of completing, except at a ruinous expense, if at that time he abandons the ship to the underwriters, as the law allows him to do, the freight is as much lost to him as if the ship had been captured and placed altogether out of his control.

The defendant's counsel admits, that, if the master, instead of repairing the ship at Pernambuco, had sold her there, the loss both of ship and freight would have been total: but he contends, that, as he did not sell, but borrowed money and repaired the ship, which brought the same cargo to England and earned her freight, the not

repaying the money borrowed was the voluntary act of the ship-owner, and which alone prevented him from [811] receiving the freight; and that he had no right to make the loss total by his own voluntary act.

But, in the first place, the arrival of the ship with the cargo is not of itself sufficient to deprive the plaintiff of his right to recover, if he gave notice of abandonment at the time when there was a total loss. The ship must not only arrive, but must arrive in such circumstances, as Mr. Justice Bayley expresses it in *Holdswoth v. Wise* (7 R. & C. 794, 1 Mann. & Ryl. 673), "that the assured may, if they please, have possession, and may reasonably be expected to take it." In that case the ship had been deserted by the crew, acting bonâ fide for the preservation of their lives, and had been taken possession of by the crew of another vessel, who took her into port, repaired her, and brought her into England, but subject to a claim for repairs and salvage, equal to or exceeding her value. The owner, having abandoned before he knew of the safety of the ship, was held not to be bound to take the ship, but to be entitled to recover for a total loss. In that case, also, the captain had granted a bottomry bond, and the ship was taken possession of on her arrival in England by the persons claiming title under the bottomry bond. The case therefore bears a very close resemblance, no less in principle, than in all its circumstances, to the present; for here, the owner in England, had abandoned both ship and freight immediately on hearing of the damage done to the vessel, and had never afterwards interfered with either: here, also, the master had repaired, giving a bottomry bond for the money borrowed: here, also, the ship is taken possession of by the persons claiming under such bond; and the charge far exceeds the value of the ship and freight.

We think the case above referred to does, in principle, decide that before us. In the events which took [812] place, there never was a moment of time at which the owner of the ship could have earned or received the freight, after the ship sustained her injury, except at a cost far exceeding the value of ship and freight. After the cargo was not shipped at Pernambuco, he could not put it on board again without incurring the expense of repairs beyond the value of the ship and freight: when the ship arrived in England, he could not receive the freight without paying the amount of the bottomry bond. If the master had actually sold the ship at the time the damage was sustained, and the purchaser had brought her back and earned the freight, there is no doubt but that the owner could have recovered for a total loss after abandonment; and we see no substantial difference between his situation under those circumstances and the return of the ship pledged by a bottomry bond beyond her value. There seems no reason for holding that the act of the master in repairing abroad, whilst the owner was ignorant of what was going on, should vary his rights; the case expressly stating "that he never interfered, in any way, with freight or ship, after the abandonment."

We therefore think there should be a verdict entered for the plaintiff for 2000l. Postea to the plaintiff (a).

[813] DOE DEM. MURCH v. MARCHANT. Dec. 6, 1843.

[S. C. 7 Scott, N. R. 644; 13 L. J. C. P. 59; 8 Jur. 21. Principle applied, *Persæ v. Daly*, 1847, 9 Ir. Eq. R. 519. Referred to, *Fitzmaurice v. Sadlier*, 1848, 12 Ir. Eq. R. 554; *Plenty v. West*, 1848, 6 C. B. 216. Applied, *In re Wilcock*, [1898] 1 Ch. 99.]

A. devises the remainder in fee in all her lands (upon certain events, which had taken place) to B., in clear and unambiguous terms. By a codicil, which A. directed to be annexed to and taken as part of her will, after reciting that she had become possessed of certain freehold property since the date of her will, she gave to B. an estate for her life in her freehold property "instead of the devise and bequest contained in the will," with remainder to such child or children as should be living at the time of B.'s decease, in fee, or, if none such, then with remainders to the brothers and sisters of B. (with the exception of one brother by name) who should be living at the time of her decease, in fee; but the codicil did not go on to dispose of the ultimate fee, in case the intermediate remainders should, as they eventually did, fail to take effect:

(a) The case was afterwards turned into a special verdict, pursuant to the power contained in the special case.

Held, that the limitation of the remainder in fee to B. by the will, must still be considered as a subsisting limitation, as being a disposition thereof in the will unaltered by any substitution in the codicil.

Ejectment, to recover the possession of an undivided fourth part of certain lands lying in the parish of Exton, in the county of Somerset, of which lands Elizabeth Pollard, widow, died seised in fee, having acquired the same after the making of the will, but before the making of the codicil, hereinafter mentioned.

By consent, the following case was stated for the opinion of the court:—

In the last will and testament of the said Elizabeth Pollard, bearing date the 6th May, 1786, and duly executed and attested to pass real estate, is contained as follows:—"All and singular my freehold messuages, lands, tenements, and hereditaments, situate, lying, and being within the county of Somerset, or elsewhere within the kingdom of Great Britain, whether the same be in possession, reversion, remainder, or expectancy, or otherwise howsoever, partaking or pertaining of or to the nature of freehold or real estate, I give and devise unto my worthy friend Sir John Durbin, of the city of Bristol, knight, and Charles Hobbs, of Cossington, in the said county, clerk, and their heirs, to, for, and upon, the uses, trusts, intents, and purposes, and subject to the [814] proviso, conditions, and contingent limitations, hereinafter mentioned, expressed, and declared of, and concerning the same, that is to say, to the sole and separate use of my daughter, Frances Evered, the wife of Robert Evered, Esq., and her assigns, exclusive of and apart from her husband the said Robert Evered, and not subject to his debts or engagements, for and during the term of her natural life, without impeachment of or for any manner of waste, provided the said Frances Evered shall so long remain and continue under her present coverture of marriage with the said Robert Evered, and yet nevertheless live in a state of separation from him, as she has for some years done under mutual deeds of separation; but, in case the said Frances Evered shall happen to be divorced of her present marriage de facto by act of parliament, so as to be at liberty to marry again, or shall survive and outlive the said Robert Evered, then immediately upon either of such events, the said divorce or survivorship, which of them shall first happen, to the use of the said Frances, her heirs and assigns, for ever; but, in case the said Frances shall cohabit again with the said Robert Evered, or shall happen to die in his lifetime, whether with or without issue of her present marriage, then, immediately upon either of such events, that is to say, cohabitation again with her present husband, or death in his lifetime, which of them shall first happen: To the use of my granddaughter Betty Jones, daughter of Thomas Jones, late of Chilton-upon-Polden, in the said county, gentleman, her heirs and assigns, for ever; it being my mind and will, and I do hereby declare such to be my intention, that the said Robert Evered, or any issue of his, shall not inherit, have, receive, or take, or be entitled to inherit, have, receive, or take, any estate, right, title, interest, claim, benefit, or advantage whatsoever under this my will: and whereas my jointured estates, lands, and hereditaments [815] in the parish of Huntspill, in the said county, now in the possession of Daniel Way, were left by my first husband John Jennings, clerk, deceased, greatly incumbered with a large mortgage-debt and interest, which I have long since wholly paid off and discharged with my own proper moneys, and the said mortgage and mortgaged premises ought therefore to have been assigned and conveyed to me, but which has not yet been done; and to prevent any doubts arising what was my mind in regard to the said jointured land so by me redeemed from, and discharged of, its incumbrances as aforesaid, I do hereby declare my mind and will to be, that the same lands and every part thereof, and all my legal and equitable estate, right, title, and interest whatsoever of, in, and to the same, shall pass, and is meant and intended to be included in and to pass, by the general devise of my lands above mentioned."

The said testatrix then proceeded to bequeath her leasehold messuages, lands, tenements, and hereditaments to the said Sir John Durbin and Charles Hobbs, their executors and administrators, for all her terms and interest therein, in trust for the sole and separate benefit of the said Frances Evered, apart from her husband, during so many years of the said terms as should expire in the lifetime of the said Frances; but under a similar proviso to that thereinbefore contained as to the said devise of her freehold estates: and, in case the said Frances should happen to be divorced or survive or outlive the said Robert Evered, then to the sole use of the said Frances:

but, in the event of the said Frances cohabiting again with her said husband, or dying in his lifetime, then to the sole use and benefit of the said Betty Jones, her executors, administrators, and assigns.

The will then contained a residuary bequest of all the personal estate of the testatrix to the like effect, and in similar terms.

[816] In a codicil to the said will, duly executed and attested to pass real estate, is contained as follows:—"A codicil to be annexed to, and taken as part of, the last will and testament of me Elizabeth Pollard, now of Chilton-supra-Polden, in the county of Somerset, widow: Whereas, in and by my last will and testament, bearing date the 6th day of May, 1786, and duly executed in the presence of and attested by Abraham Stevens, Elizabeth Stevens, and Ann Buller, I disposed of my freehold, leasehold and personal property and effects, for the benefit of my daughter Frances Evered (the then wife of Robert Evered, of Bridgewater, in the said county, Esq.) and of my granddaughter Betty Jones (daughter of Thomas Jones, late of Montague Street, in Bristol, deceased, then and now living with me), in manner therein mentioned; and since the making of my said will the said Frances Evered hath departed this life, and I am become seised and possessed of some other freehold lands lying in the parish of Exton, in the said county of Somerset, and entitled to considerable personal estate under the will of the said Frances Evered, which were not comprehended in my said will, but which also, together with my other estates and property, I now intend to dispose of for the benefit of my said granddaughter Betty Jones, save only the bequests hereafter made, for her life, with such limitation, and in such manner, as hereafter expressed, instead of the devise and bequest contained in my said will, with a view the better to secure the same to her against the vicissitudes of human life."

The testatrix, after bequeathing by the said codicil, a moiety of a leasehold estate to her daughter Jane Gibbs Jones, and some pecuniary legacies, proceeds as follows:—"And lastly, all and singular my freehold, leasehold, and copyhold messuages, tenements, lands, hereditaments, and premises (except my said moiety of the said thirty acres), and also all the residue and re-[817]-mainder of my goods, chattels, and personal estate, of what nature or kind soever, or wheresoever situate or being, with all their rights, members, and appurtenances, subject, in the first place, to the payment of all my just debts, funeral expenses and legacies hereby given, I give, devise, and bequeath unto my good friends, Sir John Durbin, Charles Hobbs, clerk, the said James Parsons, and to the survivors and survivor of them, their and his heirs, executors, &c. to, for, and upon the uses, trusts, intents, and purposes hereafter expressed; that is to say, upon trust and for the benefit of my said granddaughter Betty Jones, and her assigns, for and during the term of her natural life; and, from and after her decease, upon trust for all and every the child and children of the said Betty Jones, lawfully to be begotten, which shall be living at the time of her decease, their heirs, executors, &c., as tenants in common; and, in case there shall be no such children or child living at the time of her decease, then, upon trust for all and every the brothers and sisters of the whole blood, of her my said granddaughter Betty Jones (except the said Robert Hole Jones, who is already provided for), who shall be living at the time of her decease, their heirs, executors, &c., as tenants in common; and I do hereby appoint the said Sir John Durbin, Charles Hobbs, and James Parsons, executors in trust of this my last will and testament, hereby giving them full power and authority to reimburse themselves, all expenses they shall be at, in the execution of my said will and codicil, and in seeing the same duly performed. In witness whereof, I, the said Elizabeth Pollard, have, to this codicil, to be annexed to, and which I declare shall be taken as part of, my said will, set my hand and seal, this 8th of February, 1799." To this codicil there was an attestation, in the words following:—"Signed, sealed, published, and declared by the said Elizabeth [818] Pollard, the testatrix, as, and to be, a codicil to be annexed to and taken as part of her last will and testament, in the presence of us, who in her presence, and at her request, and in the presence of each other, have subscribed our names as witnesses thereto." This attestation was signed by three witnesses.

The said Robert and Frances Evered, in the will mentioned, lived but a short time together after their marriage, when, in consequence of differences between them, they separated by mutual consent, and remained so separated until and at the time of the death of the said Frances. During their union, however, the said Frances had given birth to a child, the offspring of the said marriage, which was born alive, but

which died immediately after its birth; and by this means the said Robert Evered became, at the death of the said Frances his wife, tenant by the curtesy of England of considerable freehold estates, of which the said Frances was seised, during the coverture, as tenant in tail, with remainder in tail to Jane Gibbs Jones, sister of the said Frances Evered, and mother of the said Betty Jones: and the said Robert Evered, at the time of the making of the said codicil to the said will, was in possession of the said last-mentioned estates as such tenant by the curtesy.

At the time of the making of the said codicil, it was known to the testatrix that the said Robert Evered was then in possession of the said last-mentioned estates as tenant by the curtesy, and that the said Jane Gibbs Jones was entitled thereto as tenant in tail in remainder.

The testatrix Elizabeth Pollard died in 1799; Betty Jones married Samuel Brewer, and died, without issue, in 1840, having survived her husband and all her brothers and sisters.

Albert Murch, the lessor of the plaintiff, is the great grandson and one of the co-heirs at law of the testatrix Elizabeth Pollard.

[819] The question for the opinion of the court is—Whether, under the above will and codicil, Betty Jones took an estate in fee-simple or an estate for life only, in the lands in the parish of Exton: it being agreed, that, if the said Betty Jones took an estate for life only, then Albert Murch, the lessor of the plaintiff, as one of the co-heirs at law of the said Elizabeth Pollard, is entitled to recover in this action the possession of an undivided fourth part of the said lands; and that judgment shall be entered up for the plaintiff, by confession, for one undivided fourth part of the tenements mentioned in the declaration in this action; but that if the court shall decide that the said Betty Jones took an estate in fee-simple, then judgment of *nolle prosequi* shall be entered.

The case was argued in Michaelmas term last.

Manning Serjt. (with whom was Tamlyn), for the plaintiff. Under the codicil in question Betty Jones took an estate for life only in the lands in Exton. Great hostility seems to have existed between the testatrix and her son-in-law Evered. By her will she had given Betty Jones an estate in fee-simple in these lands; but, probably discovering that under such a devise Betty Jones's husband might become tenant by the curtesy, she, by the codicil, clearly indicates her intention of cutting it down to a life estate. The testimonium clause at the end of the codicil forms no part of that codicil. The words "as, and to be, a codicil to be annexed to and taken as part of her last will and testament" are mere words of course, and can have no effect in controlling the express words of the codicil, by which the devise to Betty Jones is restricted to the term of her natural life. It cannot be successfully contended that the terms of the will apply to, and pass, the subsequently acquired property devised by the codicil; for that would [820] be totally to disregard the express language employed in the latter of these documents (*vide ante*, 458).

Channell Serjt. for the defendant. In the events which happened Betty Jones took an estate in fee in the lands in question. Looking at the words used it is clear, according to the authorities, that the will and codicil must be read together, and that the codicil amounts to a republication of the will, so as to make the devise therein operate on after-acquired property. It is not necessary, to give effect to the construction for which the defendant contends, to displace any of the limitations in the codicil, inasmuch as it does not dispose of the ultimate fee. So much only of the original devise is displaced as is requisite to let in the limitations in the codicil; which, so far as they go, are a partial revocation of the will. *Duffield v. Duffield* (3 Bligh, N. S. 260. And see *Duffield v. Elwes*, 3 B. & C. 705, 5 D. & R. 764), is a leading authority upon the point of a codicil making a will apply to subsequently acquired property. But no clause resembling that upon which the decision in that case proceeded, is to be found in this codicil; which therefore has the usual effect; and these copyholds pass. In *Goodtitle v. Meredith* (2 M. & Sel. 5), it is said by Le Blanc J., "I take it to be a settled rule, since *Acherley v. Vernon*" (1 Comyns's Reports, 381, 3 Brown, P. C. 1st ed. 107, 2nd ed. 85), "and the other cases, that it is not necessary that there should be an actual republication of the will, by its being before the testator at the time, and by his declaring that he means to republish it; but that, if the codicil be properly executed, it shall be taken to operate as a republication of the will, so as to make the will speak as of the latter date. Now, this codicil

is stated to be 'a codicil to be taken as part of the will,' and there is no question made as to what will the testator [821] referred to, for he does not appear to have made any other will; and he concludes the codicil thus: 'In witness whereof I have to this my codicil, which I desire may be taken as part of my will, set my hand,' &c. By this codicil he makes a different disposition of part of his property; the codicil, therefore, brings down the will to its own date, making the will to speak as of that date, and to pass lands which the testator had not at the date of the will, and which, but for the operation of the codicil, it would not have passed." *Coppin v. Fernyhough* (2 Bro. C. C. 291), *Hulme v. Heygate* (1 Mer. 285), *Rowley v. Eytton* (2 Mer. 128), and *Williams v. Goodtitle* (10 B. & C. 895), are to the same effect. According to these cases the codicil was a republication of the will, and the lands at Exton pass under the devise therein contained, in the same manner as the property of which the testatrix was seised at the time of making her will, unless the codicil discloses a clear intention on the testatrix's part, to revoke the devise in the will. The question therefore is, whether the limitations in this codicil necessarily amount to a total revocation of the devise in the will, or to a partial revocation only, leaving the devise, in other respects, in full force. The argument is the same, whether the will and codicil are considered as one instrument, or as separate and distinct instruments. There can be no doubt, that, under the will, the testatrix intended Betty Jones to take all the real estate, by way of executory devise, and all the personal estate, absolutely. Supposing Frances Evered was not divorced, or did not survive her husband, so that the limitation in fee to her could not take effect, the sole object of the testatrix's bounty was Betty Jones; and as no altered disposition appears in the codicil, the fair inference is that the testatrix continued to regard her with favour. It is suggested that the testatrix gave a [822] life estate only to Betty Jones, in order to prevent a tenancy by the curtesy. Assuming such an intention to have existed, that will not determine this case; for it is consistent with that intention that the ultimate fee would pass to Betty Jones. Where there are several devises in the same will, the latter of which are not wholly reconcilable with the former ones, the court will not hold them to operate as a revocation beyond the extent that is necessary to give them full effect. Also, if there be one devise in a will, and another apparently inconsistent devise in the codicil, the court will, if possible, give effect to both. *Weld v. Acton* (2 Eq. Ca. Ab. 777, pl. 26), *Doe dem. Hearle v. Hicks* (8 Bingh. 475, 1 Moo. & Scott, 759), *Hicks v. Doe* (1 Y. & J. 470), *Cookson v. Hancock* (1 Keene, 817, 2 Mylne & C. 606), *Philippis v. Allen* (7 Sim. 446), *Brine v. Ferrier* (7 Sim. 549), *Doe dem. Amlot v. Davies* (Law Journ. N. S. vol. viii. p. 75, Exch.). Here, full effect may be given to the codicil, without taking away the estate in fee given to Betty Jones by the will. The rule by which the first of several contradictory clauses is sacrificed, is never applied but on the failure of every attempt to give to the whole will such a construction as will render every part of it effective. To attain this object the order of the limitations is disregarded, if it be possible, by transposing them, to make a consistent disposition from the entire will. Thus, "if a man devise lands to J. S. in fee, and after, by the same will, devise the same lands to B. for life, both parts of the will shall stand; and, in the construction of law, the devise to B. shall be first; the will being read as if the lands had been devised to B. for life, with remainder to A. in fee—per Anderson C. J. (Cro. Eliz. 9), *Cuthbert v. Lempriere* (3 M. & Sel. 158), shews, that, where a testator, after devising the whole of his [823] estate to A. devises Blackacre to B., the latter devise will be read as an exception out of the first. That case shews the anxiety of the courts to reconcile apparently inconsistent devises. The plaintiff relies on the words of the codicil as disclosing an apparent intention of the testatrix to substitute the devise in the codicil for that in the will; but the question is whether she intended to substitute it for the whole of the former devise or merely to the extent sufficient to give effect to the object she had in view. The effect of the codicil is to exclude Betty Jones from taking the fee, only in the event of her leaving children or brothers or sisters of the whole blood. To hold it to operate as a total revocation of the will, would be to strain its words beyond their fair and legal import. In order to operate a revocation of the will, the codicil must exhibit a clear intention to that effect. *Doe dem. Hearle v. Hicks* (8 Bingh. 495, 1 M. & Scott, 759, 1 Y. & J. 470), *Newman v. Lade* (1 Younge & Coll. N. C. 680). It is quite clear that the testatrix intended the will to have some effect, and that she did not mean it to be revoked by the codicil, which is to be taken as part thereof. [Tindal C. J. By the codicil, the testatrix made no disposition of the

ultimate fee.] There is strong evidence that she did not intend to die intestate as to any part of her property. *Strathmore v. Bowes* (7 T. R. 482), *Monypenny v. Bristow* (2 Russ. & M. 117), and *Hughes v. Turner* (3 Myl. & K. 666), may be relied on for the plaintiff as interfering with the principle now contended for; but those cases, decided upon the peculiar language used, are exceptions to the general rule.

Manning Serjt., in reply. It may be admitted that the general rule is, that effect shall, if possible, be given [824] to the whole will and codicil, and that the latter shall not be held to be a revocation of the former, unless the intention of the testator be clearly expressed. Here, the language of the codicil is much stronger than that used in *Strathmore v. Bowes* and the other cases referred to, where a codicil was held to revoke the previous devise. It commences with a recital of the testatrix's intention to dispose of all her property "for the benefit of her granddaughter Betty Jones, for her life, with such limitation and in such manner as thereafter expressed, instead of the devise and bequest contained in her will, with a view the better to secure the same to her against the vicissitudes of human life." The devise in the will is, to Sir John Durbin and Charles Hobbs, and their heirs, in trust for Betty Jones in fee; that substituted by the codicil is, to Sir John Durbin, Charles Hobbs, and James Parsons, in trust for Betty Jones for life. The devise in the will to two trustees is not consistent with the devise in the codicil to only two of such trustees and a third party. If the construction contended for on the part of the defendant be correct, it would let in Robert Hole Jones, who is expressly excluded; and the unquestionable intention of the testatrix to prevent the husband of Betty Jones from taking as tenant by the curtesy, would also be destroyed. If Betty Jones were held to take a life estate, and also the ultimate limitation in fee, she would have it in her power, by a simple conveyance, to destroy the contingent limitations and prevent them from taking effect. It is conceived that the case falls clearly within the exception to the general rule; and it is no answer to say that the result of this construction will be that the testatrix will have died intestate as to the ultimate fee; for the descent to the heir is not to be intercepted except by a conveyance from the ancestor, or by a distinct and unequivocal devise by him.

Cur. adv. vult.

[825] TINDAL C. J. now delivered the judgment of the court. We are of opinion, that, under the will and codicil stated in this special case, Betty Jones took an estate in fee in the lands situate in the parish of Exton.

The codicil was duly executed by the testatrix so as to pass real property, and was directed by her (a) to be "annexed to, and taken as part of, her last will and testament." The execution of this codicil, therefore, operates as a republication of the will, and makes the will speak as from the time of the codicil, unless a contrary intention can be drawn from the codicil itself: see *Goodtitle dem. Woodhouse v. Meredith* (2 M. & Sel. 5). And, as the codicil was executed after the purchase of the lands in Exton, the lands in Exton will pass both by the will and the codicil.

By the will the testatrix gives the ultimate remainder in all her lands in Great Britain, upon certain events which have taken place, to her granddaughter, Betty Jones, in fee; and she makes this devise in terms which shew the most clear and unambiguous intention to that effect; and the question therefore is, whether, taking the two instruments, the will and the codicil, together, the testatrix has either shewn an intention to revoke, or, by any inconsistent devise in the codicil, has revoked, the devise of this ultimate remainder in fee. Now, it is certain that the codicil itself is not, nor was it intended to be, in itself a revocation of the will, of which, on the contrary, it is expressly directed to form a part: it can only, therefore, be a revocation so far as there is any particular disposition therein which is inconsistent with any previous devise in the will, and to no further extent.

The first observation that arises, is, that the codicil contains no disposition of the ultimate remainder in fee in the Exton estate. The codicil gives an estate therein to Betty Jones for life, with remainder to such child or [826] children as shall be living at the time of her decease, in fee, or, if none such, then with remainder to the brothers and sisters of the whole blood of Betty Jones (with the exception of one of the brothers by name) who shall be living at the time of her decease, in fee. But the codicil does not go on to dispose of the ultimate fee, in case the intermediate

(a) Vide ante, 817, 819.

remainders should, as the fact has proved, never take effect. But, as this ultimate fee is given by the will to Betty Jones, it appears to us that such disposition of the fee in the will, being unaltered by the codicil, must still be considered as taking effect.

The argument on the part of the plaintiff has been, that, inasmuch as the devise in the codicil is expressly given to Betty Jones "instead of" the devise and bequest contained in the will, it must be considered as an express revocation of the former devise, and the substitution of that contained in the codicil. But we think the force of that word will be satisfied without giving it so large an operation; and that it may well be interpreted to mean "instead of so much only of" the devise in the will as is incompatible with the disposition contained in the codicil. And this appears to us the sounder construction, as it is the manifest intention of the testatrix, both in the will and codicil, to make Betty Jones the principal object of her bounty.

In the course of the argument some reliance was placed by the plaintiff on the circumstance that the estate was devised in the codicil, not to the same trustees as those in the will, but to them and a third trustee: but it is sufficient to refer to the case of *Willett v. Sandford* (1 Ves. sen. 178), where Lord Hardwicke on a similar occasion held that the addition of new trustees in a codicil made no difference in the interpretation of the will and codicil.

For the reasons above given, we think, that on the proper construction of the will and codicil, Betty Jones [827] took an estate in fee; and we direct a judgment of nolle prosequi to be entered.

Judgment of nolle prosequi (a).

JOSEPH JARMAN THE ELDER v. HOOPER, PILCHER, AND HEENAN. Dec. 6, 1843.

[S. C. 7 Scott, N. R. 663; 1 D. & L. 769; 13 L. J. C. P. 63; 8 Jur. 127. Referred to, *Stratten v. Lawless*, 1864, 14 Ir. C. L. R. 438. Distinguished, *Smith v. Keal*, 1882, 9 Q. B. D. 340. Referred to, *Thomas v. Rowlands*, 1886, 3 T. L. R. 149. Considered, *Morris v. Salberg*, 1889, 22 Q. B. D. 614. Adopted, *Lee v. Rumilly*, 1891, 7 T. L. R. 303.]

In trespass quare domum fregit against the sheriff and A., the sheriff justified under a fi. fa. issued against the goods of the plaintiff by A.; to this plea the plaintiff replied, that the fi. fa. did not issue against the goods of the plaintiff.—It appeared that A. had obtained judgment against Joseph Jarman, who was the son of the plaintiff, and thereupon issued a fi. fa. against Joseph Jarman, without any further description, under which the goods of Joseph Jarman the elder were taken: Held, that the writ afforded no justification to the sheriff.—And held, that A. was also liable in trespass, notwithstanding he was not proved to have in any way interfered beyond giving instructions to the attorney to sue Joseph Jarman the son.—Held also, that the writ de idempnitatis nominis is not a remedy necessary to be resorted to, or applicable in such a case.

Trespass. The declaration stated that the defendants, on the 6th of January 1843, and on divers other days, with force and arms, broke and entered certain rooms and apartments of the plaintiff in the parish of St. Luke, Chelsea, in the county of Middlesex, and being the first floor and kitchen, called and known as No. 3 Prospect Place, and then made a great noise and disturbance therein, and continued therein making such noise and disturbance for a long time, to wit, for the space of fourteen days then next following: by means of which premises the plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said rooms and apartments, but also the plaintiff during all that time was prevented from carrying on therein his necessary affairs, &c.

The defendant Heenan pleaded not guilty only; whereupon issue was joined.

[828] The defendants Hooper and Pilcher pleaded—first, not guilty—secondly, that the said rooms and apartments were not, at the time when, &c., the rooms and apartments of the plaintiff—thirdly, that, before the time when, &c., to wit, on the

(a) See *Doe d. York v. Walker*, 12 M. & W. 591.

5th of January 1843, the defendant James Heenan sued and prosecuted out of H. M.'s court of Common Pleas at Westminster, a certain writ of the Lady the Queen, called a *fieri facias*, directed to the sheriff of the county of Middlesex, by which writ the said Lady the Queen commanded the said sheriff that of the goods and chattels of the now plaintiff in the said sheriff's bailiwick, he should cause to be made 23l. 3s. 6d., which the said James Heenan had lately, in Her Majesty's court before her justices at Westminster, recovered against the now plaintiff for his damages which he had sustained, as well on occasion of the not performing of certain promises, then lately made by the now plaintiff to the said James Heenan, as for his costs and charges by him about his suit in that behalf expended; whereof the now plaintiff was convicted; as appeared to H. M.'s justices, of record; together with interest upon the said sum of 23l. 3s. 6d. at the rate of 4l. per centum per annum, from the 5th of January 1843, on which day the said judgment was entered up; and that the said sheriff should have that money with such interest as aforesaid, before H. M.'s justices at Westminster, immediately after the execution of the said writ, to be rendered to the said James Heenan for his damages and interest as aforesaid; and that the said sheriff should do all such things as by the statute passed in the second year of Her Majesty's reign (1 & 2 Vict. c. 110); he was authorized and required to do in that behalf; and that in what manner he the said sheriff should have executed that Her Majesty's writ, he should make appear to Her Majesty's justices at Westminster, immediately after the execution thereof, and that he should have there then that writ; which writ afterwards, and before the delivery thereof to the said sheriff as thereafter mentioned, to wit, on, &c., was duly indorsed with a direction to the said sheriff to levy the whole, with 15s. for that writ and warrant, besides sheriff's poundage, officer's fees, and all other legal incidental expenses; and which writ, so indorsed, afterwards, and before the execution thereof, to wit, on the day and year last aforesaid, was delivered to the defendants Hooper and Pilcher, who then and from thence until and at and after the execution of the said writ, were sheriff of the county of Middlesex, to be executed in due form of law: by virtue of which writ the defendants Hooper and Pilcher, being such sheriff as aforesaid, afterwards, and before the return of the said writ, to wit, at the said time when, &c., peaceably and quietly entered the said messuage in the declaration mentioned, the same being in the bailiwick of the said sheriff, and the outer door thereof being then open, and then entered the said rooms and apartments in the declaration mentioned in order to seize and take in execution, and did then seize and take in execution, divers goods and chattels of the now plaintiff in the said rooms and apartments respectively then being, for the purpose of levying the moneys so directed to be levied by the said writ and the said indorsement thereon as aforesaid; and in so doing the defendants necessarily and unavoidably made some noise and disturbance in the said rooms and apartments, and continued therein making such noise and disturbance, for the space of time in the declaration mentioned, as they lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on that occasion; which are the same trespasses as in the declaration are mentioned, and whereof the plaintiff has therein complained.—Verification.

[830] A fourth plea set out a *fi. fa.* at the suit of Heenan against "Joseph Jarman the younger, described in the said writ as Joseph Jarman," and alleged an entry of the said rooms and apartments, and a seizure therein of "the said goods and chattels of the said Joseph Jarman the younger."

The plaintiff after joined issue on the first and second pleas of the defendants Hooper and Pilcher, replied to the third plea, that the supposed writ of *fieri facias* in that plea mentioned, was not sued out or prosecuted and did not issue out of the said court of Common Pleas at Westminster, *modo et formâ*; concluding to the country. To the last plea he replied, that, although true it is that the said writ of *fieri facias* was issued out of the said court and delivered to the defendants Hooper and Pilcher as such sheriff, *modo et formâ*, for replication nevertheless in that behalf the plaintiff said that the defendants Hooper and Pilcher, at the times when, &c., of their own wrong, and without the residue of the cause in the last plea alleged, committed the several trespasses in the declaration mentioned, *modo et formâ*; concluding to the country.

At the trial, before Tindal C. J., at the sittings at Westminster after Trinity term last, it appeared that the defendant James Heenan had brought an action against one Joseph Jarman (the plaintiff's son), and judgment having gone by default therein,

a writ of testatum fi. fa. was sued out upon the judgment, and lodged with the defendants Hooper and Pilcher, as sheriff of Middlesex, on the 5th of January 1843. By the writ the sheriff was directed to levy upon the goods of Joseph Jarmain the sums set forth in the third plea, and it was indorsed as follows:—The defendant is an upholsterer and bill-broker, and resides at No. 3 Prospect Place, Church Street, Chelsea, and No. 38 Leicester Square, Middlesex." The sheriff having granted a war-[831]-rant pursuant to this writ, the officer proceeded to the residence of the present plaintiff, No. 3 Prospect Place, Church Street, Chelsea, and seized the goods in respect of which this action was brought.

The plaintiff having claimed the goods seized, the sheriff applied for relief under the interpleader act, and an issue was directed to try whether the goods seized were at the time of the seizure the goods of the claimant—the claimant to be plaintiff, and the execution-creditor, (Heenan) defendant. The execution-creditor however having declined to try the issue, the money which the claimant had paid into court upon the goods being delivered up to him, was paid out to him, with costs; and he then commenced the present action for the alleged trespass.

For the sheriff it was submitted that the writ established the justification set up by the third plea. On the part of the defendant Heenan, the execution-creditor, it was contended, that, inasmuch as he had not interfered in the original action further than giving the attorney instructions to sue, he was not liable as a trespasser for the alleged wrongful seizure by the sheriff.

His lordship left it to the jury to say to what amount of damages the plaintiff was under the circumstances entitled, adding that no justification had been pleaded by the defendant Heenan: leave was reserved to move to enter a verdict for the sheriff, if the court should be of opinion that the seizure was justified by the writ.

The jury having returned a verdict for the plaintiff, damages 20l.

Talfourd Serjt., on the part of the sheriff, in Michaelmas term last, obtained a rule nisi accordingly. He submitted that the writ must *prima facie* be taken to be against Joseph Jarmain the elder, and consequently that it afforded a complete justification to the sheriff: and he [832] referred to *Lepiot v. Browne* (1 Salk. 7). There, one brought up by habeas corpus, and in custod. mar., was declared against by the name of A. B. de D. in custod. mar. The defendant pleaded in abatement, that his father lived in D. likewise, and that his name was A. B., and so, because there was no addition, *pet. jud. de billa*; and it was urged, that, though this be by bill, and not within the statute of additions, yet, by common law, there ought to be an addition to distinguish father and son, viz. junior and senior; and, if the son be sued, there ought to be an addition; aliter, if the father. The following authorities were there referred to: Rast. 310; 3 H. 6, 54, 55 (*Bonham's case*, T. 3 H. 6, fo. 54, pl. 128), 37 H. 6, 29 (T. 37 H. 6, fo. 29, pl. 9), 4 Ed. 3, 31 (*Robert de Lacy's case*, T. 4 E. 3, fo. 30, pl. 10), 21 H. 6, 26 b. (H. 21 H. 6, fo. 26, pl. 9), 5 Ed. 4, 25 (*Longo Quinto*, fo. 25). And there was judgment quod respondeat ouster. He also cited *Rex v. Peace* (3 B. & Ald. 579).

Byles Serjt. also, on behalf of the defendant Heenan, the execution-creditor in the former action, obtained a rule nisi for a new trial, on the ground of misdirection. He submitted this was not a case in which the client was liable in trespass for the mistake of the attorney; and he sought to distinguish *Barker v. Braham* (3 Wils. 368), and *Bates v. Pilling* (6 B. & C. 38), because in both those cases the process was irregular and void.

Halcombe and Shee Serjts., on subsequent days, 14th and 15th November, shewed cause. The argument on the other side is, that as the writ was against the goods of John Jarmain, only, and not John Jarmain junior, the justification attempted on the part of the sheriff was made out. It is submitted that it is not sufficient for him to shew that he was acting under the authority of a writ [833] against one of the same name: he was bound, at his peril, to execute it against the goods of the right person. It is not necessary to consider, whether if the words "3 Prospect Place, Chelsea," had been inserted in the writ, the sheriff would have been justified; for it cannot be contended that a mere indorsement by a clerk, is to have the like force as the writ itself. No case can be cited in which it has been held that the name A. B. must necessarily mean the eldest of that name in a family. *Lepiot v. Browne* (1 Salk. 7), which is relied on by the other side, only shews that, where there are father and son bearing the same christian name, and process is issued against one of them without distinguishing

whether one or the other is meant, *prima facie* the father shall be intended. There, it is said by Holt C. J., "If father and son are both called A. B., by naming A. B. the father, *prima facie*, shall be intended; but, if a devise were to A. B., and the devisor did not know the father, it would go to the son. Suppose one deals with the son, and knows nothing of the father, must he bring his action v. A. B. junior? If this had been an original, and the father and son had lived in different counties, there would have been no need of this addition; but this is an action v. A. B. in *custod. mar.*; you must shew there is A. B. the father in *custod. mar.* too." But although an action may be properly brought against a son having the same name as his father, without adding the word junior, the question, whether the sheriff may seize the father's goods under an execution against the son, comes under a very different consideration. Here, the similarity of names did not relieve the sheriff from the necessity of inquiring to whom the goods really belonged. In *Bac. Abr. Execution* (N) 5 (seventh edition), "Where the execution is in the generality, without mentioning any thing in particular, the sheriff is to make execution of the right [834] thing at his peril, otherwise he will be a disseisor; for he is bound to take notice thereof; and he hath no warrant from the court but to make execution of the right thing." So again: "The sheriff, in executing a *fi. fa.* or *levari fa.*, must be careful that the absolute property of the goods be in the debtor; and therefore, if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a trespasser; for he is obliged, at his peril, to take notice whose the goods are, and, for that purpose may impanel a jury, to inquire in whom the property in the goods is vested: *Roberts v. Thomas* (6 T. R. 88). And this, it is said, shall excuse him in an action of trespass." Most of the cases which will be cited, are cases of misnomer, and have little bearing upon the present question. In *Cole v. Hindson* (6 T. R. 234), this passage from Foster, 312, is cited by Lawrence J.—"If the process be defective in the frame of it, as, if there be a mistake in the name or addition of the person on whom it is to be executed, or if the name of such person, or of the officer, be inserted without authority, and after the issuing of the process, or the officer exceed the limits of his authority, and be killed, this will amount to no more than manslaughter in the person whose liberty is so invaded:" which, says Mr. Justice Lawrence, evidently shews "that in such cases, the officer is a trespasser." *Shadgett v. Clipson* (8 East, 328), it was held that the defendant could not justify an assault upon, and an imprisonment of, A. B., by shewing a writ issued against C. B., and averring that it was issued against A. B. by the name of C. B., and that they are one and the same person—there being no averment that A. B. was known as well by the name of C. B. In that case, Lord Ellenborough says, "Process ought regularly to describe the party against whom it is meant to be issued; and the arrest [835] of one person cannot be justified under a writ sued out against another." *Finch v. Cocken* (2 C. M. & R. 196, 4 Tyrwh. 285, 3 Dowl. P. C. 678) is to the like effect. In *Scandover v. Warne* (2 Campb. 270), Lord Ellenborough says: "The writ must speak for itself. I cannot hear, that, instead of A. B. mentioned in the writ, it was meant that the sheriff should arrest X. Y." The late case of *Fisher v. Magnay* (ante, vol. v. p. 778, 6 Scott, N. R. 588) also shews that the sheriff cannot justify what he has done. [Tindal C. J. There, the party was the right person, and consented to be called by the wrong name.] As regards the defendant Heenan, having put the attorney in motion, he is clearly responsible for his acts; for it must be taken for granted that all the proceedings were with his sanction and knowledge. [Byles Serjt. I objected that Heenan was not liable to the action, except on proof that he had personally interfered. Tindal C. J. The broad ground as to Heenan is, that he never directed the attorney to enter the wrong house. I gave no opinion at the time, but said, that as the case was nearly closed, it might as well go to the jury in order to ascertain the damages, and that the law as to this point, could be decided by the court afterwards.] A sheriff is liable for the acts of his bailiff; *Sanderson v. Baker* (3 Wils. 309), *Ackworth v. Kempe* (1 Dougl. 40), *Parrot v. Mumford* (2 Esp. N. P. C. 586), *Woodgate v. Knatchbull* (2 T. R. 148); and in like manner a client is answerable for the acts of his attorney (i). In *Parsons v. Lloyd* (3 Wils. 341), where the plaintiff [836]

(i) Formerly the suitor, who was the client of his serjeant, was called the master of the apprentice of the court, whom he employed, whether that apprentice was acting as his attorney, or as his counsel in courts in which serjeants did not usually attend. (Serviens ad legem, 11, 45, 188). The case of attorney and client (master) would,

who had been arrested under process afterwards set aside for irregularity, brought trespass against the execution-creditor for the false imprisonment, Lord Chief Justice De Grey said: "Parsons, the now plaintiff, has been illegally imprisoned under colour of a writ sued out against him, which is a mere nullity: he has been unlawfully injured, and must have a remedy; but he has none against the officer, who is not to exercise his judgment touching the validity of the process in point of law, but is obliged to obey the command of the courts at Westminster or other superior courts having general jurisdiction, and he may justify under the writ although it be void (*sed vide infra*, n. (d); 2 Keb. 705, pl. 69, 844, pl. 81; 3 Keb. 213; 6 Rep. 54 a. But, where a court has no jurisdiction of the cause, the whole was *coram non iudice*, as was the case of *Smith v. Bouchier* (2 Stra. 994), which is cited by the court in giving their judgment in *Perkins v. Proctor and Green*, and is by the court well observed upon in my brother Wilson's Reports, 2d part 385, that Lord Hardwicke was of opinion that trespass and false imprisonment will lay against the Vice-Chancellor of Oxford, the judge, gaoler, officer, and all of them. That this action well lies against Lloyd, the party himself who sued out this void writ, is clear from the cases of *Turner v. Felpole* (1 Lev. 95, 1 Sid. 272), and many others which might be cited; and to say now that this action does not lie against the party himself, would be *quieta movere*. There is a great difference between erroneous process and irregular (that is to say, void (*sed vide supra*, n. (a)) process; the first stands valid and good until it be reversed, the latter is an absolute nullity from the beginning: the party may justify under the first until it be reversed; but he cannot justify under the latter, because it was his own fault that it was irregular and [837] void at first. It is said that trespass *vi et armis* is not the proper action, and that a man cannot be made a trespasser by relation: but relation is not at all applicable to this case, for Lloyd, who sued out this void irregular writ, and caused Parsons to be unlawfully arrested thereupon, was the principal mover or trespasser in this case. The act of an attorney is the act of his client (*vide supra*, 835) (i); and I am very clearly of opinion that trespass *vi et armis* well lies, and therefore the plaintiff must have judgment." So, in *Barker v. Braham* (3 Wils. 368), it was never suggested that the execution-creditor was not liable. It was there laid down by De Grey C. J., in delivering the judgment of the court: "Whoever procures, commands, assists, assents, &c., is a trespasser; here, the client commands the attorney, the attorney actually commands the sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action; so attorney and client are both principals." In *Bates v. Pilling* (6 B. & C. 38, 9 D. & R. 44), where an attorney, at the instance of a creditor, sued out process against a debtor in the county court, and the attorney's agent, after the debt and costs had been paid, but in ignorance of that fact, signed judgment and sued out execution, and levied upon the debtor's goods, though he had never appeared—it was held that both the creditor and his attorney, were liable to the debtor in an action of trespass. Abbott C. J. there said: "It seems to me that Pilling, the plaintiff in the suit below, is answerable for the act of Seddon his attorney, and that Seddon and his agent Smith are to be considered as one person." [Tindal C. J. A general authority given to an attorney to bring an action and pursue it to judgment, cannot possibly extend to the taking of the goods of the wrong person. Maule J. In *Bates v. Pilling*, the client was in fault [838] for not telling the attorney that he had settled the action.] That was not the ground on which he was held liable. *Crook v. Wright* (R. & M. 278) also shews that the client is responsible for the act of his attorney. [Erskine J. What evidence is there in this case, that Heenan authorized the attorney to take the goods of the plaintiff?] He adopted and ratified the act of the attorney in causing the plaintiff's goods to be seized under the writ of *fi. fa.*, and by being party to the interpleader rule, and insisting upon his right to retain the goods. [Erskine J. All he did by so doing was, to assert that the goods seized were the property of Joseph Jarman the younger, against whom he had authorized the attorney to proceed: he did not thereby adopt the taking of the father's goods.] By adopting an act done in his name, and for his benefit, and endeavouring to obtain the fruits of it, he became a party to the original act of trespass; *Wilson v. Tumman* (ante, p. 236, 6 Scott, N. R. 894). Most of the cases in which the client has been held liable in trespass, have been cases where the

therefore, appear, like that of sheriff and bailiff, to come distinctly within the rule, *respondet superior*.

process has been set aside for irregularity; and yet it may be said that the client never authorized his attorney to sue out irregular or void process. *Barker v. Braham* and *Parsons v. Lloyd* were cases of that description. In *Coltrington v. Lloyd* (8 Ad. & E. 449, 3 N. & P. 442. And see *Smallcombe v. Olivier*, 13 M. & W. 77) it was held, that, where an arrest is made under process which is afterwards set aside for irregularity, the attorney in the suit is liable in trespass as well as the plaintiff; and, if, in an action of trespass, he justifies under the process, it is a good replication that the process was irregularly sued out, and was afterwards set aside, by rule of court, for irregularity. So, in *Dawson v. Wood* (3 Taunt. 256), the client was held responsible. It is submitted, that the attorney, by stepping [839] out of the strict line of his duty, does not cease to act for his client. On the contrary reason and justice require that every thing done by the attorney, in furtherance of the suit, shall be taken to have been done by the authority of the client himself.

Nov. 15.—Sir T. Wilde and Talfourd Serjts. (with whom was Kennedy), in support of the rule obtained on the part of the sheriff. The question is, against whose goods did the writ issue. It appears that a testatum *fi. fa.* was placed in the hands of the sheriff, commanding him to make, of the goods of Joseph Jarman, 231. 3s. 6d., with an indorsement that “the defendant is an upholsterer and bill-broker, and resides at No. 3 Prospect Place, Church Street, Chelsea, and No. 38 Leicester Square.” The sheriff, not being apprised that there were two persons bearing that name, and there being nothing calculated to excite inquiry, went to the place indicated by the indorsement, and executed the writ. [Maule J. The indorsement is no part of the writ of the sheriff: it is a mere direction for his guidance.] An ambiguity in the description of the defendant in the indorsement will in some cases excuse the sheriff for not executing the writ; *Clarke v. Palmer* (9 B. & C. 153, 4 M. & R. 141). Although there is no rule in this court making it part of the writ, it is submitted that a sheriff is not bound to execute a writ without instructions as to the party upon whom that process is to be executed; and, if he receives such instructions, it is not incumbent on him to make inquiries. It is only when he chooses to act without receiving instructions, that any obligation is cast upon him to inquire.

Suppose, a *capias* having issued against John Jarman, of Prospect Place, the sheriff were to delay a day or two to make inquiries, the defendant might, in the mean-[840]-time escape. It is therefore necessary to inquire only in the absence of instructions; for otherwise the sheriff would act at considerable peril. The law applicable to this case is, in strictness, in favour of the sheriff; and the court will not relax it against a public officer acting in the discharge of his duty. The question is, whether the defendant has proved the affirmative of the third issue,—that of the goods of the plaintiff, he was commanded by the writ, to levy a certain amount. Where there is a father and also a son bearing the same name of J. G., the law intends that, by J. G., the father is meant. There is nothing in this case to take it out of the general rule, and to limit the name to the son. On the contrary, the indorsement on the writ applies it more precisely to the father. Although the son, if his goods had been taken under the writ, might not have been able to object that he was not properly described in it, by reason of his having waived the objection, it by no means follows that the writ is not to be considered as having issued against the father. The effect of the writ must be determined by the writ itself. It is laid down in the books that it is not necessary to describe the father as “senior,” for the father shall not change his name for the son, but the son for the father. Many of the cases cited by the other side shew that the description of the party in the writ will not be allowed to be varied by extrinsic evidence; that you may not take F. Jones in execution, and aver that it was execution against him by another name. Lord Ellenborough, in *Scandover v. Warne* (2 Camp. 270, *supra*, 835), treats the description in the writ as decisive. [Coltman J. Was not that a case of *mesne process*?] The rule would be more strict in cases of execution. The question is, whether the plaintiff can alter the effect of the writ by averring that the writ issued against another person and not himself to whom it legally [841] applies. In no case is a party, by means of any averment, allowed to vary the exigency of a writ. Pleading in abatement is a different matter, and does not apply. The question is, not who is intended, but who is the party legally described in the writ. That is to be decided by what appears in the writ, and not by what passes in the attorney’s office. In *Wilson v. Stubbs* (Hobart, 330) the plaintiff brought a writ of second deliverance against Ralph Stubbs, and, having obtained judgment, had a writ of

capias utlagatum to take Stubs in execution. Afterwards Ralph Stubs the younger brought a writ de idempnitatem nominis, and had a supersedeas to the sheriff to forbear execution; but the court thought that, in that particular case, the writ and the supersedeas thereupon, were not warranted; but that the defendant Ralph Stubs the younger might have his action of false imprisonment; "for that the defendant, being named Ralph Stubs, without addition, shall never be accounted the younger, but always the elder of the two of that name." *Lepiot v. Browne* (1 Salk. 7) is also an authority to the like effect. [Maule J. The issue depends on whether the *fi. fa.* produced at the trial is truly described in the plea, which says—that it issued against the goods of the plaintiff. The question is, whether it did so issue. Suppose the meaning of the writ produced was to levy the amount upon the goods of the son; the defendant would fail in establishing his plea. Tindal C. J. You stand upon the form of the writ. The question is, whether you are not let into evidence to shew against whom the judgment was actually recovered. According to your argument, I do not see why a sheriff would not be justified, where the judgment was against John Smith, in taking the goods of any John Smith.] It may be admitted that it would not be sufficient for the sheriff [842] to say that a writ applied to John Smith which would apply to any person of that name; but here the question is limited to two. [Tindal C. J. Then you confine your argument to the case of father and son. Maule J. Would it not apply to a great-grandfather and great-grandson who were living together?] It may apply to all in the direct line. The plea avers that the writ issued against the plaintiff's goods. The question, whether the sheriff was commanded by the writ to levy upon the goods of the father or of the son, must depend, not on what was intended, but upon the legal description of the party in the writ. Notwithstanding the writ may have been intended for the son, it puts the sheriff in motion against the father. All that the law here casts upon the sheriff, as a public officer, is, to prove that the writ applies to the father and not to the son. [Maule J. Can the sheriff, under a *fi. fa.* take the goods of a person against whom it did not issue?] If the body of the writ had directed the sheriff to levy upon the goods of John Jarman of Prospect Place, he would have been warranted in taking the goods of the father, although no judgment had been recovered against the latter. [Maule J. Here, the plea says, that the writ issued against John Jarman, against whom Heenan had recovered a judgment. The sheriff is clearly informed that the party does not mean all Joseph Jarman, but the Joseph Jarman against whom he had recovered judgment.] Where the judgment and writ contain the same description, the sheriff would gain no information by referring to the judgment. [Erskine J. The sheriff has pleaded no special circumstances in justification, but has undertaken to prove that the plaintiff in this action is the person against whose goods the writ of *fi. fa.* issued. The description given in the writ may apply to two persons.] In Comyns's Digest, Abatement (F. 21), it is said, that, "in actions where a man [843] may be outlawed, the defendant may plead in abatement that there is B. the elder and B. the younger, and that he is the younger." Suppose under this writ the son had resisted and killed the officer, according to Foster, 312, it would be manslaughter only, and not murder. In Hawkins's Pleas of the Crown, book 2, chap. 23, § 106, p. 261, it is laid down, that, "where the father hath the same name and the same addition with a defendant being his son, the writ is abateable unless it had the addition of *puisne* to the other additions; but, where the father is the defendant, it is said there is no need of the addition of *eigné*. 37 H. 6, 29; 39 H. 6, 46; 4 Ed. 3, 31." The following authorities are cited in a note to *Hoye v. Bush* (ante, vol. i. p. 790). "If I bring a writ of debt against J. A., on which a *capias* issues, if the sheriff, by colour of that writ, takes a man named B. C., he (B. C.) shall have a writ of false imprisonment against the sheriff, and not against me; but if I come to the sheriff with that writ, and inform him that B. C. is the person against whom the writ is sued, and by reason of this assertion the sheriff takes him, he may have a writ of false imprisonment against the sheriff and me, or against the sheriff alone: per Hankford (J. of C. P.); to which Thirning (C. J. of C. P.) agreed, and said that that was law. M. 13 H. 4, fo. 2, pl. 5. 'If John Curson the son of John Curson be outlawed, and the sheriff, under a *capias utlagatum*, takes John Curson the son of William Curson, he shall have an action of false imprisonment against the sheriff; and also when he appears upon the *capias utlagatum* he may plead that he is the son of W. C. and not of J. C., and shall not be put to his writ of idempnitatem nominis;' per Littleton J., in T. 10 E. 4, fo. 12, pl. 7.

The *capias utlagatum* must have been against John the son of John; for if it had been against John the son of William, it would have protected [844] the sheriff: *Cotes v. Michell* (3 Lev. 20): and see *Sir Henry Ferrer's case* (Cro. Car. 371); *Thurbane's case* (Hardres, 323, 2 Roll. Abr. 552, pl. 10); *Wall v. Hill*" (1 Bulstr. 149; vide etiam F. N. B. 269 (e)). According to the authorities referred to in the above note, the sheriff was, under the circumstances, justified in treating the *fi. fa.* as a writ against the present plaintiff. The interpleader act (1 & 2 W. 4, c. 58), shews that, as the law advances, increased protection is given to public officers acting fairly in discharge of their duty. It is submitted that, under the issue joined upon this record, all question of intention is to be rejected, and that the sheriff succeeded at the trial in making out the affirmative of the issue in its terms. He has been guilty of no fault; and it will be a disgrace to the law if he is to be punished for obeying the process placed in his hands. If, in such a case, a jury can give 20*l.* damages against a sheriff, the interpleader act will become a dead letter.

Byles Serjt. for the execution-creditor. The jury have found the execution-creditor a trespasser for the act of his attorney. It is submitted that, supposing the attorney may have rendered himself liable, by the directions he gave to the sheriff, the client cannot be made a trespasser by relation. Assuming that distinct evidence of a retainer was proved, the only authority thereby given to the attorney, was, to bring an action against the son, and proceed thereon to judgment and execution. If the attorney issued process against the father, he may have been a trespasser, but his client clearly was not so. No case has been cited in which the mere relation of client and attorney has rendered the former liable for the taking of the wrong goods or of the wrong person. In *Barker v. Braham* (3 Wils. 368) no discussion arose with re-[845]spect to the liability of the client; that of the attorney only was the subject of inquiry. In that case the attorney was acting within the scope of his authority, the process, though irregular, being awarded against the right person; whereas here, the process is regular, but was executed upon the goods of the wrong party. The same observation applies to the case of *Bates v. Pilling* (6 B. & C. 38; 9 Dowl. & Ryl. 44); there the writ of justices, which issued after the payment of the debt,—the client having received the money without communicating the fact to the attorney,—was still a proceeding against a party whom the attorney who issued that writ, had been authorized by his client to sue. In *Dawson v. Wood* (3 Taunt. 256) the present objection was never taken; besides, there the execution-creditor appears to have interfered personally in the seizure. No one has ever heard of the execution-creditor's being held to be a trespasser where goods have been taken after a secret act of bankruptcy. But it is not shewn that the execution-creditor has received any part of the proceeds. In *Balme v. Hutton* (9 Bingh. 471, 3 M. & Scott, 1, 1 C. & M. 262), Patteson J. says: "The writ commands the sheriff to take the goods of A. He takes goods which had been the property of A., and are still in his possession, though, in point of law, they have ceased to be his property, if certain contingent events happen. But no other person at that time has the right of possession. The sheriff, therefore, is not liable to be sued in trespass by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure; neither is the execution-creditor liable in trespass: but both the sheriff, and the creditor if he takes the proceeds, are liable in trover, to render the [846] value of the goods to the person whose property they turn out to be" (9 Bingh. 479).

It may be admitted, that if any part of the proceeds of this execution had been paid over to Heenan, and this had been an action in respect of the goods, he might have been liable. It is said that Heenan subsequently ratified the acts of the attorney, by coming in under the interpleader rule, and asserting that the goods belonged to the son. That proceeding, however, was an adoption, not by Heenan, but by the attorney; and he had no more authority to ratify the act than he had to commit it. There was no evidence at the trial that Heenan knew that 50*l.* had been paid into court under the interpleader rule, or that he was *conusant* of any of the proceedings taken in pursuance of such rule.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court:

This was an action of trespass, for breaking and entering the dwelling-house of the plaintiff, in which action the first two defendants, as sheriff of Middlesex, in their third plea, justified entering the house under a writ of *fi. fa.* issued against the goods

of the plaintiff by Heenan, the last-named defendant. The plaintiff replied that the writ of fi. fa. did not issue against the goods of the plaintiff. The defendant Heenan, the judgment-creditor, pleaded not guilty only.

After a verdict for the plaintiff against the three defendants, with 20l. damages, a rule nisi was obtained by the sheriff for setting aside the verdict as to the issue joined on the third plea, and for entering a verdict on that issue in their favour; and a rule nisi was also obtained by Heenan, the judgment creditor, for a new trial.

At the trial of the cause it appeared that the defendant [847] Heenan had brought an action against Joseph Jarman, the son of the plaintiff, to recover a debt due to Heenan from the son; that the writ of summons had been served on the son, and that judgment by default had been obtained against him, upon which the writ of fi. fa. in question was issued; but that both the writ of summons and in the fi. fa., and also in the sheriff's warrant thereon, the defendant in that action was named "Joseph Jarman" only, without any addition or other description. And upon this state of facts it was contended, on the part of the sheriff, that, inasmuch as the writ required him to take the goods of Joseph Jarman, and that as the name Joseph Jarman, without any addition to shew that the son was intended, does, by law, necessarily import that the father was meant by the writ, so the sheriff was justified in entering the house to take the goods of the father, as he has done on the present occasion.

It is undoubtedly true, that, if the father and son have the same name of baptism and surname, and the name of baptism and surname only be stated in the writ, without any addition thereto, *primâ facie* the son shall not be intended. This is the full extent of the observation of Lord Holt in Salk. p. 7. But it is equally true, that, if the action is brought against the son without any addition, and such want of addition is not pleaded in abatement, a judgment obtained in such action against the son, and a writ of execution upon such judgment, are good against him by the name inserted in the writ. Although, therefore, the want of addition imports, *primâ facie*, that the son is not intended, it is no more than a *primâ facie* intendment; for the son may be the person really intended by the writ. The situation, therefore, of the sheriff, under such a state of circumstances, seems to be the same as if he had received a writ against a defendant described by the name of J. S. in the writ, and there appeared, at the time of executing the writ, to [848] be two persons of the name of J. S.; in which case there can be no doubt but that the sheriff would be liable, if, through inadvertency or mistake, he took the person, or the goods, of the wrong J. S. The authorities from the Year Books, cited in 2 Rolle's Abridgment, 552, l. 17, 25, and 30, are clear and express to that point; in the last of which references it is laid down that the sheriff is liable, "though the taking be by the shewing of the party to the suit." And the precise form of the issue, raised on this record, leads to the same conclusion. The issue is, whether the writ of fi. fa. was sued out against the plaintiff, that is, Jarman the father; and the affirmative is upon the sheriff, who pleads that it was so issued.

The sheriff rested his case, at the trial, upon the production of the writ, and upon the fact that the plaintiff had a son of the same name; but that, at the most, would, as we have seen, only prove that *primâ facie* some Joseph Jarman other than the son was intended; whereas, all the evidence in the case shewed that it was not the father against whom the writ of fi. fa. had been really issued. Even therefore, if the argument on the part of the sheriff were well-founded,—that the writ against the goods of Joseph Jarman, might, in some form of pleading, have justified him in taking the goods of the father, whether he were the real defendant or not, we think that, upon the present issue, which affirms, in substance, that he was the real defendant in the action, the verdict was necessarily found against the sheriff.

As to the writ *de idemnitate nominis*,—which was said to be the proper and the only remedy for the person wrongfully taken under process issued against a party bearing the same name,—it appears, upon reference to that writ, as set out in F. N. B. p. 268, and also to the authorities cited from the Year Books under that head in Fitzherbert's and Brooke's Abridgments, that it was used principally, if not exclusively, in cases where [849] the plaintiff had proceeded to outlawry, and had taken either the body, or the land or goods, of a person bearing the same name with the defendant, but not being the real defendant, and had seized the same into the king's hands. In that case, the writ issued, praying for a supersedeas to the sheriff, and that the king's hands might be amoved; and the attorney general was at liberty to

plead thereto that he was the person intended. There is great doubt whether the writ applied at all to a case of a simple taking by a plaintiff in a cause; for, in the case cited from Hobart, 330, the reporter observes—"The court did take a great difference between the cases of the outlawry and the principal case, being only at the plaintiff's suit, and not at the king's; as in every outlawry the king is interested; and of which principal case no precedent was or could be shewed." And nothing appears in the books to shew, that, if the writ had been sued out, it would have taken away the plaintiff's right of action for damages for his wrongful arrest, or for the wrongful taking of his goods.

As to the defendant Heenan, the only question in his case is, whether he is bound by the act of his attorney, in giving the directions to the sheriff to take the goods of the plaintiff. That the plaintiff in the original action is liable in trespass, if, by his own order, the sheriff takes the goods of a stranger in execution, is clear law—2 Roll. Abr. 553, l. 10, pl. 5 (a)¹. And it appears to [850] us that the direction given by the attorney, is a direction given by an agent within the scope of his authority, and binds the principal (a)². The attorney has the general conduct of the cause; he is the only person with whom the sheriff has communication: and, in taking a step essentially necessary for the benefit of the client, that is, for the obtaining the fruit of his judgment, we think he cannot be held to have acted beyond his authority, though he has miscarried in its execution. And, when it is argued that he cannot be his agent in giving false information, the answer is, that, if his agent to do the particular act, the client must stand to the consequences if he act inadvertently or ignorantly; as in *Parsons v. Lloyd* (3 Wils. 341), where trespass was held maintainable against the client, for causing the plaintiff to be arrested under a writ which was afterwards set aside for irregularity. It was argued, in that case, that suing out the writ was the immediate act of the attorney, that he had not been retained to sue out a void or an irregular writ, and that it was therefore not within the scope of his authority. But it was answered by De Grey C. J., that "the act of the attorney is the act of his client;" and by Gould J., "the plaintiff should have employed a more skilful and diligent attorney; for the act of the attorney, in point of law, is the act of the party, his client" (c).

For these reasons, we think, that the present rules, obtained on the part of the sheriff and of the judgment-creditor, must be discharged.

Rules discharged.

[851] JOHN COURTNEY AND BENJAMIN HOWELL v. ROBERT TAYLOR.

Dec. 6, 1843.

[S. C. 7 Scott, N. R. 749; 12 L. J. C. P. 330. Followed, *Marryat v. Marryat*, 1860, 28 Beav. 236. Applied, *Saunders v. Milsome*, 1866, L. R. 2 Eq. 575; *Isaacson v. Harwood*, 1868, L. R. 3 Ch. 228; *Holland v. Holland*, 1869, L. R. 4 Ch. 457. Discussed, *Jackson v. North Eastern Railway*, 1877, 7 Ch. D. 583.]

Where, in an indenture between A. and B., B. acknowledges that he owes so much money to A., such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay, appear upon the face

(a)¹ Citing 14 H. 4 (H. 14 H. 4, fo. 24, pl. 32). There, in trespass against the under-sheriff for taking the plaintiff's sheep, the defendant pleaded that one J. sued out a writ of replevin, directed to the sheriff, who commanded the defendant to make delivery of the sheep to J.; and he prayed judgment, (in the then usual form) if wrong in his person ought to be assigned. The plaintiff replied that the sheep were his. Cheine Serjt. for the defendant, objected to this replication; which was, however, allowed by the court. He afterwards said, by his faith, if the matter had been his own he would have demurred, but that his client (who, perhaps, knew that J. was prepared to disprove the replication) would not. An original report of the same case is to be found in Fitz. Abr. tit. Trespass, pl. 15 and 243.

(a)² And see *Wilson v. Tumman*, ante, 236, 6 Scott, N. R. 894.

(c) And see *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & Ald. 590; *Gregory v. Piper*, 9 B. & C. 591, 4 Mann. & Ryl. 500; *Lyons v. Martin*, 8 A. & E. 512, 3 N. & P. 509; *Attorney General v. Siddons*, 1 Tyrwh. 41, 1 C. & J. 220.

of the deed.—Secus, where the acknowledgment appears to have been made solely for a collateral purpose.

Debt. The first count of the declaration stated, that in the life-time of William Gronow, since deceased, to wit, on the 31st of July 1828, by a certain indenture between Thomas Coulsting of the first part, the defendant of the second part, the plaintiffs and Gronow of the third part, and John Vaughan and John Simmons of the fourth part, the defendant covenanted with the plaintiffs and Gronow, that he would, on the 31st of January 1829, pay unto the plaintiffs and Gronow, or their executors, &c., 525l., with interest at the rate of 5l. per cent. Yet the defendant had not paid the said sum of 525l., or any part thereof, &c.

Second count: that after the death of Gronow, to wit, on the 30th of August 1838, by a certain other indenture between the defendant, of the first part, Vaughan and Simmons, of the second part, the plaintiffs, of the third part, William Thomas and Catherine his wife, of the fourth part, Jane Jenkins, W. J. Browne and Roland J. Browne, of the fifth part, the said R. J. Browne, of the sixth part, and John Heaviside of the seventh part, the defendant did covenant with the plaintiffs that he would, upon request, pay unto the plaintiffs, their executors, &c., 577l. 10s., being the amount of the principal sum of 525l. in the first count mentioned, and an arrear of interest, at the rate aforesaid, in respect thereof, of 52l. 10s. Yet the defendant had not paid, &c.

The declaration also contained a count upon an account stated; and it made profert of the two deeds.

The defendant pleaded (to the first count), that, after the said 31st of January 1829, to wit, on the 14th of April 1831, the defendant became bankrupt within [852] the true intent and meaning of the statute then in force concerning bankrupts, and that the cause of action in the first count mentioned accrued to the plaintiffs before the defendant became a bankrupt as aforesaid—secondly (to the second count), that the indenture in the second count mentioned was not his deed—thirdly (to the second count), that the indenture in that count mentioned was obtained from the defendant by the plaintiffs and one R. J. Browne, and others in collusion with them, by fraud, covin, and misrepresentation—fourthly (to the third count), never indebted—fifthly (to the third count), that the statement of the account in the said third count mentioned, and the statements, acknowledgments, and admissions therein made by the defendant, were obtained from him by the fraud, covin, and misrepresentations of the plaintiffs and one R. J. Browne, and others in collusion with them.

The plaintiffs joined issue on the first, second, and fourth pleas, traversed the fraud, covin, and misrepresentation in the third, and replied *de injuriâ* to the fifth plea (*a*).

(*a*) In *Cowper v. Garbett*, 13 M. & W. 33, it was contended that a plaintiff could not, in debt on simple contract, reply *de injuriâ* to a plea containing matter of excuse only. In delivering the judgment of the court in that case, Pollock C. B. says, "As to the first objection, the general traverse, *de injuriâ*, was, no doubt, until the new rules came into operation, confined to actions of trespass, replevin, and actions on the case (for malfeasance); for, in those actions only, did the necessity of such a traverse, generally speaking, occur. In actions of assumpsit, and on the case for nonfeasance, (and misfeasance), there were probably no special pleadings containing matter in excuse, and requiring such a traverse; as is explained by Lord Deuman in delivering the judgment of the court of Queen's Bench in *Purchell v. Salter*, 1 Q. B. 202; and in actions of covenant and debt on specialties, such pleas were very rare; and the adoption of a general traverse was practically unnecessary. But since the new rules, such pleas, in actions of assumpsit and debt, have become very common; and the principle being the same, viz. that a plaintiff should be at liberty to put in issue, by one traverse, the whole matter of excuse contained in the plea, it is highly reasonable that a similar form of general traverse should be allowed in those actions also; and accordingly, all the courts have sanctioned such a form of replication in actions of assumpsit, making a change only in the words, which are merely formal. In actions of debt in any form, this has not yet been done, except by the court of Queen's Bench, in the case of *Purchell v. Salter*, in which judgment was reversed on another ground, the court of error not being called upon to give an opinion upon this question. It is now neces-

[853] The defendant joined issue upon the replication to the third and fifth pleas.

By their particulars of demand, the plaintiffs claimed [854] 109l. 6s. 10d., the alleged balance of a mortgage debt of 525l., secured by the deed of the 31st of July 1829, mentioned in the first count of the declaration; which [855] debt, though barred by the defendant's certificate, was said to be revived by the deed of the 30th of August 1838, mentioned in the second count.

sary for us to decide it; and we concur in thinking that the judgment of the court of Queen's Bench, upon this point, was correct, and that the reasons given at length by Lord Denman, are quite satisfactory."

Notwithstanding these changes in the law with respect to pleadings in assumpsit and debt on simple contract, the course of pleading in covenant and in debt on specialty, appears to remain unaltered. The new rules make no alteration as to the course of pleading in these two forms of action, except by declaring that, "in debt on specialty or covenant, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it avoidable." The few cases which are affected by this rule do not appear to require any deviation from the antient rules of pleading as to replications. In *Rickards v. Murdock*, 10 B. & C. 427, 5 Mann. & Ryl. 418, and in *Gibbons v. Mottram*, ante, 656, de injuriâ was replied in covenant. In these cases the defendant, instead of raising the question as to the propriety of the course taken by the plaintiff, by a special demurrer, joined issue upon the replication, and thereby waived the objection.

The following cases are referred to in *Crogate's case* :—

M. 21 E. 3, fo. 40, pl. 43. In trespass for cutting trees, the defendant justified as lessee of the Master of St. Leonard of a house as appurtenant to which, the Master was entitled to estovers. A general replication de injuriâ was held to be bad without answering the title set up as to estovers.

M. 24 E. 3, fo. 72, pl. 86. In a plea of trespass, coram rege, for taking a plough and three horses, the defendant, by Skipwith, pleaded—"We are lord of such a manor, annexed to our prebend; and we say that all the tenants within the manor are tenants in bondage or at will" (afterwards called tenants by the court-roll, now, tenants by copy of court-roll), "and that the usage is such that all the tenants come to the court there holden next after the feast of St. Michael, and elect among them two or three to be reeves (provostes), and present them to the steward, so that he accept one of them to the office, and take fine of the others if they come not. And if he who is elected and accepted will not do it, it has been always used to compel and justice him to do it by distress. And he says that the plaintiff holds of him fourteen acres of land of such condition, and was elected by the tenants and accepted by the steward. And because he refused to be, &c. he took the said plough and horses, and prays judgment, if wrong, &c." The plaintiff replied that he took them *of his own wrong, without this, that he took them for such cause, &c.*, the issue upon which was accepted. (The second edition of the Year-books, by an evident misprint, omits the words in italics.)

T. 44 E. 3, fo. 18, pl. 12. In trespass, quare clausum fregit, brought by an infant, the defendant pleaded that the plaintiff's father held a house and land of the Prince of Wales by escuage, and died, whereupon the Prince seized the wardship and granted to us, and we entered, &c. A general replication de injuriâ was held to be bad; upon which the plaintiff traversed the tenure.

22 Ass. fo. 94, pl. 42. In trespass quare clausum fregit, and destroying the germins of his fruit-bearing trees, the defendant pleaded, that which the plaintiff calls his close is a croft containing eight acres of arable land, in which we and our ancestors from time, &c. have common appendant to our freehold in the same town for all manner of animals, to wit, two years—after the corn reaped and carried away, until the land be re-sown, and every third year—for the whole year. That the plaintiff had inclosed the said croft with ditches and hedges, and afterwards the plaintiff, when the corn there growing was carried, abated the ditch and hedge, and made an entry for his cart to the croft to carry the same; and after his said corn had been carried, he inclosed as before. That we abated the same, and entered into the close with beasts to common. And as to the breaking down and destroying the trees, we say that there was a garden adjoining the croft, which garden was inclosed with walls, and

[856] At the trial, before Lord Denman C. J., at the last summer assizes for the county of Kent, the following facts appeared :—

[857] By an indenture of the 31st of July 1828, made between James Coulsting, of the first part, the defendant, of the second part, the plaintiff Courtney, the deceased [858] Gronow, and the plaintiff Howell, trustees of the marriage settlement of William Thomas and Catherine Jenkins, of the third part, and Vaughan and Simmons, of the

always held in severalty, and that the plaintiff abated a wall which was between the croft and the garden, and made them as one plain ; and that our beasts escaped into the garden by default of closure, and by the plaintiff's own fault. Judgment, if he can assign trespass in our person. Richmond, for the plaintiff. You broke our close of your own wrong, as we have supposed by our bill, *absque hoc* that you had common there ; upon which, issue was joined.

22 Ass. fo 104, pl. 85. In trespass against the prior of G. for imprisoning the plaintiff for six months, in the 10th year of Edward II. (26 years before), the defendant pleaded that he was con-canon with the former prior, who commanded the defendant and others to seize the body of the plaintiff as a ward and (as) heir apparent to R., his father, who held his land in M. of the prior, by knight's service. Whereupon we seized the body of the plaintiff, in the name of a ward, as it was lawful for us to do ; and we kept him in our custody six months, &c. ; and we say that there was one R., his elder brother, son and heir of the aforesaid R. of the said land ; which R. in the time of his father, was seized and taken away by the Scots (*ravy ove les Escoces*), and carried out of the kingdom ; and after the death of his father, and after the said six months, he came back to M. And we perceiving his return, and that he was the next heir of the land and not the plaintiff, removed our hands (*ouster la maine*) and waived the wardship of the plaintiff. And we demand judgment, if, of this detainer, you can assign wrong in our person. The plaintiff replied that he held his land of T. M., and not of the prior of G., wherefore he imprisoned us of his own wrong, *absque tali causâ*. It was held that the tenure was not traversable specially, and that the issue was properly taken *de injuriâ*, &c., *absque tali causâ*. Sed vide 14 H. 4, *infra*.

H. 13 R. 2, Fitzh. Abr. Issue, pl. 163. Rescue, against two. Plea, by Hankford, that one R. affirmed a plaint to the sheriff of summons against (sur) the plaintiff, of the same cattle and the same taking ; whereupon the sheriff made a warrant of deliverance to the defendants to make the deliverance, wherefore they made deliverance by force of the said warrant. Judgment, if, &c. The plaintiff replied by Hill Serjt., *de injuriâ suâ propriâ*, *absque tali causâ* ; and by the award of the court Hill was put to answer to that matter specially, notwithstanding that it was not of record ; wherefore Hill said *de injuriâ suâ propriâ*, *absque hoc*, that they had a warrant of the sheriff at the time of the said taking ; upon which issue was joined.

H. 14 H. 4, fo. 32, pl. 45, was an action of trespass for taking the plaintiff's goods and his servant, in which the defendant justified taking the plaintiff's servant by the command of Sir John Oldcastle, as guardian in chivalry of the plaintiff's servant. A general replication *de injuriâ* was held bad, as involving the tenure as well as the command.

P. 2 H. 5, fo. 1, pl. 1, was *replevin* ; in which the defendant made cognizance as bailiff to the prior of B., for rent service. A replication *de injuriâ* was held bad, because it was no answer to the substance of the cognizance, namely, the prior's right to distrain.

M. 10 H. 6, fo. 3, pl. 9. In trespass for taking horses, the defendant justified for a distress for rent arrear upon a demise from him to the plaintiff. *De injuriâ* generally was held to be a bad replication, and the plaintiff was told that he should traverse the demise or the arrears. He traversed the latter.

M. 19 H. 6, fo. 7, pl. 14. A general replication *de injuriâ* to a plea justifying under an execution for an amercement in the admiral's court, was held to be insufficient.

M. 21 H. 6, fo. 5, pl. 14. In false imprisonment at D. in Cornwall, by Oliver against Michil, the defendant pleaded that J. Kelly and others were seised of the manor of Bodmalgan, in the county of Cornwall, in fee, until they were ousted with a strong hand by the plaintiff ; that they came to Baldwin Folford, one of the justices of the peace within the county, and required him, according to the form of the statute,

fourth part ; after reciting a mortgage debt of 250l. due from the defendant to Coulsting, and that the defendant had requested Courtney, Gronow, and Howell to lend him 525l., which they had agreed to do upon having such security as thereafter contained, and also the bond of the defendant thereafter mentioned, and that it had been agreed that Coulsting should be paid the 250l. due to him out of the said 525l., and that he should join in executing that indenture—it was witnessed, that, in pursuance of the said agreements, and in consideration of 250l., part of the said sum of 525l., to Coulsting paid by Courtney, Gronow, and Howell, at the request and by the direction of the defendant, the receipt of which sum of 250l., and that the same was in full discharge of the said debt, Coulsting did thereby acknowledge, and of and from which said principal sum of 250l., and all principal and interest moneys due upon or by virtue of his said thereinbefore in part recited securities, he did thereby acquit, release, and discharge the said Courtney, Gronow, and Howell, and their respective heirs, executors and administrators, and the defendant, his heirs, appointees, executors and administrators, and also the said hereditaments ; and also in consideration of 275l. (residue of the said sum of 525l.) lent by Courtney, Gronow, and Howell, to the defendant, Coulsting released, and the defendant ratified and confirmed unto Vaughan and Simmons, and to their heirs, certain messuages, tenements, and hereditaments therein de-[859]-scribed, and in their actual possession then being, by virtue, &c., to the use of Vaughan and Simmons, and their heirs, subject to the proviso for redemption thereafter contained, and upon the trusts, and for the purposes, thereafter declared and expressed ; with a proviso for redemption by the defendant, his heirs, executors, administrators, or assigns, on payment, on the 31st of January then next, unto Courtney, Gronow, and Howell, or the survivors, &c., the principal sum of 525l., with interest thereon thenceforth at the rate of 5l. per cent., without deduction, and also for avoiding a bond of even date therewith, from the defendant to Courtney, Gronow, and Howell, in the penal sum of 1050l., for securing the said principal sum and interest ; and also a power to the mortgagees to sell, upon default, and a covenant by the defendant, for himself, his heirs, executors, &c., to pay the principal sum on the day named, with interest thereon thenceforth at 5l. per cent., &c.

to remove the said power out of the manor : whereupon the said B. Folford, on, &c., according to the form of the statute, came to the said manor to see the said power and forcible entry, and found the plaintiff within the manor, and keeping the said manor with force and arms, and arrested him, and sent him to the king's gaol at Launceston, of which town the said Michil was, at the time of the supposed trespass, constable ; and by force of a warrant made to the said Michil by the said justice, to receive the plaintiff, he did receive him and put him in prison, &c. : the plaintiff replied de injuriâ generally. This replication being held bad, the plaintiff traversed that the justice illum ei misit. At the end of this case of *Oliver v. Michil* two cases were cited, in which a replication de injuriâ was admitted to a justification under a fi. fa. upon a judgment recovered, on the ground that, notwithstanding the recovery, the recoveror may have taken the goods wrongfully.

T. 38 H. 6, fo. 9, pl. 14. In trespass, the defendant justified under a right of way, by prescription, from his messuage, and land, to a church and to a market. The plaintiff replied de injuriâ, absque hoc that the defendant and his ancestors had such right. The reporter suggests that the plea was bad, inasmuch as the road to the market might be found one way, and the road to the church, another way.

M. 39 H. 6, fo. 32, pl. 44. In case for stopping a sewer through which water ran from Henley to Abingdon, the defendant pleaded a demise from R. Dalburgh of a mill, and prescribed through him, to repair and rebuild the mill when necessary ; and alleged that the mill was ruinous, and that it became necessary to repair, and that the repairing caused the stoppage. The plaintiff traversed the prescription only.

T. 9 E. 4, fo. 22, pl. 23. In trespass for taking two butts of wine, the defendant prescribed for wreck, and alleged that the butts were thrown upon his manor from a vessel that was wrecked, and that he took them as wreck. The plaintiff replied de injuriâ, absque hoc that they were wreck ; upon which an issue was accepted.

P. 12 E. 4, fo. 10, pl. 28. In trespass quare clausum fregit, the defendant pleaded that the plaintiff had his the defendant's land in execution by statute-merchant, and that he entered to see if any waste had been committed. A general replication de injuriâ was held bad. The plaintiff then replied that the defendant entered and

The defendant, on the 14th of April 1831, became bankrupt; and shortly afterwards duly obtained his certificate.

On the 21st of December 1832, by an agreement between Vaughan and Simmons of the one part, and the defendant of the other part—reciting the mortgage deed of the 31st of July 1828, and the power of sale therein contained; that, on or about the 16th of April 1831, a commission of bankrupt was awarded and issued against the defendant, under which he was duly declared a bankrupt, and had duly obtained his certificate; and reciting that Vaughan and Simmons had offered the property for sale, and that there had been no bidder; and reciting that Vaughan and Simmons, in pursuance of the trusts reposed in them by the indenture of the 31st of July 1828, had contracted with the defendant for the sale to him of the messuages, tenements, and hereditaments comprised in that indenture, at the price of [860] 577l. 10s.—it was witnessed that Vaughan and Simmons agreed to sell, and the defendant to purchase, the messuages, &c. for the sum of 577l. 10s., to be paid by the defendant to Vaughan and Simmons, their heirs, executors, &c., on the 4th of August then next, at which time the said purchase was to be completed: and it was thereby agreed that the defendant should pay interest on the said purchase-money, after the rate of 5l. per cent. from the date thereof to the day of settlement of the said purchase: and it was thereby provided and declared, that if the defendant should make default in the settlement of the said purchase, or in payment of the said purchase-money of 577l. 10s. on the said 4th of August, it should be lawful for Vaughan and Simmons, or the survivor, &c., his heirs, &c., upon any such default being made, or at any such time or times thereafter as he or they might think proper, to commence any suit at law or in equity on account of any breach of the agreement, or to compel a specific performance thereof, or to enter upon and take possession of the premises so sold as aforesaid, and the rents and profits thereof, and either immediately thereafter or at any such remote period or periods as Vaughan and Simmons, or the survivor, &c. might think proper, to exercise and carry into execution all the powers and trusts reposed in them by the said indenture of the 31st of July 1828, as fully as if the agreement now in recital had never been made; in which case the defendant should be responsible to Vaughan and Simmons for any loss or damage occasioned thereby

claimed the land as his own, *absque hoc*, that he came to see waste. It was held that the *absque hoc* should have been omitted.

P. 16 E. 4, fo. 4, pl. 10. The defendant justified taking grass cut and severed from the nine parts, as his tithes. The court intimated an opinion that the general replication *de injuriâ* was improper; upon which the plaintiff traversed the severance from the nine parts.

M. 2 H. 7, fo. 3, pl. 9. To a justification of arresting the plaintiff on suspicion of a robbery committed, the general replication *de injuriâ* was received without objection.

M. 5 H. 7, fo. 6, pl. 12. In trespass for assault, wounding, and imprisonment, the defendant justified the assault by son assault demesne, and justified the imprisonment on the ground that he was constable in the town, and that the plaintiff assaulted him and broke the peace, and that he took him and brought him to gaol for the preservation of the peace. The plea was held good, as was also a replication *de injuriâ*, because no matter of record was alleged in the plea.

M. 16 H. 7, fo. 2, pl. 7. In trespass *de bonis asportatis* the defendant pleaded that J. Wimbish was possessed of the goods, and sold them to the plaintiff; that the plaintiff left them in the possession of Wimbish for his, the plaintiff's use; that afterwards Wimbish delivered the goods to the defendant, to carry them to Grocers' Hall in London; and that by force thereof the defendant took them accordingly.—*Fineux Serjt.* When goods are bought of me and are left in my possession, the property and possession are immediately in him; and for the detainer afterwards, trespass lies against him; *quod fuit negatum per totam curiam*; & *fortiori* against his bailee or vendee; *quod fuit etiam negatum*; for it was said that where a party comes to goods by lawful title by the delivery of the plaintiff, he shall not be punished as a trespasser, but by writ of *detinue*; but if a person takes them out of the possession of him who comes lawfully to the goods at first, he shall be punished as a trespasser. *Fineux* then replied *de injuriâ* generally. In that case it was said by Bryan C. J., that the general replication *de injuriâ sua propriâ absque tali causâ*, is a good form of pleading in those cases only where a tort is confessed on both sides.

or in consequence thereof, as, or in the nature of, liquidated damages, and should also be entitled to any surplus that might remain in the hands of Vaughan and Simmons, or the survivor, &c., after payment of the said purchase-money and interest, costs, charges, damages, and expenses.

By indenture of the 30th of August 1838, between the [861] defendant of the first part, Vaughan and Simmons of the second part, the plaintiffs of the third part, W. Thomas and C. his wife of the fourth part, Jane Jenkins, W. J. Browne, and R. J. Browne, of the fifth part, the said R. J. Browne of the sixth part, and Heavyside of the seventh part—reciting the marriage settlement of the 29th of August 1820, made between the said W. Thomas of the first part, the said C. Thomas (then C. Jenkins, spinster) of the second part, the plaintiffs and Gronow, and Walter Browne, since deceased, of the third part; and reciting the power contained in such settlement for the plaintiffs and the other trustees to invest the moneys thereby settled, in the funds or upon real security, and a power to appoint new trustees in the case of the death, refusal or declining to act of either, and that the trust premises should be conveyed and assigned to such new trustees jointly with the surviving trustees, or solely, as the case might require; and reciting the death of Walter Browne; and reciting that a sum of 525l. therein mentioned had been paid off and secured by the said indenture of the 31st of July 1828, and by the said bond of the defendant, dated the 31st of July 1828, and by the said agreement of the 21st of December 1832; and further reciting “that by indentures of lease and release, bearing date the 30th and 31st days of July 1828, the release made between Coulsting of the first part, the defendant of the second part, the plaintiff Courtney, Gronow, and the plaintiff Howell, of the third part, and Vaughan and Simmons of the fourth part, certain premises therein described were,—in consideration of the sum of 250l. to Coulsting, by the desire of the defendant, and of 275l. to the defendant, paid by Courtney, Gronow, and Howell (and which sums, amounting together to 525l., formed part of the trust fund vested in Courtney, Gronow, and B. Howell),—conveyed by Coulsting and the defendant, subject as therein is mentioned, unto and to the use of [862] Vaughan and Simmons, and their heirs, upon trust, in case the defendant, his executors, &c., should not pay unto Courtney, Gronow, and Howell, or the survivors, &c., on the 31st of January 1829, the sum of 525l., and interest at 5l. per cent., to enter upon the said premises and sell the same, and to apply the proceeds which should arise from the sale thereof, in discharge of the said sum of 525l. and interest, and to stand possessed of the surplus or residue of such proceeds, upon the trusts in the last-mentioned indenture declared of and concerning the same: and also reciting that the said sum of 525l. and interest was further secured by the defendant's bond, bearing date the 31st of July 1828: and also reciting that there was due from the defendant, on the 21st of December 1832, the said sum of 525l., and an arrear of interest in respect thereof, amounting to 52l. 10s.: and also reciting that Gronow departed this life previously to November 1832: and also reciting that the plaintiff Courtney was desirous of relinquishing the trust: and also reciting that by an agreement bearing date the 21st December 1832, and made between Vaughan and Simmons of the one part, and the defendant of the other part, Vaughan and Simmons, in pursuance of the power for that purpose vested in them by the indenture of the 31st of July 1828, and at the request of the several parties thereto of the second, third, fourth, and fifth parts, agreed to sell, and the defendant agreed to buy, the premises vested in them by the said indentures of the 30th and 31st of July 1828, at the price of 577l. 10s., to be paid by the defendant on the 4th of August then next, at which time the purchase was to be completed: and also reciting that the said agreement had not been carried into effect, but the said principal sum of 525l., and the said arrear of interest of 52l. 10s., making together 577l. 10s., were still due and owing from the defendant to the plaintiffs, as the defendant did thereby acknowledge: and also [863] reciting that all interest in respect of the said sum of 577l. 10s. had been received by C. Thomas up to the 24th day of June last, as he the defendant declared; it was witnessed that W. Thomas and C. his wife, pursuant to the power to them given by the said indenture of the 29th of August 1820, did nominate and appoint the said R. J. Browne to be a trustee of the said indenture, and of the trust money thereby assured, in the place of the plaintiff Courtney, and in conjunction with the plaintiff Howell, and J. Jenkins, and W. J. Browne: and it was further witnessed that the plaintiffs, and W. Thomas and C. his wife, J. Jenkins, W. J. Browne, and R. J.

Browne, did thereby assign unto Heaviside the said mortgage debt of 525l., and the said debt of 52l. 10s. (which debts, making together the sum of 577l. 10s., were then stated to be due from the defendant), and also the said bond of the defendant, to the intent that Heaviside should forthwith assign the same unto the plaintiff Howell, Jenkins. W. J. Browne, and R. J. Browne, upon and for such trusts, intents, and purposes as by the said indenture of the 29th of August 1820 were expressed and declared: and it was further witnessed, that, in consideration of 5s. &c. Vaughan and Simmons, by the direction and with the consent of the several parties thereto, testified as aforesaid, and, so far as they lawfully could or might, did grant unto Heaviside and his heirs all their estate and interest in the messuages, tenements, and hereditaments vested in them by the said indenture of the 31st of July 1828; and that the plaintiffs, and W. Thomas and C. his wife, J. Jenkins, and W. J. Browne, and R. J. Browne, did release unto Heaviside (in his actual possession, &c.) the messuages, tenements, and hereditaments so vested in Vaughan and Simmons: to hold the same unto Heaviside and his heirs, for all such estate and interest as Vaughan and Simmons then had therein, to the use of the plaintiff Howell, J. Jenkins W. J. Browne, and [864] R. J. Browne, and their heirs, upon such trusts, and subject to such powers, provisos, agreements, and declarations as were expressed and declared in and by the said indenture of the 31st of July 1828 and the said agreement of the 21st of December 1832: and it was thereby agreed between the parties thereto, that all the powers vested in Vaughan and Simmons under the said indentures of the 30th and 31st of July 1838, particularly the powers of sale therein contained, should be vested in the plaintiff Howell, J. Jenkins, W. J. Browne, and R. J. Browne, and their heirs, as fully as if the same had been therein expressed and set forth.

It was admitted that the defendant was entitled to a verdict upon the first issue.

Upon the second issue, it was contended, on the part of the defendant, that the acknowledgment contained in the recital, that 577l. 10s. was then due for principal and interest, did not amount to a covenant to pay that sum.

With respect to the third and fifth issues, it was contended, on the part of the defendant, that he was entitled to a verdict upon the pleas of fraud, covin, and misrepresentation, on the ground that he had been induced to execute the deed of the 30th of August 1838 by a representation that his position would in no degree be varied by his so doing; and his lordship inclined to think that upon this plea there was some evidence to go to the jury.

The jury having, under the direction of the learned judge, returned a verdict for the defendant upon all the issues,

24th April.—Bompas Serjt., in Easter term last, moved for a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence.

The point of misdirection arises upon the second issue. It is submitted that an acknowledgment of a [865] debt under seal amounts to a covenant to pay; *Seddon v. Senate* (13 East, 63). In that case Lord Ellenborough says (ib. 74), "The same sense is to be put upon the words of a contract in an instrument under seal, as upon the same words in any instrument not under seal." Now, it is clear that an action of assumpsit would have lain upon the contract of 30th of August 1838, if it had not been under seal. [Cresswell J. An acknowledgment of a debt does not amount to a promise, but the law implies a promise from the acknowledgment.] There are cases in which an undertaking to make out a good title has been implied in a contract to sell. [Cresswell J. That would be, that the party contracted to sell what he had title to, and not that to which he had no title.] The learned judge should have directed the jury that there was no evidence of fraud. Brown, the witness called to prove the fraud, stated that he had no recollection whether he had said that it would make no difference. The finding upon all the issues was against the evidence. [Tindal C. J. You may take a rule upon the first point. We will consult Lord Denman as to the verdict being against evidence.]

A rule having been granted upon both points.

Sir T. Wilde and Channell Serjts. (with whom was Peacock) now shewed cause. The deed of the 30th of August 1838 contained no covenant on the part of the defendant to pay the 577l. 10s. At the time that deed was executed, the defendant's liability, under his personal covenant to the plaintiffs, was altogether barred by his bankruptcy and certificate. The agreement of the 21st of December 1832, was not before the court, otherwise than by the recital in the last deed. But, as by that

agreement they had contracted to sell the premises to the [866] defendant, they could not convey without making him a party. That deed may operate as an admission of the contract with Vaughan and Simmons; but it is not further binding upon the defendant. [Maule J. The deed of the 30th of August 1838 seems to enable the new trustees to maintain the same action in respect of the money, which Vaughan and Simmons might have maintained on the agreement of the 21st of December 1832.] The defendant thereby abandoned the contract of Nolan; which was abandoned by the trustees when they sold the property. Words in a deed which, as those used in *Seddon v. Senate*, clearly import an agreement to pay, may amount to a covenant: but no such agreement appears in this instrument.

Bompas Serjt. (with whom was Ogle), in support of the rule. The object and effect of the deed of the 30th of August 1838, were, to continue the mortgage security. The defendant was liable to pay the 577l. 10s. under his contract. [Cresswell J. In *Laird v. Pim* (7 M. & W. 474. S. C. per nom. *Laird v. Payme*, 8 Dowl. P. C. 860), a party having been let into possession of lands under a contract of purchase, which he refused to complete, it was held that the vendors could not recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract.] The recital contains a clear acknowledgment of a debt. A distinct admission of a debt by deed, amounts to a covenant to pay it; *Barfoot v. Freswell* (3 Keble, 465), *Bryce v. Carre* (1 Lev. 47), *Seddon v. Senate* (13 East, 63), *Saltoun v. Houstoun* (1 Bingh. 433, 8 J. B. Moore, 546), *Sampson v. Easterby* (9 B. & C. 505, 4 Mann. & R. 422 S. C., in error, 6 Bingh. 645, 4 M. & P. 60), *The Duke of St. Alban's v. Ellis* (16 East, 352), *The [867] Earl of Shrewsbury v. Gould* (2 B. & Ald. 487), Com. Dig. tit. Covenant (A. 2) (A. 4).

TINDAL C. J. To charge a party with a covenant, it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant, be apparent. In the present case the question is, whether or not the defendant did, by the indenture of the 30th of August 1838, covenant to pay to the plaintiffs the sum of 577l. 10s. The deed contains no express covenant to that effect: but it is argued that such covenant is necessarily implied. Looking at the whole scope of the deed, and considering the situation of the parties, it appears to me that no such intention is to be gathered from it. The deed begins with a recital of the settlement made on the 29th of August 1820, on the marriage of William Thomas and Catherine Jenkins, containing a power for the plaintiffs and the other trustees to invest the moneys thereby settled in the funds or upon real security. It then recites that a sum of 525l. had been secured by an indenture of the 31st of July 1838, and by the bond of the defendant of the same date, and that there was due from the defendant on the 21st of December 1832, the said mortgage sum of 525l. and an arrear of interest amounting to 52l. 10s. There is, therefore, a recital that a sum of 577l. 10s. is due from the defendant in respect of the mortgage debt followed by a further recital of a contract of purchase of the premises comprised in the mortgage, bearing date the 21st of December 1832, between Vaughan and Simmons, acting under the power vested in them by the indenture of the 31st of July 1828, and the defendant. After which comes this: "And whereas the said agreement (of the 21st of December [868] 1832), hath not been carried into effect, but the said principal sum of 525l., and the said arrear of interest of 52l. 10s., making together the sum of 577l. 10s., is still due and owing from the said Robert Taylor to the said John Courtney and Benjamin Howell, as he the said Robert Taylor doth hereby acknowledge." The plaintiffs contend that this acknowledgment of a debt due for principal and interest, implies a covenant or agreement to pay it. It appears to me, however, that no such inference is to be drawn from this recital. Had it been the intention of the parties that the defendant should be liable to pay the 577l. 10s., nothing could have been more easy than to insert an express covenant for payment of the money. In the absence of such a covenant this acknowledgment may be supposed to have been inserted for some other purpose. It is also worthy of observation that, as the deed of 1838 recites the previous indenture of 1828, in which the defendant covenanted to pay the mortgage debt and interest, there was no necessity to require from him a new covenant. That of itself furnishes strong ground for presuming that a further engagement to pay was not contemplated. Looking at the deed of 1838, the acknowledgment may very well have been made *diverso intuitu*. The object of the parties may have been, to prevent any disputes with the new trustees as to the equity of redemption.

If this admission were to operate as a covenant to pay the money, the defendant would be in a worse situation than at the time the deed of 1838 was executed. That deed recites the contract with Vaughan and Simmons, but does not shew that that contract is rescinded. If construed as a dry covenant by the defendant to pay the 577l. 10s. abstractedly from his position as a purchaser under the contract of the 21st of December 1832, this deed would compel him to pay at all events; whereas, under that contract, he would be liable only upon the property being [869] conveyed to him. Looking at the whole scope of the deed, it cannot be treated as a covenant by the defendant to pay the money. It appears to me therefore, that the rule must be discharged. I am glad to be able to come to a conclusion, by which the party who procured the defendant to execute the deed is absolved from all suspicion of fraud.

COLTMAN J. I am of the same opinion. I do not think the deed of August 1838 was at all intended to vary the liability of the defendant in respect of the 577l. 10s. The agreement of the 21st of December 1832, by which the defendant contracted with Vaughan and Simmons to purchase the mortgaged premises, and to pay the interest until the purchase should be completed, was in existence at the time this deed was prepared: from a recital therein it appears that all interest due in respect of the 577l. 10s. had been received up to the 24th of June then last. The recital in question was introduced, not for the purpose of creating a personal covenant to pay the 577l. 10s., but to explain why that sum was mentioned in the contract. The only engagement on the part of the defendant is, to pay the money on the property being conveyed. It gives a power to the trustees to sell. Is the defendant to pay the purchase-money after that power has been exercised? It seems to me that we give full effect to the deed by saying that it only intended to render the defendant liable to pay on having a conveyance; and that he has not entered into the covenant declared upon in the second count.

The account stated is open to the same answer.

MAULE J. I also am of opinion that the defendant is entitled to the verdict on the plea of non est factum to the second count, and never indebted to the third count. [870] The contract declared upon in the second count is, that by the indenture of the 30th of August 1838, the defendant covenanted with the plaintiffs that he would, upon request, pay unto them the sum of 577l. 10s. The object of the deed given in evidence was to add one trustee and to substitute another. The recitals mention a mortgage of the 31st of July 1828, and a bond of the same date, and that the mortgage debt and bond still remain unsatisfied, and also a contract of sale for the aggregate amount of principal and interest; and a power of sale is given independently of that contract of sale. The object of the deed appears to have been to leave the defendant in the same situation as to liability, in which he then already stood; and the action fails because the recital relied on is not an acknowledgment that the money was due and was payable on request, but to be paid on a conveyance being executed. Where in a deed a party unequivocally admits himself to be liable to pay money, a covenant that he will pay it may be implied. But, where the deed sets out the instrument under which the liability arose, and does not expressly affirm that liability, I think the necessity for implying a covenant to pay does not arise. It would not be giving this recital its true and legitimate effect to construe it as a covenant for the payment of the money. If the recital had been that the money was due on a parol security, no such covenant would have been implied as would have the effect of merging the parol security. Where there is a liability the origin of which is shewn, there is no necessity for implying a covenant. I have not the smallest doubt that no intention was entertained by any of these parties that the defendant, upon executing this deed, should be placed in the situation of a person liable on a covenant for payment of money. The question upon the pleadings on the account stated is, in substance, the same.

[871] CRESSWELL J. I am of the same opinion. I think there is no ground for implying a covenant for payment of the money, and no promise to sustain the account stated. The general scope of the deed of the 30th of August 1838, appears to have been, to remove Courtney from the trust and to appoint a new trustee; and the object of the particular recital seems to have been, to describe the nature of the property to be conveyed to the new trustees. The deed recites the marriage settlement, the mortgage bond of the 31st of July 1828, and that the mortgage debt and an arrear of interest were due; the agreement of the 21st of December 1832, whereby the

defendant contracted to buy for 577l. 10s.; that Courtney was desirous of ceasing to be a trustee, and the appointment of new trustees; that the agreement of sale had not been carried into effect, but that the principal and interest, amounting together to 577l. 10s., were still due from the defendant to the plaintiffs, as he the defendant did thereby acknowledge. The object of that simply was, to point out what the new trustees were to take, and to shew that the contract of purchase had not been completed and that the money remained unpaid. I see nothing that can amount to an implied covenant to pay the money on request; nor do I find any promise to sustain the count upon an account stated. The rule for a new trial, therefore, must be discharged: and as all imputation of fraud is abandoned, the pleas alleging fraud had better be struck out of the record (*a*).

Rule discharged.

[872] COLE v. GREEN. Dec. 6, 1843.

[S. C. 7 Scott, N. R. 682; 13 L. J. C. P. 30.]

By a paving, lighting, watching, cleansing and improving act, commissioners are empowered to enter into any contract for the performance of any of the works by the act authorized to be done, or for any other of the purposes of the act, provided that no such contract shall be made for a longer term than three years; and before any such contract shall be entered into, ten days' public notice, as least, shall be given, in order that persons willing to undertake the same, may make proposals to the commissioners at a time and place in such notice to be specified; and all such contracts shall specify the several works to be done, and the prices to be paid for the same, and the time or times when the works are to be completed, together with the penalties to be incurred in the case of non-performance; and the same shall be signed by the commissioners or by any three of them, or by their clerk, and also by the person or persons contracting to perform such works respectively; and copies of such contracts shall be entered in a book, to be kept for that purpose by the clerk. Held, that the proviso applies to the duration of the contract only, and that the subsequent provisions are not essential but directory, and that a contract signed otherwise than in the manner pointed out, is not, therefore, void.—A certain number of the commissioners were appointed a road-committee, who resolved to obtain estimates for certain works. At a meeting of the commissioners, 28th of April 1842, a tender made by the plaintiff was read, and the committee recommended that it should be accepted. A general board of commissioners met 3d of May, when the minutes of the road-committee were confirmed, "but with the understanding that the contract (the work in question) should not be entered into otherwise than upon the express condition that the commissioners should not be required to pay the contractor until they should have received the moneys from the owners of the lands." At a meeting of the road-committee, 5th of May, it was resolved that the contract proposed to be entered into by the plaintiff should be signed, and it was accordingly signed, by the road-surveyor, that being the course usually adopted on such occasions. The contract so signed contained an undertaking on the part of the commissioners, to use all lawful means for compelling the respective owners of the lands adjoining on each side of the street, to pay their portions, on the work being satisfactorily completed. Held, that the resolution of the general board, coupled with the order of the road-committee, authorized the road-surveyor to sign, on behalf of the commissioners, a contract made in conformity with that resolution, and that the undertaking was reasonable, and that its insertion in the contract by the road-committee, was justifiable.—By a subsequent act, after giving the commissioners authority to cause certain streets, &c. to be soughed, paved, &c., it was provided that the charges and expenses should be reimbursed to the commissioners by the occupiers or owners of the houses, buildings, ground or land within or on the respective sides of the streets, &c. so to be soughed, paved, &c., each such occupier or owner paying a proportionable share thereof, to be ascertained by the commissioners or their surveyor, and that if any such occupier, &c. should at any time refuse or neglect to pay such proportion of the said charges and expenses, the same should be levied by distress and sale, or sued for and recovered, together with full

(a) This was assented to.

costs of suit, in any of Her Majesty's courts of record at Westminster.—In an action against one of the commissioners for work done under a contract, the breach of promise assigned was, that although there were divers lawful means for compelling the owners of the houses, &c. to pay their respective portions, to wit, the means in the acts mentioned, and which the commissioners might and ought to have resorted to, yet neither the defendant nor the other commissioners did, or would, use all or any of such lawful means, but therein made default; and the plaintiff had thereby been prevented from obtaining the money due to him. The defendant, by his plea, traversed the allegation, that there were lawful means existing for compelling the owners, &c. to pay. Held, that the meaning of the clause was, that the land-owners should not be called upon to pay in anticipation, but that, when the work had been actually done, the commissioners were to be in a condition to call upon the land owners for payment of their proportionable shares of the expenses incurred, although the amount might not have been actually paid to those who did the work.—Held, also, that the omission in the declaration to specify any particular means whereby the owners and occupiers might be compelled to pay, was no ground for arresting the judgment.

Assumpsit. The first count of the declaration stated, that, after the passing of certain acts of parliament (3 & 4 W. 4, c. lxviii., and 1 & 2 Vict. [873] c. xxxiii. (vide *infra*, 880)), and whilst the defendant was one of such commissioners as aforesaid, to wit, on the 14th of May, 1842, by a certain agreement, then made and entered into between the plaintiff of the one part and the commissioners of the other part, it was agreed by and between the plaintiff and the commissioners in manner following; that is to say, the plaintiff agreed to make that portion of a street called Conway Street, in Birkenhead, extending from Watson Street to the north-west corner of Mr. Pim's garden wall, upon the conditions, and in manner, thereafter mentioned, that is to say, he the plaintiff did thereby undertake and agree to perform and execute all and singular the works mentioned, in the manner specified in the schedule to the said agreement annexed, and to complete the same on or before the — day of [874] —, and should and would find and provide all over-lookers, labour, tools, and materials of every description, not thereafter expressly excepted, which should be necessary for proceeding with and completing the said works; that notwithstanding certain work or materials might be set forth to be done or supplied in the said schedule, it should not be construed to limit or affect the extent of the contractor's liability under that clause; that the same should be performed and executed in a sound, substantial, and workmanlike manner, to the satisfaction of the commissioners or their surveyor; that if any work should appear to the commissioners or their surveyor to be improperly executed with improper or defective materials, the contractor should, at his own expense, alter and remove the same, and make good and complete the deficiency, according to the schedule; that, in the event of the contractor's not proceeding with due diligence and dispatch in the performance of the said work, or in case the same should not be executed to the satisfaction of the commissioners or their surveyor, the commissioners or their surveyor,—after having given to or left at the usual place of abode or place of business of the plaintiff, a notice in writing requiring such works to be forthwith or properly proceeded with,—should be at liberty to employ any other person or persons to proceed with the said work, and to furnish and provide the necessary labour and materials for completing the same, and to charge the cost thereof to the contractor, or deduct the amount from any moneys that might be due or payable to him from the commissioners; and, in case the moneys, if any, that might be due or payable to the plaintiff, should not be sufficient to defray the expense occasioned by the delay in, or the insufficiency of, the work of the plaintiff, such deficiency should be borne by the plaintiff, his executors or administrators, and should be recoverable by the commissioners, as and [875] in the nature of liquidated damages: Provided, nevertheless, that any materials the property of the plaintiff that might be used in completing the works so ineffectually done, or which might be omitted or neglected to be done, should be allowed and paid for by the commissioners; and, in consideration of the performance of the said contract on the part of the plaintiff, the commissioners agreed to pay for the said works at the following rates or prices, that is to say, for forming, sewerage, and rocking carriage way, curbing and paving channels, macadamizing the carriage road, and

rocking, gravelling the parapets, the sum of 2l. 19s. 6d. per lineal yard, for each main hole 20s., for cross sewers 11s. per lineal yard, which was to remain in the hands of the commissioners until the work should be completed; Provided, nevertheless, and it was expressly understood and agreed between the parties thereto, that the commissioners should not be required to pay for the above works until the same should be paid for by the respective owners of the land adjoining on each side of the said street. And the commissioners thereby agreed to use all lawful means for compelling such owners to pay their respective portions, on the works being satisfactorily completed. All old materials on the road or in the sewer to be allowed to the contractor. And the said work was to be done according to the schedule, to the satisfaction of the surveyor of the commissioners, for the prices in the schedule in that behalf mentioned, being the prices and other prices for the other work in the said schedule in that behalf mentioned. Mutual promises. Averment, that the plaintiff did then, in pursuance of the said agreement, perform and execute all and singular the works mentioned, in the manner specified in the schedule, and did complete the same in a reasonable time in that behalf and according to the said articles, and, during the continuance of the said work, did find and provide all over-[876]-lookers, labour, tools, and materials of every description which were necessary for proceeding with, and completing, the said works, and did then perform and execute the said works in a sound, substantial, and workmanlike manner, to the satisfaction of the commissioners and their surveyor, and did proceed with due diligence and dispatch in the performance of the said work, and did perform and fulfil all things in the said agreement contained on his part to be performed and fulfilled, and that the said works were then completed by the plaintiff, to the satisfaction of the commissioners and their surveyor, and according to the true intent and meaning of the agreement; and although the price and value of the said work, at the rates and prices aforesaid, amounted to a large sum, to wit, 560l., and although there were, then and from thenceforth for a long time, to wit, till the commencement of the suit, divers lawful means for compelling the owners in the said articles in that behalf mentioned and referred to, to pay their respective portions, to wit, the means in and by the last-mentioned acts in that behalf specified, and which the commissioners then might and ought to have used and resorted to; of all which several premises, as well the said commissioners as the defendant, to wit, on the day and year last aforesaid, had notice, and were then requested by the plaintiff to use all such lawful means as aforesaid for the purpose aforesaid; yet neither the defendant nor the commissioners, nor any of them, did nor would, when they were so requested as aforesaid, or at any other time, use all or any of such lawful means as aforesaid, but therein wholly failed and made default; and by means of the premises the plaintiff had been wholly prevented from obtaining the said price, or any part thereof, and the same was still wholly due and unpaid to him.

Second count for work and labour, and materials. [877] Third count for money paid. Fourth count upon an account stated.

The defendant pleaded—first, non assumpsit; secondly, to the first count, that the plaintiff did not perform or execute the said works, nor did he complete the same, in a sound, substantial, and workmanlike manner, to the satisfaction of the commissioners and their surveyor, according to the true intent and meaning of the said agreement, modo et formâ; concluding to the country; thirdly, to the first count, that the defendant and the commissioners did use all and every lawful means for compelling the said owners to pay their said respective portions of the said moneys in that count mentioned: concluding to the country; fourthly, to the first count, that there were no lawful means existing for compelling the said owners to pay their said portions, which the commissioners could have used or resorted to; concluding to the country—fifthly, to the whole declaration, that the commissioners, before the commencement of the suit, to wit, on, &c. paid to the plaintiff, who then accepted and received from them divers sums of money amounting to a large sum, to wit, 1000l., in full satisfaction and discharge of the said causes of action in the several counts mentioned, and all damages by the plaintiff sustained by reason thereof.

The replication joined issue upon the first four pleas, and traversed the acceptance in satisfaction in the fifth plea.

The rejoinder joined issue upon the replication to the fifth plea.

At the trial before Maule J. at the last spring assizes for the county of Chester the following facts appeared:—

c. lxviii. (supra, 880), or pursuant to the authority given by the commissioners ; or to enter a verdict for the defendant on the fourth issues.

April 15. Sir T. Wilde Serjt., in Easter term last, obtained a rule nisi accordingly. The declaration did not disclose any means whereby the owners and occupiers could be compelled to pay their proportionable shares of the expense incurred. The contract was not authorized by the statute. [Tindal C. J. The motion should be rather in arrest of judgment.]

A rule having been granted in the alternative—to enter a nonsuit, or to enter a verdict for the defendant upon the general issue, or to arrest the judgment,

Byles Serjt. (with whom was E. V. Williams), in Trinity term last, shewed cause. The contract declared upon sufficiently complies with the requisites of the statute. The directions contained in the 151st section of the Birkenhead paving act (supra, 880), are not conditions precedent, so that, on a failure to comply with any one of them, the contract is avoided. It may have been intended that a contract for a longer term than three years from the making thereof should be void ; but the subsequent matters are directory only. They may all be obligatory upon the commissioners themselves ; but it never could have been intended that the rights of parties contracting with them should be affected by the neglect of the commissioners. In *Rez v. Inhabitants of Birmingham* (8 B. & C. 29, 2 Mann. & Ryl. 230), a marriage by licence was solemnized between a man and a woman, the former being a minor, whose father was living, and who did not consent to the marriage. It was [884] held that the marriage was valid, the 4 G. 4, c. 76, s. 16, being directory only. So, in *Rez v. Justices of Leicester* (7 B. & C. 6, 9 D. & R. 772. See ante, vol. i. 448) it is laid down that negative words will make a statute imperative, but that words in the affirmative are directory only. [Wilde Serjt. The contracts of the commissioners are entered into by them for the benefit of the public. The parties who contract with them are bound to see that the contracts are entered into in the terms prescribed by the act. Tindal C. J. The formality of signature by three commissioners, or by the clerk, as representing the body, may be something more than directory.] By the 43 Eliz. c. 2, s. 1, the justices are required to appoint churchwardens “yearly, in Easter week, or within one month after Easter.” These words have been held to be directory only. In *Rez v. Sparrow* (2 Stra. 1123), the court say, “Here, are no negative words, as in 12 Car. 2, c. 25, s. 13, as to the price of wines, where the words ‘and at no other time’ are added.” In *Rez v. Loadale* (1 Burr. 445), Lord Mansfield says : “There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory. The precise term, in many cases, is not of the essence.” The clause immediately preceding this section runs thus : “all such contracts shall specify the several works to be done, and the prices to be paid for the same, and the time or times when the said works are to be completed, together with the penalties to be incurred in the case of non-performance thereof.” Are these words directory only, or do they import a condition precedent? Or is the clause succeeding it merely directory?—“copies of all such contracts shall be entered in a book to be kept for that purpose by the clerk to the said commissioners?” The contract was signed, by order of [885] four commissioners present at the meeting, by Coxon, the road-surveyor, according to the usual course. The commissioners having ratified and adopted the contract so signed, it is not competent to them to say that it was not executed in the manner required by the act. It would be a good signature within the statute of frauds (vide *Burdett v. Spilsbury*, ante, 386, 408 (a) (b), 422 (a), 429 (a), 440 (d), 468 (a)). It will be contended, that Coxon was not authorized to insert a clause binding the commissioners to use all lawful means for compelling the owners of land to pay their respective portions. But this is a stipulation without which the agreement would have been perfectly inoperative, and which would, therefore, have been necessarily implied. The means which the commissioners had at their command for this purpose are distinctly pointed out by the 1 & 2 Vict. c. xxxiii. s. 18. The third and fourth pleas, therefore, afford no answer to the action ; *Negelen v. Mitchell* (7 M. & W. 612, 1 Dowl. N. S. 110). Though the declaration might possibly, for the reason assigned, have been held insufficient on special demurrer, there is no ground for arresting the judgment.

Sir T. Wilde and Channell Serjts. (with whom was Welsby), in support of the rule. The defendant not having interfered in any way is not personally, liable.

Neither is the work chargeable upon the funds to be collected under the act. The fifteenth section of the first act (*supra*) requires the presence of five commissioners. Here, four only were present at the meeting at which it was resolved that the contract should be signed. The contract was not framed in the manner required by the 151st section, no time being limited for the performance of the work, and no penalty imposed for non-performance. These are important regulations, made [886] for the protection of the rate-payers against jobbing. Where the contract is signed in the manner required, some security is afforded that the act has the sanction of the whole body of commissioners. Only in respect of works done within the authority of the act can the landowners be called upon for payment. Such clauses are not to be regarded as merely directory; *Davison v. Gill* (1 East, 64), *Curling v. Johnson* (10 Bingh. 89, 3 M. & Scott, 496). The resolution of the 3d of May 1842, authorized a contract to be entered into for making the street in question "upon the express condition that the commissioners should not be required to pay the contractor until they should have received the moneys from the owners of the land liable to pay the same:" it did not authorize the insertion in the contract of a clause binding the commissioners to use "all lawful means" for compelling the owners of the adjoining land to pay their respective portions on the completion of the work. [Cresswell J. Would not the law impose on the commissioners the duty of using all lawful means for enabling them to perform their contract? If so, how can the insertion of an express stipulation to that effect, avoid the contract (c)?] The duties and powers of the commissioners are defined by the act. The law does not cast upon them the duty of doing any thing which the act does not warrant. By the contract it is stipulated that they shall not be called upon to pay for the work until they shall have received the moneys from the owners of the land. If the commissioners have been guilty of any dereliction of duty in not using any means they may have of compelling payment, they may be liable to a mandamus, but not to an action. The expression in the eighteenth section of the 1 & 2 Vict. c. xxxiii. "the charges and expenses attending the same shall be re-[887]-imbursed to the said commissioners by the occupiers or owners," &c., imports that the commissioners must pay the expense incurred in making any street, &c. before they can call upon the owners or occupiers for their proportionable shares: and this is, in express terms, excluded by the contract. But, if such an action will, in any case, lie, it is only sustainable in respect of some breach of duty by the commissioners in their official character. The declaration should have shewn what lawful means there were for compelling payment by the landowners.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. This was an action of assumpsit on a special agreement. The declaration alleged that the defendant was, and is, one of the commissioners for putting into execution two acts of parliament, for, amongst other things, paving and improving the township of Birkenhead, in the county of Chester; that, whilst the defendant was one of the commissioners, by a certain agreement between the plaintiff and the commissioners, the plaintiff agreed to make a certain portion of a street called Conway Street, and to do certain work in a schedule to the agreement mentioned: and that, in consideration of the performance of the contract on the part of the plaintiff, the commissioners agreed to pay for the work at certain specified rates: "provided nevertheless, and it was expressly understood and agreed between the parties thereto, that the commissioners should not be required to pay for the above works until the same should be paid for by the respective owners of the land adjoining on each side of the street. And the commissioners thereby agreed to use all lawful means for compelling such owners to pay their respective portions, on the work being satisfactorily completed." The de-[888]-claration then averred performance of the contract by the plaintiff to the satisfaction of the commissioners and their surveyor; that the price, according to the agreement, amounted to 560l.; but that, although there were divers lawful means for compelling the owners of the land in the agreement mentioned to pay their respective portions, to wit, the means in the acts mentioned, and which the commissioners might and ought to have resorted to, yet neither the defendant nor the other commissioners did or would use all or any of such lawful means, but therein made default, and the plaintiff had thereby been prevented from obtaining the money due to him.

(c) Vide *Cane v. Chapman*, 5 A. & E. 647; 1 N. & P. 104; 2 Harr. & W. 355.

sewers, drains, or watercourses, shall be made, repaired, and amended, scoured, and cleansed as aforesaid, each such occupier, or person in possession, or owner, paying a proportionable share thereof, such share to be ascertained by the said commissioners or their surveyor:" the clause then goes on to provide, that, "if any such occupier or person in possession, or owner, shall, at any time, refuse or neglect to pay such proportion of the said charges and expenses so to be ascertained as aforesaid, the same shall be levied by distress and sale of the goods and chattels of such occupier or person in possession, or owner, in like manner as the rates hereinafter directed and required to be raised and levied are authorized to be recovered, or shall and may be sued for and recovered, together with full costs of suit, in any of Her Majesty's courts of record at Westminster."

Upon this section, it was contended for the defendant that the expression "the charges and expenses shall be reimbursed to the commissioners," imports that they must first pay the expense incurred in making any [894] street, &c. before they can call upon the owners and occupiers of the adjoining land to pay their proportionable shares. But it seems to us that the true meaning of the statute is, that the land-owners shall not be called upon to pay in anticipation of the work being done, but that, when the work has been actually done,—whether by the servants of the commissioners, or under contracts entered into by them,—the commissioners are in a condition to call upon the land-owners for payment of their proportionable shares of the expense incurred, although the amount may not have been actually paid to those who did the work. And this must have been the construction which the commissioners themselves put upon the eighteenth section of the statute, at the time when the contract in question was entered into; for, otherwise, they must say that they undertook to do that which they knew they had no means of doing.

If this construction of the eighteenth section be correct, the commissioners had the same means of compelling the occupiers and owners of land adjoining Conway Street, to pay the money in question, as they had to compel the payment of rates. They might also have maintained actions at law for the money. These are lawful means of compelling payment; and the issue on the fourth plea,—which traverses the existence of any such means,—was properly found for the plaintiff.

In the event of these points failing, it was contended that the judgment must be arrested, because the declaration does not specify any particular means whereby the owners and occupiers might be compelled to pay. But we are of opinion that such an objection cannot prevail in arrest of judgment, whatever might have been the fate of it if taken on special demurrer.

Upon the whole, therefore, we think the rule must be discharged.
Rule discharged.

[895] LINDON AND OTHERS, Assignees of Mason, v. SHARP. Dec. 6, 1843.

[S. C. 7 Scott, N. R. 730; 13 L. J. C. P. 67. Referred to, *Ex parte Cooper*, 1878, 10 Ch. D. 326.]

A trader having overdrawn his banker's account to the extent of 864l., promises a guarantee for 550l., and assigns all his property to the bankers by a deed, in which 1000l. is stated to be due, and which contains a power of sale upon non-payment of that sum upon demand, but no stipulation for further advances, though further advances are in fact made: Held, an act of bankruptcy.

Assumpsit, against Sharp as the registered public officer of the Provincial Bank of England, for money had and received by the bank to the use of the plaintiffs as assignees.

The defendant pleaded non assumpsit, and a traverse of the plaintiffs being assignees; with notice to dispute the act of bankruptcy.

The particulars of demand claimed 2502l., being the amount paid by Mason to the bank, in cash and bills, from the 28th of December 1841 to the 17th of February 1842.

The plaintiffs also brought an action of trover against the defendant for the value of goods, of which the defendant had taken possession under a bill of sale from Mason bearing date on the former of those days (28th December 1841). In this action the

defendant pleaded not guilty, and two pleas traversing the plaintiffs' possession, and their character of assignees.

Both causes were entered for trial before Wightman J. at the summer assizes for the county of Devon.

It was agreed that the evidence given in the action of the trover, should be considered as also given in the action of assumpsit.

The facts which appeared were as follow :—In November 1841, Mason, who carried on the business of a miller, opened an account with the bank. In December having overdrawn his account to the extent of 864l., he was pressed for security; upon which, Mason procured eleven persons to give guarantees for 50l. each; and on the 28th of December, he executed to the banking com-[896]pany a bill of sale of a policy of insurance for 700l., and of certain stock and effects enumerated in a schedule (including mill-stones and machinery), with a power of sale on default in payment of 1000l. on demand. The deed recited that Mason was indebted to the company in 1000l., but it contained no engagement on the part of the bank to make further advances. There was no evidence that Mason had any other property than that mentioned in the schedule. The cashier of the bank, through whom the negotiation for the security took place, was aware, at the time, that Mason had no other property to carry on his trade or to pay his creditors. After the execution of the deed, Mason paid in and drew out money, and the balance against him was considerably increased. The fiat against Mason was awarded on the 22d of February 1842.

In the action of trover, which was first tried, it was contended for the plaintiffs, that the execution of the bill of sale was an act of bankruptcy, and that if it was not, the assignees were entitled to a verdict, on the ground that the debt in respect of which it was given had been satisfied by the subsequent payments.

In the action of trover a verdict was taken for 450l. 9s. 9d., and in the action of assumpsit for 1886l. 10s., the court to have power to draw all such inferences from the facts proved, as a jury might have drawn.

Sir T. Wilde Serjt., in Michaelmas term 1842, moved to enter a nonsuit in each action. The execution of the bill of sale was not an act of bankruptcy; *Baxter v. Prichard* (1 Ad. & E. 456, 3 N. & M. 638), *Rose v. Haycock* (1 Ad. & E. 460, n., 3 N. & M. 645).

A rule nisi was granted in the action of assumpsit; but in the action of trover it was refused.

[897] Bompas Serjt. (with whom was Merewether), in Easter term last, shewed cause. The bill of sale was clearly an act of bankruptcy. It was a fraud upon the rest of Mason's creditors. The statement as to the amount due from him to the bank was false, to the knowledge of the bankers; and it was fraudulent, because it enabled them to recover 1000l. from Mason, 804l. only being due. It could not be contended that the deed would not have been fraudulent if nothing had been due; and to swell the debt to 1000l. by adding 196l. to the amount really due, is as fraudulent as if the 196l. had stood alone. It was also fraudulent inasmuch as there was a change of possession, and as being a conveyance of all Mason's property without any money being advanced. No possession was taken, or intended to be taken, under it. [Cresswell J. There appears to have been no stipulation for an extended credit.] There is no provision as to advancing the 196l. to make up the 1000l. In *Twyne's case* (3 Co. Rep. 80 b.) Lord Coke says, "When any gift shall be to you in satisfaction of a debt by one who is indebted to others also—first, let it be made in a public manner and before the neighbours, and not in private; for, secrecy is a mark of fraud; secondly, let the goods and chattels be appraised by good people to the very value, and take a gift, in particular, in satisfaction of your debt; thirdly, immediately after the gift, take the possession of them; for, continuance of the possession in the donor, is a sign of trust." In *Edwards v. Harben* (2 T. R. 587) it was held, that, where a creditor takes an absolute bill of sale of the goods of his debtor, but agrees to leave them in his possession for a limited time, and, in the meantime, the debtor dies, and the creditor takes the goods and sells them, he makes himself executor de son tort, by his intermeddling with the goods, such [898] goods being the goods of the deceased; for, the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. [Tindal C. J. The modern doctrine is, that it must be left to the jury to say whether the continuance in possession is fraudulent or not. It is a strong fact, but not conclusive. Erskine J. In *Martindale v. Booth* (3 B. & Ad. 498), the

doctrine of Buller J., in *Edwards v. Harben*, is repudiated, and continuing in possession is treated as evidence only to be left to the jury that the transfer was colourable. Buller J. treats it as a question of law; but in the later cases, which are collected in a very good note to *Twyne's case* in Smith's Leading Cases, p. 1, it has been considered that the question is for the jury.] That is quite sufficient in the present case, power being reserved to the court to draw inferences of fact as a jury might have done. The propositions laid down by Buller J. in *Edwards v. Harben*, would still be very fit to govern the discretion of juries; *Manton v. Moore* (7 T. R. 67). [Tindal C. J. If the object of the deed was to raise money to pay other creditors, it would not be fraudulent.] In *Reed v. Blades* (5 Taunt. 212) it is laid down as absolute matter of law, more strongly than it would perhaps be now laid down; but a jury would, no doubt, come to the same conclusion. They ought to consider such a deed as fraudulent; and the judge would so direct them, leaving it to them to decide. In *Wordall v. Smith* (1 Campb. 332) Lord Ellenborough says, "There must be an exclusive possession under the deed; or it is fraudulent and void as against creditors." [Tindal C. J. Mason may have thought that he might obtain assistance from the bankers, which would enable him to go on.] If a trader go out of the way to avoid a creditor, it is an act of bankruptcy, although he does it with the expectation of raising money to pay. Here, [899] there is no provision for an advance of money, and without such a provision it can hardly be conceived that he bonâ fide expected to get over his difficulties and continue his trade. The possession of the assignor may be consistent with the deed; as, in the case of a marriage settlement; *Jarman v. Woolton* (3 T. R. 618), *Haselinton v. Gill* (3 T. R. 620, n.); or a bill of sale, by the sheriff, of goods taken in execution; *Kidd v. Rawlinson* (2 B. & P. 59), *Latimer v. Batson* (4 B. & C. 652, 7 Dowl. & R. 106). The law laid down in *Edwards v. Harben* has frequently met with approbation (*Manton v. Moore*, 7 T. R. 72; *Steel v. Brown*, 1 Taunt. 381). In *Reed v. Wilmut* (7 Bingh. 577, 5 M. & P. 553), Park J., observes "that the case of *Edwards v. Harben* had never been doubted;" and Bosanquet J., adds, "*Edwards v. Harben* is a leading case, and consistent with all the principles of law" (h). In *Martindale v. Booth* it was consistent with the terms of the decree, that the possession should be retained. Here, the right of possession vested immediately, though before the creditor could proceed to a sale, a demand was necessary. [Tindal C. J. Do you treat the execution of the deed as a fraud upon existing, or upon future, creditors?] Upon both. [Cresswell J. However fraudulent the transaction, it is no act of bankruptcy unless done with intent to defeat or delay creditors.] According to all the cases, if a false and delusive credit is held out, it is a defeating or delaying of creditors. [Cresswell J. Does the trader get credit by the assignment? The deed and the conduct of the parties are to be taken together. [Tindal C. J. referred to *Thornton v. Hargreaves* (7 East, 544), where the deed was held void on the ground of fraudulent preference; but Lawrence J., there said: [900] "If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy; . . . and, if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditors."] Here, the deed was clearly an act of bankruptcy, since it deprived the trader of the whole of his property and of the means of continuing his trade. *Worseley v. De Mattos* (1 Burr. 467) is directly in point. In that case the court of King's Bench held that the conveyance of the bankrupt's whole substance, though by way of security, and for valuable consideration, was fraudulent and an act of bankruptcy. The same doctrine was laid down in *Wilson v. Day* (2 Burr. 827). In *Compton v. Bedford* (1 W. Bla. 362), it was held that an assignment of all the trader's stock,—with a trifling and colourable exception,—in favour of particular creditors, shortly before an act of bankruptcy, was fraudulent. *Law v. Skinner* (2 W. Bla. 996), is to the like effect. *Hassell v. Simpson* (1 Dougl. 89, n.). So, in *Butcher v. Easto* (1 Dougl. 294), the execution by a trader of a bill of sale of all his stock and effects, to pay certain debts, any overplus to be accounted for to himself, was held to be an act of bankruptcy. So, in *Eckhardt v. Wilson* (8 T. R. 140), and *Tappenden v. Burgess* (4 East, 230). A conveyance by a trader of the whole of his property, whatever the object, whether for the benefit of particular creditors, or for distribution amongst all, is an act of bankruptcy. *Newton*

(h) Vide *Benton v. Thornhill*, 6 Taunt. 149, 2 Marsh. 427; *Steward v. Lombe*, 1 Brod. & B. 506, 4 J. B. Moore, 281.

v. *Chandler* (7 East, 138). *Doe dem. Lloyd v. Powell* (5 B. & C. 308, 8 D. & R. 35). In *Botcherley v. Lancaster* (1 A. & E. 77, 3 N. & M. 383), the execution of a deed by which the trader conveyed his whole property for the benefit of some of his creditors, was held to be an act of bankruptcy, [901] though the deed was executed by the trader only, and had never been acted upon and should not have passed out of his hands (a). In *Siebert v. Spooner* (1 M. & W. 714, Tyrwh. & Gr. 1075, 2 Gale, Exch. 135), Lord Abinger says; "If a man assigns the whole of his effects, not for a new consideration, but for an outstanding debt, that is an act of bankruptcy; because the very nature of the transaction prevents him from carrying on his trade." And Parke B. says: "I take it to be perfectly well settled, that, where a trader makes an assignment of all his effects, or of all except a very small portion, it is necessarily an act of bankruptcy without any actual fraud." In *Porter v. Walker* (ante, vol. i. 686, 1 Scott, N. R. 568), an assignment by a trader of goods,—there being no evidence that the assignor possessed any other property,—to a creditor, in trust for sale, to pay himself and the other creditors, was held by Littledale J. to be an act of bankruptcy; and that ruling was not questioned. [Cresswell J. I suppose it is meant to be contended on the part of the defendant, that the object of the assignment was, to enable the assignor to obtain further credit (d)]. The understanding of the whole profession has been, that the conveyance of all a trader's property is, necessarily, an act of bankruptcy. The 6 G. 4, c. 16, s. 4, by introducing certain provisoes, leaves no doubt that such a conveyance is an act of bankruptcy, where those provisoes are not complied with. [Tindal C. J. The bankers could not take possession immediately, because the whole 1000l. was not due.] They would have the power of selling, as owners, without making a demand. No proposition [902] of law is more clear than this, that a conveyance of all a trader's property to secure a bygone debt is an act of bankruptcy; as by thus dispossessing himself of the whole of his property, he deprives himself of the ability to carry on his trade. In *Whitwell v. Thompson* (1 Esp. N. P. C. 68), *Baxter v. Pritchard* (1 A. & E. 456, 3 N. & M. 638), *Rose v. Haycock* (1 A. & E. 460, n., 3 N. & M. 644), and *Harwood v. Bartlett* (6 N. C. 61, 8 Sc. 17), property was transferred for a full consideration. These cases, therefore, do not apply. Leescombe, the agent of the defendants, is shewn to have had full knowledge of the state of the bankrupt's affairs at the time the deed in question was obtained, and that the real effect of that deed was to convey to the defendants all that the bankrupt possessed.

Sir T. Wilde Serjt. (with whom was Montague Smith), in support of the rule. When Mason executed the deed in question, he was not winding up his concerns. He was not preferring a creditor in contemplation of bankruptcy or of insolvency. The object of the whole arrangement was the furtherance of his trade. The deed, it is true, is unfortunately framed; and the effect of the present action is to demand from the defendant bills, after the bankrupt has had the produce of those bills. The deed is followed by conduct corresponding with the inference that the object of the transaction was to facilitate the obtaining of further advances. Facilities were sought to be obtained for carrying on the trade, which would include the payment of the other creditors. There is an absence of all evidence to shew actual fraud. The effect of the late statute was to take away the difference between transfers by deed and transfers by delivery. The real question in this case is, what are the restraints imposed by law upon traders raising money [903] for the purpose of carrying on their trade. Very considerable transactions took place afterwards, which shews that the parties went on with an increased credit. The security was taken with a view, not to the trader's stopping, but to his going on. In *Twyne's case* (3 Co. Rep. 80 b.) the transaction was merely colourable; there was, in that case, no reason why possession should not be taken. It may be admitted, that upon the face of the deed of assignment there is nothing by which the bankers are compellable to make further advances; though it is not clear what view a court of equity would take of the operation of that deed. In *Whitwell v. Thompson* (1 Esp. N. P. C. 68) Lord Kenyon said that all the

(a) By the execution of the deed, supposing no livery of seisin to be necessary, the property is vested in the party to whom the grant, &c. is made, until such party disclaims.

(d) Quære, whether by taking a security for more than was due, the bankers did not impliedly undertake to make further advances, at least to the extent of the difference.

cases where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a bygone debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him. Here, the object of the assignment was not to get out of debt, but to get into debt; *Rose v. Haycock* (1 A. & E. 460, n., 3 N. & M. 644). In *Baxter v. Pritchard* (1 A. & E. 456, 3 N. & M. 638) it was held that an assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase-money, is not an act of bankruptcy, when the purchaser pays a fair price for the goods, and is ignorant of the trader's design. In *Harwood v. Bartlett* (6 N. C. 61, 8 Sc. 171) goods were sold by the defendant as agent to C., in contemplation of C.'s bankruptcy, for the purpose of raising money for the benefit of the defendant and C., and defrauding C.'s creditors, but the purchasers paid a fair price, and were not [904] cognizant of any fraud. It was held that the sale was not an act of bankruptcy. The doctrine of these cases, though at variance with the dicta and decisions in some of the older cases, is in perfect consonance with the general principle of the bankrupt law. Here, there was no evidence to shew that the deed did, in fact, convey all Mason's property; and, if it were so, it is not to be assumed that the defendants knew it; *Oom v. Bruce* (12 East. 225), *Hentig v. Staniforth* (5 M. & S. 122).

The plaintiffs, by relying on the subsequent payments in the action of trover, have adopted those payments, and cannot now recover them back: they cannot adopt the transaction in part and repudiate it in part; *Birdwood v. Raphael* (5 Price, 593), *Brewer v. Sparrow* (7 B. & C. 310, 1 Mann. & Ryl. 2).

Bompas Serjt., as to the last point. In the action of trover the plaintiffs sought to set up the payments only in the event of its being held that the assignment was not an act of bankruptcy.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the court. Upon the argument in this case, which was an action for money had and received, three questions were raised; first, whether the execution of the deed of the 28th December 1841 was an act of bankruptcy; secondly, whether the banking company had notice of that act; thirdly, whether the assignees, by setting up, in the action of trover, as one ground of their right to recover, that the original debt had been since paid off, have so irrevocably adopted the subsequent payments, and appropriated them to the liquidation of the original debt, as to be precluded from recovering the amount in an action for money had and received.

[905] Upon the first question we are of opinion, that, although the deed did not purport, on the face of it, to convey all Mason's property, yet the evidence was sufficient to shew that it did, in fact, substantially, convey all that he had at that time; and, although the assignment was evidently made by Mason upon the expectation that the bank would allow him to remain in possession and carry on his trade, and make him further advances on the credit of the assignment, yet, as there was no stipulation (a) for any fresh advances, and as the deed placed it in the power of the bank to take possession at any time, and to sell in default of payment on demand, this case comes within the principle of those decisions which have declared that the conveyance of all a trader's property, whether bonâ fide for the purpose of regular distribution among all his creditors, or by way of security to bonâ fide creditors for a valuable consideration, is fraudulent, and an act of bankruptcy. It is so, if it be for distribution among all his creditors; first, because thereby he necessarily deprives himself of the power of carrying on his trade; secondly, because it is an attempt to make a distribution of his effects different from that which the bankrupt law directs. See Lord Eldon's judgment in *Dutton v. Morrison* (17 Ves. 193). And if such conveyance is made as a security to creditors for a pre-existing debt, then it is fraudulent and void: not only because the trader thereby deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of his other creditors, but, according to Lord Mansfield in *Worsley v. De Matlos*, because "such a conveyance of all, must either be fraudulently kept secret or produce an immediate absolute

(a) Vide ante, 901.

bankruptcy" (c). If this had been the case of a conveyance, upon a *bonâ fide* purchase by the defendant, [906] the transaction would have been protected on the principle laid down in *Bazler v. Pritchard*, and some other cases referred to; or if it had been an assignment by way of security to the bank for advances of money thereafter to be made, the observation of Lord Kenyon in the case of *Whitwell v. Thompson* would have applied strongly in favour of the defendant. But as it was a security for a by-gone and pre-contracted debt, the language of Lord Kenyon in the last case, and that of the judges in the other cases, pointedly apply the principle of the earlier decisions to this transaction, and confirm the opinion that it is an act of bankruptcy.

Upon the second question, it was, of course, at once admitted that the company had notice of the execution of the deed; but it was argued, that, as the deed did not purport to convey all the bankrupt's property, they had no notice of that which rendered it an act of bankruptcy. Upon reference, however, to the evidence of the manager of the bank, through whom the negotiation for the security took place, it is obvious that he was well aware that the bankrupt had no other property available to enable him to carry on his trade, or to provide for the payment of his other creditors. Therefore, the company, through their agents, had notice of all the facts necessary to render the transfer an act of bankruptcy.

Upon the third point, it is manifest, on the statement of it, that the assignees could only be considered as adopting the subsequent payments to the amount of the original debt, namely, 864l.; because as soon as payment to that extent had been made, the deed would be satisfied, and no more would be necessary to enable them to recover in an action of trover. At all events, therefore, the assignees are entitled to a verdict for 1022l. 0s. 10d. But we think that the verdict ought not to be reduced. If, indeed, the jury had, under the judge's direction, found that the deed of the 28th of [907] December was no act of bankruptcy, and the verdict in the action of trover could only be supported on the assumption that the debt secured by the deed had since been paid off, the assignees could not have repudiated that payment in the action for money had and received. But, in asserting their claim in the action of trover, the assignees appear to have done no more than declare that if the deed of the 28th of December was no act of bankruptcy, they were willing to adopt and confirm so much of the payment as was sufficient to pay off the original debt. But as, by arrangement between the parties at the trial, both the questions in the action of trover were reserved for the opinion of the court, and the right of the assignees to recover in an action for money had and received, was also reserved for the decision of the court,—making, as it were, one reference of the whole question between the parties both in fact and in law,—we think that the defendant cannot be allowed, by abandoning all claim to disturb the verdict in the action of trover, to withdraw from the consideration of the court the ground on which the verdict is to stand, and so convert a conditional adoption of payments into an absolute appropriation of them to the liquidation of the original debt: and as, in our opinion, the assignees were entitled to recover, in both actions, upon the ground that the execution of the deed of the 28th of December was an act of bankruptcy, we think that the assignees are not estopped from denying, in the action for money had and received, that any of the subsequent payments were legally appropriated to the payment of the original debt. In *Brewer v. Sparrow*, which was cited and relied on, the assignees had accepted, unconditionally, the payment of a sum of money as the balance of an account rendered to them by the defendant; and they were held to have adopted and confirmed the account so rendered and paid. In *Birdwood v. Raphael*, [908] which was also relied on, there was a question whether a general pledge by the bankrupt was an act of bankruptcy; but in an action of trover, brought by the assignees to recover the value of the goods legally pledged by the bankrupt before any act of bankruptcy, it was pressed in argument, that the assignees ought not to recover; because, as they could only succeed on the assumption that the debt, for which the goods had been pledged, had been paid off, and as, in fact, the pledge had been redeemed by payments after the act of bankruptcy, the assignees might afterwards recover the money. The answer given by the court was, in substance, that as the payment of the debt formed the foundation of the right of the

assignees to maintain trover for the goods, they could not afterwards disaffirm the payments, on the strength of which they had recovered the value of the goods (a). There, the only foundation of the right to recover, was, the admitted payment of the debt. Here, the assignees, in effect, recover in trover, on the illegality of the assignment, independently of all payment of the debt secured.

We think, for these reasons, that the assignees are right in each of the three points above considered; and that they are, therefore, entitled to retain the verdict for the full amount of 1886l. 0s. 10d. Consequently, the rule must be discharged.

Rule discharged.

[909] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco during this term were, Tindal C. J., Colman J., Erskine J., Cresswell J.

CLAPPERTON AND WIFE v. CATHERINE MONTEITH. Jan. 12, 1844.

It is no objection to the discharge of a prisoner, under the 48 G. 3, c. 123, that he has petitioned and has been remanded by the insolvent court.—The notice of motion under that statute must be entitled in accordance with the title of the cause.

Talfourd Serjt. moved for the discharge of the defendant under the 48 G. 3, c. 123, she having been in custody for twelve calendar months, in execution for a debt not exceeding 20l., exclusive of costs.

Byles Serjt. shewed cause, in the first instance, on the ground that the defendant had petitioned the insolvent debtors' court for her discharge, and had been remanded [910] until she should produce a certain bond for securing to her an annuity of 50l. per annum. He submitted that, under these circumstances, this court had no jurisdiction, inasmuch as the defendant was now under the jurisdiction of the insolvent court. At any rate this court will not interfere, for if the application were to succeed that court would lose its power over her. The other side will probably call the attention of the court to *Chew Lye* (7 Dowl. P. C. 465). But there is a fact in this case which did not exist there, namely, that the remand was to produce a document. [Tindal C. J. In *Hopkins v. Pledger* (1 D. & Lowndes, 119) it was held that a prisoner in custody for twelve calendar months for a debt under 20l. was entitled to his discharge under the 48 G. 3, c. 123, notwithstanding he had applied for relief, under the 1 & 2 Vict. c. 110, to the insolvent court, and the commissioner had adjudged that he should not be entitled to the benefit of that act for three years—the operation of such an order being, not to secure the imprisonment of the applicant for that length of time at all events, but only to prevent his obtaining for so long the benefit of the insolvent act.]

The learned serjeant took a further objection, that the notice of the intended application was not properly intituled—the title of the cause being “Thomas Clapperton and Caroline his wife, plaintiffs, and Catherine Monteith, defendant;” and the notice being intituled, “Thomas Clapperton and Caroline his wife, plaintiffs, and Catherine Ure, sued as Catherine Monteith, defendant.”

Talfourd Serjt. submitted that there was no ground for opposing the motion. In answer to the second objection, he contended that the notice was not invalidated by the addition of the defendant's real name.

[911] TINDAL C. J. You must give another notice, and come again better prepared. The rest of the court concurred.

Rule discharged.

(a) Namely, by having established their property in the goods themselves up to the moment of the conversion.

SMART v. NOKES. Jan. 12, 1844.

[S. C. 7 Scott, N. R. 786; 13 L. J. C. P. 79; 8 Jur. 44.]

In debt the defendant pleaded never indebted, and payment; the plaintiff gave in evidence in chief a document purporting that the defendant admitted the debt, but that it had been paid by a bill of exchange: Held, that the unstamped bill was admissible in evidence for the plaintiff to negative the alleged payment.

Debt, for money lent, for interest, and upon an account stated. 1000l. was demanded in each count.

Pleas—never indebted, and payment.

The plaintiff, in his particulars, after giving credit to the defendant for a payment of 500l., claimed 500l. as the balance of the debt, with interest at 5 per cent.

At the trial, before Cresswell J., at the sittings for Middlesex in last Michaelmas term, it was proved that there had been various money transactions between the plaintiff and the defendant, which, it was allowed, resulted in a debt due from the latter to the amount of 1000l. In order to prove the defendant's admission of the debt, the plaintiff produced the following document in the defendant's writing:—

	£	s.	d.	
"1000)	500	0	0	cash
	500	0	0	bill
	33	6	8	interest

533 6 8 Bill at four months' date, at the rate of 20l. per cent.

"May 2, 1842."

The plaintiff's counsel then proposed to produce the bill in question,—which was improperly stamped,—for the [912] purpose of anticipating the inference that might be drawn from this document, that the 500l. had been paid by a bill. The reception of the bill in evidence was objected to on behalf of the defendant; and it was rejected by the learned judge on the authority of *Sweeting v. Halse* (a)¹. No witnesses were called for the defendant, and no other evidence was given of any payment. The learned judge left it to the jury to say whether or not they were satisfied that there had been an ascertained debt of 1000l.; and if so, whether it had been paid. They found that there had been a debt to that amount, but that it had been liquidated by payment of 500l. in cash, and the bill for 533l. 6s. 8d. The verdict was accordingly entered for the plaintiff on the first issue, for the defendant on the second.

Talfourd Serjt., in the same term (9th November), obtained a rule nisi for a new trial, upon the ground that the unstamped bill had been improperly rejected, and also that the verdict was against evidence. On the first point he cited *R. v. Hawkeswood* (b), *R. v. Pooley* (3 B. & P. 311), *Dover v. Maestaer* (5 Esp. N. P. C. 92), *Nash v. Duncomb* (1 Moo. & R. 104). [Tindal C. J. referred to *Gregory v. Fraser* (3 Campb. 454), the report of which case Cresswell J. observed was not very satisfactory.]

[913] Bompas Serjt. now shewed cause. The bill of exchange, being insufficiently stamped, could not be given in evidence for any purpose. The 31 G. 3, c. 25 (which has been incorporated with the subsequent stamp acts), by s. 19, expressly provides "that no bill of exchange liable to the duties imposed, shall be pleaded, &c. or given in evidence in any court, or admitted in any court to be *good, useful or available* (a)² in

(a)¹ 9 B. & C. 365, 4 Mann. & R. 287; where it was agreed between the drawer and acceptor of a bill of exchange, which had become due, that it should be renewed, and on the back of the bill another instrument for the same value was drawn and accepted by the same parties, but it was not stamped; at the same time the name of the acceptor was erased from the genuine bill. In an action on that bill, Lord Tenterden C. J. left it to the jury to find whether it had been cancelled with the consent of the drawer; and the unstamped instrument was submitted to the view of the jury: but the court held that the jury ought not to have been permitted to draw a conclusion of fact from the unstamped instrument.

(b) 1 Leach, C. C. 292, 3d ed., 2 East, P. C. 955, 2 T. R. 606, n.; Bayley on Bills, 80, 5th ed.

(a)² The words in italics are treated by the court (post, 915, 917, 918), as grammatically connected with the whole of the preceding matter; tamen quære; et vide infra (c).

law or equity," unless duly stamped. *Sweeting v. Halse* and *Jardine v. Payne* (1 B. & Ad. 663) are expressly in point. In the latter case it was held that an unstamped bill could not be given in evidence for the purpose of shewing, by an indorsement on it, that the plaintiff was the person mentioned in a letter written by the defendant. [Cresswell J. It may be said that in *Sweeting v. Halse*, the unstamped renewed bill was offered in evidence to prove a contract to cancel the original bill: in this case, the paper purporting to be a bill was offered to prove that it had no effect or validity as a bill (c). Still, it could not be "given in evidence," according to the words of the statute, even for that purpose. In the cases cited the unstamped document was tendered in evidence, not as a valid instrument, but for a collateral purpose. If such documents were so admitted, it would be an evasion of the statute, as the jury might always infer from them a debt between the parties. The cases relied upon on the other side are either cases of felony; as *R. v. Hawkeswood*, and *R. v. Pooley*; or of bribery; as *Dover v. Mestaer*, and *Coppock v. Bower* (4 M. & W. 361); or of usury; as *Nash v. Duncomb*; or of fraud; as *Gregory v. Fraser*. These cases are exceptions to the [914] general rule, rendered necessary for the ends of justice. [Erskine J. referred to *Wilson v. Vysar* (4 Taunt. 288), where it was held that a bill of exchange written on a wrong stamp, was no payment, although it would have been paid if presented in time.] There, as in *Cundy v. Marriott* (1 B. & Ad. 696), no objection seems to have been taken to the admissibility of the bill.

Talfourd Serjt. (with whom was Willmore) in support of the rule. The object with which the unstamped bill was produced was not, to use it as a "good, useful or available" instrument, but to rebut the inference that might be drawn from the document which had been put in evidence, that the defendant had paid the balance of his debt by a bill. It lay upon the defendant to establish that payment; but he gave no evidence of it, and relied entirely upon the inference in question. The plaintiff was at liberty, therefore, to shew that such inference was false, by producing the document which, although purporting to be a bill, was not available as such. The defendant, undoubtedly, is precluded by the stamp act from setting up the bill as a valid one; but that is in effect what he is seeking to do. *R. v. Reculist* (2 Leach, C. C. 703, 704, 811; 2 East, P. C. 956) is an additional authority, to those already cited, to shew that such a document is admissible for collateral purposes: and though that was a criminal case, there is no such distinction as has been suggested, between the rules of evidence in civil and criminal cases; *Nash v. Duncomb*. The true principle, as recognised in *Williams v. Gerry* (10 M. & W. 296; 2 Dowl. N. S. 201), is, that a party cannot avail himself of an unstamped document for the purpose of enforcing it; but that he may put it in evidence, where his object is to invalidate it.

[915] TINDAL C. J. The question in this case is, whether the plaintiff ought to have been allowed to give in evidence this insufficiently stamped bill of exchange. And taking into consideration the position of the cause when it was tendered, and the purpose for which it was offered, I am of opinion that it ought to have been received in evidence. But for the statute 31 G. 3, c. 25, there would be no objection to the admissibility in evidence of an unstamped bill of exchange. The question therefore is, what is the nature of the prohibition contained in that statute, and how far does it extend? The words of the statute are, "no bill of exchange, &c. liable to be stamped, &c. shall be pleaded, &c., or given in evidence, in any court, or be admitted in any court, to be good, useful or available in law or equity," unless duly stamped. The prohibition, therefore, in its direct terms, applies only to cases where such a bill is pleaded or given in evidence as a good, useful or available bill. At the time the bill in question was tendered in evidence the cause stood in this position:—the plaintiff had put in evidence a document in the defendant's handwriting, to shew an admission of a balance of 500l.; but the fair inference from that document, unexplained, was, that this balance had been paid by a bill at four months' date for 533l. 6s. 8d. What the plaintiff had in view, therefore, in tendering the bill in evidence, was, not to shew that the bill mentioned in the memorandum was "good, useful or available," but that the statement respecting it in the memorandum was false in fact, and that the instrument really given in pursuance of the memorandum, and which purported to be a bill at four months for 533l. 6s. 8d., was wholly worthless,

(c) This distinction was disallowed by the court of Exchequer in *Buxton v. Cornish*, 12 M. & W. 426.

unproductive and unavailable—a mere piece of waste paper. I think the instrument tendered with that view, was admissible, and that it does not come within the prohibition in the statute. Nor does it appear to me that [916] any of the authorities cited, militate against this position. *Sweeling v. Halse* is the strongest case against the plaintiff. But in that case the very purpose of giving the unstamped bill in evidence was, to prove an existing contract between the parties—namely, a contract to cancel the former bill—not, as here, to shew that the unstamped instrument was unavailable. The later case of *Williams v. Gerry* is not inconsistent with the present decision. It was there held, that the plaintiff, who claimed title to certain goods under a bill of sale, could not, in order to prove the bill of sale to be *bonâ fide*, give in evidence a previous unstamped bill of sale, which had been cancelled, of the same goods by the same party. For there, again, the unstamped bill of sale was produced to shew an existing contract, which the plaintiff was seeking to enforce: it could not, therefore, be said that it was tendered merely for a collateral purpose. Let us suppose that in the present case an issue had been directed to try whether the defendant had paid the plaintiff the sum of 533l. 6s. 8d. by a bill of exchange; surely in such an issue it would have been competent to the plaintiff to produce the document in question to the jury, for the purpose of shewing that what purported to be a bill of exchange was, by reason of the insufficiency of the stamp, in reality no bill at all. It would be singularly unjust that a plaintiff, in availing himself of a memorandum which proved that the defendant was indebted to him, should be bound by every assertion or statement in that memorandum, and should be wholly without the power of shewing that they were untrue. I think, therefore, that the rule must be made absolute upon the first point.

COLTMAN J. I also am of opinion that the instrument in question was improperly rejected. The case stands upon a very different footing from those that have been [917] cited, in which unstamped documents have been held to be inadmissible. The party in this case, who, in effect, is seeking to contravene the stamp laws, is the defendant, and not the plaintiff. It lay upon the defendant to prove the fact of payment; and it is he who is endeavouring to shew that the unstamped bill was “good, useful and available.” The plaintiff seeks to shew the contrary: and I think he is at liberty to do so, by the production of the instrument, without infringing either the words or the meaning of the statute; and that none of the cases cited are inconsistent with our so holding.

ERSKINE J. I also am of opinion that this bill of exchange, though insufficiently stamped, was admissible in evidence for the purpose for which it was tendered, namely, to rebut the inference which might be drawn from the memorandum previously given in evidence, that the defendant's debt had been paid by a bill. Under the circumstances of the case nothing could be more unjust than to exclude the bill in question; and I should be most unwilling, therefore, to put such a construction upon the statute as would have that effect, unless the words of its enactments were so stringent as to lead to no other conclusion. Taking the first part of the section alone, which says that no bill of exchange, &c. (unless duly stamped) “shall be pleaded or given in evidence in any court,” the words would be imperative; but taking the whole of the section together, the latter part of which goes on to say, “or be admitted in any court to be good, useful or available,” I think it quite clear that the object of the legislature was to prevent such a document from being given in evidence with a view of setting it up as a binding and obligatory contract. And this interpretation of the statute is distinctly recognised, in *Williams v. Gerry*, both by Lord Abinger C. B. and Alderson B. The [918] latter observed, “The only cases in which such an instrument is allowed to be given in evidence without a stamp are, where it is used for the purpose of shewing that it never had any validity at all, but was merely colourable:” and that is precisely the present case; for here, the instrument purporting to be a bill, was tendered to shew that it never had any validity as such, but was merely a colourable payment.

CRESSWELL J. I concur with the rest of the court in thinking that under the circumstances I ought to have received in evidence the unstamped bill in question, though I cannot consider the point free from difficulty. The instrument was not evidence upon the first issue, either to prove a debt, or a contract between the parties, or an account stated; but when it is given in evidence on the new trial, it will be difficult to prevent the jury from attaching some weight to it as evidence upon that

issue. The judge, however, who tries the cause must deal with that difficulty as best he can. But as there is a plea of payment on the record, the burden of proving which lay upon the defendant, I think it was competent for the plaintiff's counsel—anticipating that an inference might be sought to be raised on the other side from a document already in evidence, that a payment by a bill of exchange had in fact been made—to rebut such inference, and shew, by the production of the bill in question, though unstamped, that it was worthless, and therefore not a payment. This was not giving the bill in evidence as “good, useful or available.” I certainly felt much pressed at the trial by the case of *Sweeting v. Halse*: but perhaps that case may be distinguished in this manner, that there, the unstamped bill of exchange was tendered to prove the cancellation of another bill: and the unstamped bill could only have [919] been received for that purpose on the supposition that it was a good and available bill; and it was inadmissible as such, because it was unstamped.

Rule absolute.

JACOBSON v. BLAKE AND COMPTON. Jan. 13, 1844.

[S. C. 7 Scott, N. R. 772; 13 L. J. C. P. 89; 8 Jur. 272.]

The plaintiff having landed some goods liable to duty at the custom-house, they were taken possession of by the defendants, who were custom-house officers, for the purpose of examination, and detained by them upon a misapprehension that they were prohibited and liable to forfeiture. They were afterwards returned to the plaintiff: Held, that the defendants were not liable in trespass.—Quære, whether they would have been liable in another form of action, if it had been shewn that they had detained the goods for an unreasonable time.

Trespass. The declaration stated, that before and at the time of the committing of the trespasses thereafter mentioned, the defendants were custom-house officers, and acted as such at the custom house in the city of London, and thereupon afterwards, to wit on, &c., and on divers days, &c., the defendants, with force and arms, seized and took certain goods and chattels of the plaintiff, to wit 2000 dozens of scissors on cards, &c., of great value, to wit, &c., under a false pretence that the said goods and chattels were forfeited as having been imported contrary to the provisions of a certain act of parliament, and the defendant then kept and detained, and caused to be kept and detained, the said goods and chattels on the pretence aforesaid, for a long space of time, to wit for six months then following, &c., at the expiration of which time the said goods and chattels were delivered up to the plaintiff: and the plaintiff further saith, that by reason of the seizure and detention of the said goods and chattels by the defendants as aforesaid, the plaintiff hath lost and hath been deprived of divers great gains and profits, amounting, to, &c., by reason of the market price of the said goods and chattels having fallen, to the amount afore-[920]-said, between the respective times at which the said goods and chattels were so seized as aforesaid, and their delivery up to the plaintiff as aforesaid; and the plaintiff in fact said, that the market price and value of the said several goods and chattels, when seized and detained by the defendants, amounted in the whole to a large sum of money, to wit, &c.; and that the market price and value of the said goods and chattels when delivered up to him, the plaintiff, amounted in the whole to a much smaller sum, to wit, &c.: and the plaintiff further saith, that the said goods and chattels became and were greatly deteriorated and depreciated in condition and value by reason of the detention aforesaid: and the plaintiff further saith, that, by means of the premises, he the plaintiff was put to and forced and obliged to pay, and did pay, a large sum of money, to wit, &c., for warehouse-rent for the said goods during their detention as aforesaid, and for the expenses incurred in and about the opening and inspecting of the said goods: and the plaintiff also saith, that he hath also, by means of the premises, been put to, and forced and obliged to pay, and hath in fact paid, expenses to a large amount, to wit, &c., in and about the employment of law and custom-house agents, for the recovery of the possession of the said property: and the plaintiff also saith, that he hath also, by means of the premises, incurred losses and expenses to a large amount, to wit, &c., by reason of the loss of time of divers clerks and servants of the plaintiff, occasioned by their employment in attendances at the custom house in the city of London, and

elsewhere, during the time that the goods of the plaintiff were so detained as aforesaid, for the purpose of recovering possession of the said goods, and in and about certain correspondence and incidental expenses connected with, and occasioned by, the seizure and detention of the goods as aforesaid; and the plaintiff also saith, that by reason of the seizure and detention of the said goods, under the false pretences [921] aforesaid, he the plaintiff was forced and obliged to, and did send for one Daniel Lutter, the manufacturer of the said goods, from Solangen, in the kingdom of Prussia, in order to establish the falsity of the pretence under which the said goods were so seized as aforesaid, which said D. L. did accordingly come over to this country for the purposes aforesaid, and continue here for a long space of time, to wit for six months: and the plaintiff further saith, that he the plaintiff hath paid to the said D. L. a large sum of money, to wit, &c., as and for expenses incurred in and about the said journey from Solangen, in the kingdom of Prussia, and in and about his stay in this country for the purposes aforesaid: and the plaintiff further saith, that by reason of the seizure and detention of the said goods he the plaintiff hath been deprived of all interest which he might have made on the moneys which he could and might have acquired by the sale of the said goods at the times when the same were so seized by the defendants; and other wrongs, &c.

Plea, not guilty—by statute (vide 3 & 4 W. 4, c. 53, s. 105).

At the trial of the cause, before Tindal C. J., and a special jury, at the sittings for Middlesex after last Michaelmas term, the following facts appeared in evidence:—

On the 23d of September 1842 several cases of cutlery, consigned, amongst other things, to the plaintiff in London, arrived in the Thames, on board the ship "Columbia," from Rotterdam. They were landed, on the custom-house quay, by a bill of sight (b), and warehoused in the ordinary manner. Some of these cases contained knives and scissors which were mounted upon cards, whereon was printed, in English, "superior knives (or scissors), [922] made of the best double-refined steel." On the 26th some more cases of cutlery arrived on board the ship "Giraffe" from Rotterdam. They were also landed on the custom-house quay by a bill of sight, and warehoused. Some of these cases contained similar cards to those before mentioned; others contained knives and scissors, upon some of which were impressed the words "Watson, Barbican, Norton Folgate;" upon others "Daniel Lutter, extra-patent silver steel." The cutlery with the name of Watson upon it, had been made to order for one Charles Watson, a warehouseman, who had premises in Norton Folgate and in Barbican, but who was not a manufacturer of cutlery or hardware. Daniel Lutter was the agent of the plaintiff at Solangen in Prussia, and the actual manufacturer of the whole of the cutlery in question. On the 28th the several cases were examined by the defendants, who were custom-house officers, and the plaintiff's son; and the defendants, conceiving the contents were liable to seizure—the printed cards under the 5 & 6 Vict. c. 47 (a customs act) table (A), class 19, by which the importation of "paper printed in the English language" is prohibited, and the stamped cutlery under the 1 & 2 Vict. c. 113, s. 6 (a)—said they [923] must detain the goods; and the cases were accordingly

(b) A "sight entry" was stated to be, an entry made when a merchant cannot make a "perfect entry" of the goods (that is, by describing their nature and value), they are landed to be inspected, for which purpose they are taken to an examining floor, and after inspection a perfect entry is made.

(a) Which, after reciting that "articles of cutlery and hardware of foreign manufacture, and packages of such articles, have been imported into the United Kingdom and into the British possessions abroad, bearing the names or marks of British manufacturers resident in the United Kingdom, to the great prejudice of such manufacturers; and whereas it is expedient that regulations should be made for the prevention of such importation," enacts, "that from and after the 5th day of January 1839 any articles of cutlery or hardware of foreign manufacture, and any packages of such articles, imported into the United Kingdom or into the British possessions abroad, bearing the names or marks of such British manufacturers, shall be forfeited, and shall and may be seized, prosecuted and condemned, and the proceeds thereof distributed and applied in like manner as any goods now are directed to be seized, prosecuted and condemned, and their proceeds are directed to be distributed and applied, under any law or laws relating to the customs."

See also the 5 & 6 Vict. c. 47, s. 11.

placed under "stop." The plaintiff's son afterwards applied to the defendants for the goods, but was informed they were under detention, and would be prosecuted as seizures. The plaintiff's son replied, "If they are to be detained, we must apply to the board." The plaintiff thereupon memorialised the commissioners of customs several times without success; but ultimately, in the month of February 1843, the goods were delivered up to him on payment of the duty; whereupon the present action was commenced.

Upon the part of the defendants it was objected, first, that as there had been no duty paid, or bill of entry delivered, pursuant to the 3 & 4 W. 4, c. 52, ss. 18, 59 and 60 (a)¹, the plaintiff was not in a situation to insist [924] upon the delivery of the goods at the time of the alleged detention; that the goods having been legally in the possession of the defendants, and there having been no seizure by them, the action of trespass could not be maintained; and that, at any rate, no act of trespass had been proved against them. The Lord Chief Justice acceded to the latter view, and directed the jury to find a verdict for the defendants; but, at the same time, in order to prevent the necessity for a new trial, he requested them to find the amount of damages to which the plaintiff would be entitled, supposing the action to be maintainable; and the jury having assessed the damages at the sum of 20l., his lordship reserved leave to the plaintiff to move to enter a verdict for that amount.

Channell Serjt. (with whom was Warren) now moved accordingly. If the defendants had detained the goods upon the ground suggested at the trial, namely, the non-payment of the duty or their non-entry, the action of trespass would certainly not have been maintainable, as it would have been a denial, not of the plaintiff's property in them, but merely of his right to the immediate possession of them (a)². But the goods were detained on the ground that they were forfeited. This, therefore, was an illegal interference with the plaintiff's right of possession, which was never out of him. And the right to personal chattels draws with it, in law, the constructive possession of them. The act of the defendants was a denial of that right. Though they, as custom-house officers, had a licence or authority, given by the law, to take the goods in the first instance for the purpose of examination, their subsequent abuse of that licence will render them trespassers ab initio, according to the first resolution in *The Six Carpenters' case* (8 Co. Rep. 146). [Cresswell J. [925] I do not see any abuse of authority here on the part of the defendants. They seem to have faithfully exercised the licence which the law gives them, though they may have made a mistake in judgment. Tindal C. J. The defendants detained the goods in order that application might be made to the board to ascertain whether they might pass. The plaintiff

(a)¹ Which enacts, "that the person entering any goods inwards (whether for payment of duty, or to be warehoused upon the first perfect entry thereof, or for payment of duty upon the taking out of the warehouse, or whether such goods be free of duty) shall deliver to the collector or controller, a bill of the entry of such goods, fairly written in words at length, expressing the name of the ship and of the master of the ship, in which the goods were imported, and of the place from whence they were brought, and the description and situation of the warehouse, if they are to be warehoused, and the name of the person in whose name the goods are to be entered, and the quantity and description of the goods, and the number and denomination or description of the respective packages containing the goods; and, in the margin of such bill, shall delineate the respective marks and numbers of such packages, and shall pay down any duties which may be payable upon the goods mentioned in such entry; and such person shall also deliver at the same time two or more duplicates, as the case may require, of such bill, in which all sums and numbers may be expressed in figures; and the particulars to be contained in such bill shall be written and arranged in such form and manner, and the number of such duplicates shall be such, as the collector and controller shall require; and such bill being duly signed by the collector and controller, and transmitted to the landing-waiter, shall be the warrant to him for the landing or delivering of such goods."

By sect. 59 goods (with certain exceptions) may be warehoused for exportation only, although prohibited.

By sect. 60 such goods are to be entered to be so warehoused.

(a)² Quære as to this distinction in trespass.

was aware of this. Coltman J. How do you get over the second resolution in *The Six Carpenters' case*, that a mere nonfeasance does not make a party who has an authority or licence in law, a trespasser ab initio? This is not a case of mere nonfeasance. The defendants asserted a right which was inconsistent with that of the plaintiff. The learned serjeant also cited Bac. Abr. tit. Trespass (B).

TINDAL C. J. I continue of the opinion which I entertained at the trial, that there was no evidence in this case to maintain an action of trespass. In order to entitle the plaintiff to maintain such an action there must have been an actual seizure of the plaintiff's goods. But the evidence here was all the other way, and went to shew that the defendants merely took possession of the goods, in the execution of their duty as custom-house officers, for the purpose of examination. When the goods were examined certain marks were found upon them, which induced the defendants to think they were prohibited; and they said they must detain them; and then, on a subsequent application on the part of the plaintiff for the delivery of the goods, the answer was that they were detained and would be prosecuted as seizures. It appears, therefore, that the defendants originally detained the goods under a real and honest doubt that they were subject to forfeiture: whether that doubt was well grounded, is not now the question. And in order to resolve this doubt, the goods were taken out of the control of the officers; the question [926] being referred to the decision of the commissioners,—and, as it appears to me, with the assent of the plaintiff himself,—as his son, who made the application on his behalf, said if they were detained he must apply to the board. Throughout the case, there was nothing to affect the defendants, beyond a detention of the goods on the ground of a doubt whether or not they should be passed without a previous reference to the proper authorities. There is no pretence, therefore, to charge the defendants as trespassers. There has been no abuse of authority on their part. The goods remained, during the whole time of the examination, in the same custody in which they were, in the first instance, legally detained. Whether or not the plaintiff might have maintained an action in another form, if it could have been shewn that the goods were detained for an unreasonable time, we are not called upon to determine; it is sufficient to say that trespass, under the circumstances, is not maintainable.

COLTMAN J. The defendants were custom-house officers acting under an authority given them by law. It was their duty to examine the goods in question, in order to ascertain to what duty they were liable, or whether or not they were subject to forfeiture. If the goods had been afterwards detained by them for a time more than reasonable for the examination, that might have been an abuse of their authority so as to render them liable in another form of action. But it appears to me there is no ground for saying they did more than detain the goods for a reasonable time, in order that the question as to the liability of the goods to forfeiture might be submitted to the proper authorities.

ERSKINE J. I also am of opinion there was no evidence of any act of trespass. There was no seizure [927] whatever by the defendants. The goods were landed and taken possession of by the defendants in the discharge of their duty, for the purpose of their being examined. Upon their being partially examined there appeared to be sufficient ground for the defendants to doubt whether they were authorised to receive the duty upon them. All that the defendants did was merely to decline to receive the duty upon them. The subsequent declaration made by them was not a declaration that what they had done amounted to a seizure, but merely a statement that, the matter being under the consideration of the commissioners, the goods could not be given up to the plaintiff. There was no evidence of any seizure, or of any other act amounting to a trespass. Neither were the defendants shewn to be chargeable with any excess, or to have been guilty of any abuse, of authority.

CRESWELL J. I am of the same opinion. There was no trespass in the first instance, or any thing that could be called a seizure. The goods were taken by the plaintiff's agent to the proper place for the examination of them by the defendants in the regular discharge of their duty as custom-house officers. Upon their examination, all that the defendants did was, to detain them, till it could be ascertained whether or not they were liable to forfeiture. This is not an act of trespass. In the case of a distress, the taking a man's goods is *prima facie* an act of trespass, which must be justified by law. So, in *The Six Carpenters' case*, the entry into a man's house was held to be, *prima facie*, an act of trespass, which was justified under the circumstances

stated in the plea. Here, there was no act of trespass, either actually, or impliedly from any subsequent abuse of authority.

Rule refused.

[928] WOOD v. THE DUKE OF ARGYLL AND SIR JAMES COCKBURN, BART.
Jan. 16, 1844.

[S. C. 7 Scott, N. R. 885 ; 13 L. J. C. P. 96.]

A preliminary association was formed for the purpose of establishing a joint-stock company, of which A. was named president, and B. vice-president. They both signed an agreement to subscribe for a certain number of shares, and to pay a deposit of 5*l.* per share when shares to the amount of 50,000*l.* should have been subscribed for ; and they attended two meetings of the association. The company was never in fact formed. C. did certain work at the request of the secretary to the proposed company.—In an action by C. against A. and B. : held, that the jury were properly told to consider—first, whether there had been a direct contract by A. and B. with C. ; secondly, whether A. and B. were members of a partnership ; and, thirdly, whether they had held themselves out as such to C.

Assumpsit, for work and labour in copying certain maps ; for journeys ; and for goods sold and delivered. Plea, non assumpsit.

At the trial, before Tindal C. J., at the sittings for Middlesex, after that term, the following facts appeared :—

In the early part of the year 1842 an association or joint-stock company was projected, to be called "The British American Association for Emigration and Colonization." Some of the projectors of the association, including the two defendants, met on the 22d of April and the 8th of June, the duke presiding and signing the minutes as chairman.

The following are the minutes of the former of these meetings :—

"The constitution or regulations of the association laid on the table, with a statement of certain clauses contained therein ; viz. (inter alia) provisions respecting the conduct of the association by a president, vice-presidents, trustees, consulting council and executive commissioners ; that the capital necessary to carry on the operations of the association shall be raised by the sale of shares, and that the vice-presidents and council shall not be liable for expenses or engagements.

"Stated—that the constitution had been ordered to be engrossed for signature, and that arrangements [929] had been entered into for the purchase of extensive seigniories.

"Prospectus laid before the meeting, preparatory to its being published.

"Resolved—first, that the objects of the association be immediately proceeded with, as regards the subject of emigration ; and, secondly, that the consideration of all other matters be adjourned till Friday, the 29th of April."

The following are the minutes of the meeting of the 8th of June 1842 :—

"Attention directed to the state of the association, and the means adopted to advance its interests. The arrangements which necessarily precede the announcement of a great public undertaking, have been matured. Arrangements made to acquire tracts of country for location. Commissioners have negotiated for the purchase of four seigniories, containing about 200,000 acres of land, in Eastern Canada. Mills, and other conveniences, have been erected. The nature of the pecuniary arrangements for these purchases. Anticipated, that the first cash payment will be covered by a well-arranged system of emigration in the ensuing year. Extensive tracts of country will be acquired in Western or Upper Canada. The commissioners will be able to plant a large tract of country in Prince Edward's Island, and will rival the United States in availing themselves of the riches of the British American seas, by the establishment of a fishery. Other extensive properties in Eastern Canada selected for future consideration. The commissioners expect to send a body of emigrants to Prince Edward's Island before the close of the present season.

"Having reference to the purchases, &c., the commissioners propose an issue of 10,000 shares in this country, and an equal amount, in Canada. Arrange-[930]ments for a 'Provident Institution ;' to create a 'Benevolent Fund.'

“Resolved—that the report be adopted and acted upon; and that a subscription be immediately opened for shares in the capital stock.”

A prospectus was issued, in which it was stated that the capital stock was to consist of 1,000,000l., in 50,000 shares of 20l. each, and the duke was named as president, and several noblemen and gentlemen (including the other defendant) as vice-presidents, and members of the consulting council.

The following memorandum was entered in a book which was kept in the office, and was open to all persons going there; it had been signed by both the defendants:—

“British American Association for Emigration and Colonization.

“We, whose names are hereunto subscribed, do agree to subscribe for the number of shares, and amount of stock, of the above association, set opposite to our respective signatures, and pay a deposit of 5l. per share thereon to the bankers of the association, when shares to the amount of 50,000l. shall have been taken, upon having twenty-one days’ notice thereof.”

Shortly after the meeting of the 8th of June the duke went to Scotland; and neither he nor the other defendant were shewn to have further actively interfered in the affairs of the association: but a copy of a newspaper called the *Emigration Gazette*, in which the various proceedings of the association were regularly reported, was forwarded to the duke by the secretary every week, down to the month of September 1842. It was suggested that the west of Scotland, in which the duke’s estates lay, was over-populated, and that it would therefore be an object with his grace to promote emigration. And it appeared that two vessels, the “Lady Wood” [931] and the “Barbadoes,” had been chartered by the association for the conveyance of emigrants. Two parties of emigrants had gone out in the “Lady Wood.” The “Barbadoes” had set sail with about twenty or thirty emigrants on board, but was driven back by stress of weather. In consequence of this the scheme was abandoned. An advertisement was also produced, which appeared in the *Emigration Gazette* of the 3d September 1842, in which it was stated that the association had chartered a vessel for Prince Edward’s Island—in order to prove that, at that time, the association had begun to act. It was not, however, shewn that any step had been taken to legalise the company either by deed, charter or act of parliament, or that the sum of 50,000l. had ever been subscribed.

The action was brought to recover the value of certain maps, plans, &c. of parts of Prince Edward’s Island, which had been ordered by the secretary, and had been left at the office, for the inspection of parties disposed to emigrate.

The Lord Chief Justice told the jury that the question for their consideration was, whether the work in question had been done on the credit of the two defendants, either upon an express or an implied contract; that a contract might be implied if a partnership had been formed, and the defendants were members thereof, or had held themselves out to the world, and amongst others to the plaintiff, as partners: and after observing that there was to be no call till the 50,000l. was subscribed for, his lordship further left it to the jury to say whether any company had, in point of fact, been formed.

The jury found a verdict for the defendants.

Byles Serjt. now moved for a new trial, upon the ground of misdirection, and that the verdict was against the evidence. The names of the defendants having been [932] inserted, by their desire, in the list of shareholders, they became partners in the association, or, at least, held themselves out as such, and were therefore liable to the plaintiff. It may be said they intended to become members only when the company should have been formed. But the association assumed two characters—the preliminary association, and that which was intended to go by the name of the emigration association. Assuming that the latter association never took effect, the defendants are still liable as members of the preliminary association. Before the work was done, in respect of which the action was brought, they had subscribed as members. [Cresswell J. To which association? You contend the defendants were shareholders. Were there any shares in the preliminary association?] It is submitted they were shareholders in both. The document by which parties agreed to take shares was certainly equivocal in its expressions; but the real meaning of it is, “We do now take shares, and will pay the deposit when 50,000l. worth of shares are taken

altogether." If the parties signing the document were not to be considered as taking shares till the 50,000l. worth were taken, as all parties signed the same document, when could it be said that number of shares was taken? [Cresswell J. Probably when shares to the amount of 50,000l. were agreed to be taken.] The plaintiff would clearly have a right to shew that the defendants had an interest in the preliminary association, or that they had represented themselves as having such an interest; and that would be sufficient. [Cresswell J. Provided the plaintiff had acted upon the faith of such representations. It is not sufficient to shew that a party has held himself out as a partner unless it be also shewn that he has been so treated by the plaintiff who sues him (a).] If a joint-[933]-stock company is projected and is afterwards abandoned, the parties to the original project are still liable. [Tindal C. J. Only in respect of matters in which they were joint contractors. Ex vi termini they would not be partners; they would therefore have no implied authority to bind each other. The matter was much discussed in this court in *Fox v. Clifton* (6 Bingh. 776, 9 Bingh. 115, 4 M. & P. 776, 2 M. & Scott, 146).] Here, there was a partnership formed in order to start the company. *Moneypenny v. Hartland* (1 C. & P. 352, 2 C. & P. 378), and *Doubleday v. Muskett* (7 Bingh. 110, 4 M. & P. 750), are authorities for the plaintiff. [Tindal C. J. In *Moneypenny v. Hartland* there was a direct contract with the committee; and in *Doubleday v. Muskett* the defendants were joint contractors. In this case, the defendants were not to become shareholders till a certain number of shares had been subscribed for.] It is submitted that the attention of the jury should have been called to the question whether the defendants were not partners, or had not held themselves out as partners, in the preliminary project.

TINDAL C. J. The case was very fully discussed at the trial, and all the facts were brought before the jury; and I think that every thing required by law was left to them. They considered that there was no direct contract, and that the defendants had not held themselves out as partners; and there was no pretence for saying that any actual partnership existed. The verdict is fully borne out by the evidence.

ERSKINE J.(d). I cannot perceive any evidence in the case that would have warranted the jury in finding that [934] the plaintiff had been employed by the defendants to make the maps. Neither is there anything to shew that the secretary got the work done upon their credit. On the contrary, they appear to have cautiously held aloof from all responsibility until 50,000l. worth of shares should be taken. The plaintiff did the work on the credit of the party by whom he was actually employed.

CRESSWELL J. The case was left by my lord to the jury precisely in accordance with those rules which, after much discussion and consideration, have been laid down by the courts, for the purpose of ascertaining, in the case of a prospective joint-stock company, what parties are liable. And I do not see how the jury could have arrived at any other conclusion upon the evidence. There is no ground for the rule on either point.

Rule refused.

POTTS AND OTHERS v. HIRST. Jan. 16, 1844.

The court has no jurisdiction to set aside a rule to discontinue, which now by R. H. 2 W. 4, may be obtained without the defendant's consent.

Talfourd Serjt. applied to set aside a rule to discontinue on payment of costs, which had been obtained by the plaintiffs, after plea pleaded. It was stated that the object of the rule was to enable the plaintiff to take advantage of Lord Denman's act (6 & 7 Vict. c. 85), so that the action might be commenced afresh, and thus be out of the operation of the excepting clause (s. 3), which applies to actions commenced before the passing of the act. The learned serjeant admitted that by R. H. 2 W. 4, a rule to discontinue might now be obtained without the consent [935] of the defendant, and that probably the court, therefore, might be of opinion they had no jurisdiction in the matter; to which the court assenting, the learned serjeant took nothing.

(a) Vide dict. per Parke J., in *Dickenson v. Valpy*, 10 B. & C. 140, 5 Mann. & Ryl. 126.

(d) Mr. Justice Coltman was at chambers.

BAXTER v. NURSE. Jan. 16, 1844.

[S. C. 7 Scott, N. R. 801; 13 L. J. C. P. 82; 8 Jur. 273: at Nisi Prius, 1 Car. & K. 10.]

The rule, that an indefinite hiring is a hiring for a year, is not an inflexible rule of law; it must be considered in connection with the circumstances of the particular case.—A. was engaged as editor of a new periodical publication by B. at a salary to be paid weekly. The publication was abandoned by B. soon after its commencement. In an action by A. against B. for dismissing him before the termination of a year, a usage was proved that such a hiring was annual, with regard to established periodicals: Held, that the jury were properly directed to consider whether such usage was applicable to a newly-started publication.—Where the defendant has a verdict upon two issues, each of which goes to the whole cause of action, and the verdict upon one of those issues is unsatisfactory, quære whether a new trial will be granted, and thereby the defendant's verdict upon the other issue, avoided.

Assumpsit. The first count of the declaration set out a special contract to employ the plaintiff as editor of a certain periodical publication of the defendant, called "The Illustrated Polytechnic Review," for a year, at a salary of 3l. 3s. per week, to be raised progressively when the work should reach a certain circulation; and assigned a breach, in the dismissal of the plaintiff before the expiration of the year (a)¹. There were also counts for wages and salary due for the plaintiff's work and services as editor of a periodical publication, for money paid, &c., and upon an account stated.

Pleas: first, except as to 50l., parcel of the money in the second and subsequent counts mentioned, non assumpsit. Secondly, to the first count, a justification [936] of the dismissal of the plaintiff on the ground of his misconduct as editor; and thirdly, payment into court of 50l. and no further damage in respect of that sum.

The plaintiff joined issue upon the first plea; and he replied *de injuriâ* to the second, and damages *ultra* (a)² to the third; upon which replications issue was joined.

At the trial, before Tindal C. J., at the Westminster sittings after last term, the following facts appeared.

At the latter end of the year 1842, the defendant engaged the plaintiff to conduct, as editor, the review in question, the publication of which was to commence the following year. The terms upon which the plaintiff was engaged were not proved, either as to period of service or amount of salary; but it was shewn that after the commencement of the publication the defendant had paid the plaintiff three guineas as a week's salary. It was also shewn that the plaintiff had, with the defendant's knowledge, engaged a scientific contributor, to supply articles for the work for a twelvemonth, and that after the work was commenced the defendant had complained to the plaintiff of the manner in which it was brought out, and had said that unless it was conducted better he should discontinue it. The first number appeared in January 1843, and after the third number the defendant abandoned the publication altogether; but it had been continued by another publisher.

On the part of the plaintiff, several witnesses connected with periodical works, were called to prove that, in the absence of any stipulation to the contrary, a general engagement as an editor of such a work is understood to be an engagement by the year; but, upon cross-examination, they admitted that they spoke with reference to established works, and not to new speculations.

[937] On the part of the defendant, evidence was adduced in support of the second plea.

The counsel for the plaintiff applied to amend the declaration by striking out that part of it which stated the contract to be for a progressive salary. His lordship, however, declined to amend, but said he would indorse the facts specially upon the record (under the 3 & 4 W. 4, c. 42, s. 24); and he left it to the jury to say whether

(a)¹ See *Snelling v. Huntingfield*, 1 C. M. & R. 20; *Nowlan v. Ablett*, 5 Tyrwh. 709, 2 C. M. & R. 54, 1 Gale Exch. 72; *Fawcett v. Cash*, 5 B. & Ad. 904, 3 N. & M. 177.

(a)² This replication appears to be applicable only to a plea of payment into court in bar of the further prosecution of the action, generally. The plaintiff does not mean to undertake to prove damages beyond the 50l. in respect of that 50l.

there had been a contract for a year, as alleged in the declaration, observing that the rule spoken to by the witnesses on the part of the plaintiff might be useful and proper in the generality of cases, but that it might not be so applicable in the case of a newly-started work, where it might be uncertain whether it would be continued for the period of a year (*vide infra*, 936 (b)).

The jury returned a verdict for the defendant.

Bompas Serjt. now moved for a new trial, upon the ground of misdirection, and also that the verdict, so far as it related to the issue raised by the second plea, was against the evidence. The learned serjeant submitted, that, as a general rule of law, independently of the usage proved at the trial, a general hiring, such as the present was, in the absence of a stipulation to the contrary, was an annual hiring; as much as that of a clerk; *Beeston v. Collyer* (4 Bingh. 309, 12 J. B. Moore, 552. *Vide R. v. Seacroft*, 2 M. & S. 421); in which case the contract would not the less be an annual one because the employer was starting in business for the first time. So also, the hiring of domestic servants is by the year, subject to the power, in either party, of putting an end to the contract by a month's notice or a month's warning.

TINDAL C. J. Upon the first ground on which the present motion was made, namely, that the jury ought to have been directed, as upon a general rule of [938] law, that the hiring in this case must be taken to have been by the year, it appears to me that the principle on which contracts of this nature, which have been entered into without any definite arrangement as to time, are held to be contracts for a year, is by no means an inflexible rule, but that it is a presumption to be raised from contracts of the same kind; and that the judge at a trial is not authorised to lay down any general rule upon the subject.

There are cases in which undoubtedly a rule of law is laid down to the jury. Thus, in the case of a deed, the instrument being under seal, imports the existence of a valid consideration. So, a promissory note or a bill of exchange also imports a consideration. These are rules of law; and upon these points the judge does not ask the opinion of the jury. So, twenty years' adverse possession (without reference to the late statute) will import a right of possession (a). That also is a rule of law; upon which the opinion of the jury would not be asked.

In cases where a general rule with regard to questions of hiring has been established, it has been in conformity with some established usage to be gathered from evidence. That it is not a fixed rule, is clearly shewn from the course taken at trials where the question as to the nature of a hiring arises—where evidence is always given by persons in the particular trade, or under circumstances similar to those of the parties in the case; and then the jury are told that unless there is something to distinguish the case before them from the usage that has been proved, the parties must be considered as dealing with reference to such usage. But the finding by the jury in such a case, in conformity with such general usage, cannot be considered as a rule of law (b).

[939] In the present case it appears to me that the evidence was of a weekly hiring; but even if it had shewn a general hiring, still I think the question ought to have been left to the jury, whether, under the circumstances of the case, there had been a hiring by the year. And I think it was a proper and pertinent observation made by the counsel for the defendant, which I repeated to the jury, that there might be a distinction between an established and a new publication, the success of which might be uncertain, and which might be given up in a few weeks; in which case it would be unreasonable that the employer should be considered as bound to pay the salary of a party in the situation of the plaintiff, for a whole year. It has been said that the defendant might have guarded himself by an agreement that the hiring might be put an end to at any time. But if there is no general rule on the subject, it is equally reasonable to say that the plaintiff might have guarded himself by stipulating that his engagement should be for a year. I am of opinion that there was no misdirection, and that, upon that point, there must be no rule.

COLTMAN J. I also am of opinion that the case was submitted to the jury in as favourable a manner for the plaintiff as he was entitled to have it left. I do not stop to inquire whether, in the case of an editor of a literary publication, a general

(a) The power of determining the apparent right resulting from actual possession, by entry, being taken away, after 20 years, by 21 Jac. 1, c. 16.

(b) *Vide ante*, p. 659 (c), 671.

ing or engagement is to be considered as necessarily an engagement by the year. e point has certainly never been decided. But it appears to me that my brother mpas has failed in establishing the fact upon which alone the argument could be ised, namely, that there was a general hiring in this case.

The rule with regard to domestic servants is established ; but that rule applies only the absence of any fact which would tend to shew that an annual hiring was not ntemplated. Thus, if there be a reservation of weekly wages, the inference of a ring for a [940] year does not arise. In the present case the only proof given was, at some service was performed by the plaintiff, and that weekly wages were paid to m. There is also another circumstance which tends to throw a doubt upon the opposition that there was a yearly hiring, namely, that the defendant said if the work ere not conducted to his satisfaction, he should give it up. In such a state of things is not very probable that he should hire persons to be concerned in the manage- nt of the publication for a whole year (a)¹. There is, therefore, in my opinion, no sumption of a yearly hiring ; and I do not see that the jury have come to an easonable conclusion on the subject.

ERSKINE J. I also think that my brother Bompas has failed in pointing out any lirection in this case.

Assuming that the general rule of presumption, arising from an indefinite hiring, t apply to such a case as the present, and that, if a general hiring had been proved, the jury ought to have been told that it should be taken to be a yearly hiring, still it is enough to say that a general hiring was not proved in this case. The facts in evidence clearly do not amount to such proof.

It appears that the plaintiff was paid three guineas a week, with a prospect of increase of salary ; and there is the fact of some service having been performed : but there is nothing to shew what passed at the time of the engagement. The terms of the hiring were therefore a question for the jury. And I think the circumstance of its being a new periodical, of which the plaintiff was to have the management, was worthy their attention in considering the probability of a yearly engagement having been entered into with reference to such a publication, whatever might be the usage in the case of an old-established work. It seems to me, therefore, that the whole question was properly left to the jury.

[941] CRESSWELL J. I am of opinion that my lord did right to leave the question upon the first count, as an open question to the jury. That question was, whether there had been a contract between the parties for a yearly hiring. Now, it is clear that no express contract was proved. But it is said that a contract is to be inferred ; and that, upon two grounds. First, that a usage was proved that such a contract between publishers and editors was a contract for a year. It cannot be contended that this was not a question for the jury. And it was certainly a fair observation by counsel, that all the instances that were proved had reference to old and established works. Then, that ground failing, the rule of law was referred to in the second instance, namely, that a general hiring,—or to use more correct terms, a hiring for an indefinite period,—is to be taken as a yearly hiring. But what is the evidence of the hiring in this case ? There is nothing to shew it was an indefinite hiring. The progressive increase of salary would apply as well to the second as to the first year. An indefinite hiring has been held to be a hiring for a year ; but if any other facts appear, such as payment by the week, the presumption of a yearly hiring may be rebutted.

In some of the earlier cases upon questions of settlement Lord Kenyon directed the justices at sessions, in stating a case, themselves to draw the conclusion of a hiring. His lordship (a)² must have meant a conclusion of fact, not of law—as to whether or not there had been a yearly hiring.

Upon the whole, I am of opinion that this was an open question for the jury ; and that it was quite right that the case should have been so left.

As to the issue on the second plea, the weight of evidence certainly seems in favour of the plaintiff ; but [942] if the rule is made absolute as to that, it may be a very grave question what would be the effect of a verdict for the plaintiff upon an issue going to the whole right of action, where there was a verdict for the defendant upon another issue similarly circumstanced.

(a)¹ Vide supra, 936.

(a)² See *R. v. Inhabitants of Lyth*, 5 T. R. 327.

Talfourd Serjt., on behalf of the defendant, consented that the verdict should be entered for the plaintiff on the issue joined upon the second plea, with all legal consequences.

Rule refused for a new trial; absolute, in the first instance, by consent, to enter verdict for the plaintiff on the issue joined upon the second plea.

JACKSON v. ALLAWAY AND ANOTHER. Jan. 19, 1844.

[S. C. 7 Scott, N. R. 875; 13 L. J. C. P. 84; 8 Jur. 63.]

In an action upon an agreement, whereby A. was to deliver to B., weekly, 200 tons of iron-mine, in tram-waggons to be provided by B., the declaration alleged that A. was ready and willing, and tendered and offered to deliver to B. the said quantity weekly in tram-waggons to be provided by B., of which B. had notice, but that he refused to take the said iron-mine.—Held, that the allegation of tender was immaterial, and not traversable.

Assumpsit. The declaration stated, that on the 1st of May 1840, by a certain agreement then made between the plaintiff of the one part, and the defendants and Moses Teague, since deceased, of the other part, sealed, &c., the plaintiff agreed with the defendants and Teague to sell to them from the plaintiff's mine-works called The Sling Pit, situate at Clearwell Mean, in Her Majesty's Forest of Dean, weekly, and every week, from the 1st of July then next, until the said agreement should be determined as thereafter mentioned, 100 tons of iron-mine; and, in case of more than 100 tons of iron-mine being gotten from the said works, then weekly, and [943] every week, during the continuance of the said agreement, such further quantity or quantities so gotten, not exceeding the further quantity of 100 tons, each and every of the aforesaid tons to consist of 2520 lbs., and to be fit and proper for smelting into iron, and to be of the same quality as usually produced on the Clearwell side of the said forest, and to be delivered weekly and every week by him the plaintiff to the defendants, either upon part of the Severn-and-Wye railway, lying next contiguous to the said mine-works, or upon the said works when a communication by a branch of railway should be made between them and the said Severn-and-Wye railway, on tram-waggons to be provided for that purpose by the defendants; and that he the plaintiff would, in all respects, manage, work and carry on the said mine-works, in the best possible manner, and so as to insure such sale and delivery as aforesaid, and the performance of his, the plaintiff's, part of the said agreement; and the defendants covenanted and agreed by the said agreement to and with the plaintiff, that they would purchase and take to the said iron-mine so agreed to be sold and delivered as aforesaid, and pay for each and every ton thereof, consisting of such weight and quantity as aforesaid, the sum of 6s., about the end of each and every month after the delivery thereof, upon having deducted therefrom $1\frac{1}{2}$ per cent., or by a bill, without such deduction, drawn about the end of every two months upon and accepted by them, payable three months after date; with a proviso, that, if the plaintiff or defendants should be desirous of determining the said agreement, at the expiration of the first four years from the date thereof, or at the end of any subsequent term of four years to be calculated from the previous term of four years, it should be lawful for them so to do, upon either the plaintiff giving to the defendants, &c., or the defendants giving to the plaintiff, &c., twelve calendar months' previous notice in writing to quit at the expir-[944]-ation of the said first term of four years, or at the end of any subsequent term of four years: that the said agreement continued in full force and effect between the said parties up to and until a certain day, to wit the 30th of April 1843, being the expiration of the first four years from the date of the said agreement, when the said agreement was duly put an end to, according to the provisions aforesaid, to wit, by the defendants' giving twelve months' previous notice thereof in writing to the plaintiff: that, although from the commencement of the said agreement continually until the said determination thereof, every thing on the plaintiff's part was duly performed and fulfilled under and according to the terms of the said agreement, and the true intent and meaning thereof, and the plaintiff, during all that time, did, in all respects, manage, work and carry on the said mine-works in the best possible manner, and so as to insure such sale and delivery as aforesaid, and the

performance of his, the plaintiff's, part of the said agreement; yet, for assigning a breach of the said agreement, the plaintiff said, that, although long before the said termination of the said agreement, to wit on the 1st of April 1841, and from thence continually, until the determination of the said agreement in manner aforesaid, he the plaintiff, had then raised, gotten and prepared, and was then ready and willing, and then tendered and offered, to sell and deliver to them the defendants weekly and every week, to wit, upon the said mine-works of the plaintiff called The Sling Pit (such communication as aforesaid having, during all that time, been made by a branch railway between them and the Severn-and-Wye railway), in tram-waggons to be provided by the defendants, 200 tons of iron-mine which had been then gotten from the said works, each and every of the said tons being, and consisting of, 2520 lbs. weight, and being fit and proper for smelting into iron, and of the same [945] quality as usually produced on the Clearwell side of the said forest; of all which the defendants then had notice, and were then requested to provide tram-waggons for the same, and to purchase and take to the same according to the said agreement; yet the defendants did not, nor would, during any part of the time last aforesaid, that is to say, from the said 1st of April 1841 to the said termination of the said agreement, purchase or take to or in any manner pay for, nor had they at any time in any manner paid for, the said quantity of iron-mine so by them agreed to be purchased and taken to as aforesaid, but then and there, during all that time, wholly abstained from purchasing or taking, and refused to purchase or take to, any more than a very small and inconsiderable quantity of the said iron-mine so raised, gotten and prepared as aforesaid, weekly and every week during all that time, and a much less quantity than 200 tons weekly and every week, to wit, the quantity of 50 tons thereof weekly and every week; and although the defendants did, during the time last aforesaid, purchase and take to the said last-mentioned small and inconsiderable quantity of iron-mine, yet the defendants had not at any time,—although the time for the payment of every part of the said iron-mine so purchased and taken to as aforesaid had long elapsed before the commencement of the suit, according to the terms of the said agreement,—paid to the plaintiff the aforesaid, or any price for the same, either by cash or by bill or otherwise howsoever, although often requested so to do; whereby the plaintiff had lost and been deprived of all the benefit and advantage which he might, and otherwise would have derived and acquired from the defendants' performance of their said agreement according to the terms thereof, and had otherwise been greatly injured and damnified, &c.

The third plea was (by reference to the introductory part of the first plea) pleaded to so much of the declar-[946]-ation as charged the defendants with not purchasing, or taking to, and paying for, the iron-mine, which the defendants were in the declaration alleged to have abstained from purchasing, or taking to and paying for, and to have refused to purchase or take to and pay for; and stated that the plaintiff did not tender or offer to sell or deliver to the defendants the iron-mine in the declaration and introductory part of the first plea mentioned, and any part thereof, *modo et forma*; concluding to the country.

Special demurrer to the third plea, assigning for causes—that the defendants had, in and by their said third plea, put in issue matter not properly issuable or traversable, and had thereby raised, for the consideration of a jury, a question wholly beside the merits, and altogether immaterial; that, looking at the terms of the contract between the parties, it was by no means incumbent on the plaintiff, in order to sustain the action, to tender or offer to sell or deliver the said iron-mine in the declaration mentioned, his alleged readiness and willingness so to do (which was admitted for the purpose of considering the materiality of the third plea) being sufficient to entitle him so to do; that the law does not require the performance of a nugatory act; that, before any delivery could take place under the contract, the defendants' tram-waggons must have been ready to receive the mine in question; that it was not, having reference to the language of the declaration and the breaches assigned, to be assumed that the tram-waggons were ready to receive, but the contrary; that therefore a tender was not required, and would have been only nugatory, and need not have been alleged, and is merely surplusage, and may be altogether rejected without affecting the alleged causes of action, and could not, according to the rules of pleading, be made the subject of a traverse, because a traverse taken thereon could in no way lead to a finding that would decide any [947] point or question ~~that~~ could by possibility affect

the merits of the action or the plaintiff's right to sue; that the traverse taken by the third plea could only be productive of useless expense, trouble and delay, without in any manner benefiting the defendants, or deciding the merits of the cause; and that the said third plea was, in other respects, informal, &c.

Joinder in demurrer.

Manning Serjt., in support of the demurrer. The allegation in the declaration, of a tender or offer to sell or deliver the iron-mine, is wholly immaterial. As the tram-waggons were not sent by the defendants, the plaintiff could not tender the ore. The defendants have treated the tender as something separate and distinct from the readiness and willingness to deliver. [Maule J. The plea admits the plaintiff's readiness and willingness to deliver, and the notice thereof to the defendants, and the request to them to send the waggons.]

The learned serjeant cited *Rawson v. Johnson* (1 East, 203), *Wilks v. Atkinson* (6 Taunt. 11, 1 Marsh. 412), *Levy v. Lord Herbert* (7 Taunt. 314, 1 J. B. Moo. 56), *Waterhouse v. Skinner* (2 B. & P. 447), *Sir Ralfe Bovy's case* (1 Vent. 217), *Kinnersley v. Barnard* (Cro. Eliz. 554), and *Constable v. Cloberie* (Palm. 397).

Channell Serjt., contra. The allegation of tender is material, and is therefore traversable. The plaintiff alleges that the defendants were bound to take 200 tons of iron-mine, and to pay for it on or after delivery: the delivery, undoubtedly, was to be on tram-waggons to be provided by the defendants. The plaintiff also alleges [948] that he requested the defendants to provide the tram-waggons, but that they did not do so. The delivery on the tram-waggons was a condition precedent to the payment; and either the performance of a condition precedent must be alleged, or something equivalent to a performance. If the declaration had said that the tram-waggons were not ready, and so the plaintiff was discharged from the delivery, it might have been sufficient. But by the form adopted here the allegation of tender is made material; and if it were struck out, the declaration would be bad, as the allegation is equivalent to one of performance. In the cases cited, the acts to be done by both parties were concurrent. [Maule J. What is the meaning of a tender of 200 tons of iron-mine? It is not like a tender of money.] It means notice from the plaintiff to the defendants of his readiness to deliver. [Maule J. Then that is alleged twice over. It is like saying that the plaintiff gave notice to the defendant on a certain day, to wit the 1st of January, and also gave another notice on a certain other day, to wit the 2nd of January. If there was a traverse of the first notice in one plea, surely a second plea traversing the second notice would be bad.] The tender is, to deliver every week, not generally.

Manning Serjt. was not called upon to reply.

TINDAL C. J. The question in this case appears to be whether the allegation in the declaration, that the plaintiff "tendered and offered to sell and deliver to the defendants, weekly and every week, 200 tons of iron-mine," is or is not a material allegation. And it seems to me that it is not.

The action is brought for a breach of contract, by which the defendants undertook that they would purchase and take to certain quantities of iron-mine; and [949] the entire allegation of the breach is, that the plaintiff had raised, gotten and prepared, and was ready and willing, and then tendered and offered, to sell and deliver to the defendants, at the time and place agreed upon, the stipulated quantity of iron-mine, but the defendants refused to "purchase and take to" the same according to the agreement. Now, it appears to me that this is not an allegation of a tender and offer of any commodity, and that it carries the case no further, in sound sense, than the previous allegation of readiness and willingness on the part of the plaintiff to perform the contract. The defendants, by taking an express issue on the allegation as to the tender and offer, attempt to give it more force than properly belongs to it. I think they are not entitled to do this, and that they ought not to have taken issue upon that allegation.

COLTMAN J. If the allegation in question were struck out of the declaration there would still remain sufficient to maintain the action, as the allegation of the plaintiff's readiness and willingness to perform the contract, with notice to the defendants, would be enough for that purpose. This shews that the allegation as to the tender is immaterial, and that issue cannot be taken upon it.

ERSKINE J. I am of the same opinion. If the declaration had alleged a sale of goods ~~to be~~ paid for on delivery, even though such delivery should be by the carts

of the defendant, in that case I think the argument of my brother Channell would have some weight; but the contract here is, that the plaintiff shall sell, and the defendant shall purchase, certain ore, and shall take away the same in his own carts. The tender or offer alleged in the declaration is, not of the thing itself, but is an offer by the plaintiff to complete the agreement he had undertaken, namely, to sell [950] and deliver the ore. The declaration, containing as it does, an allegation of readiness and willingness to perform the agreement on the plaintiff's part, with notice thereof to the defendants, would have been perfectly good without the allegation as to the offer. That allegation, therefore, is immaterial.

MAULE J. I also am of opinion that, striking out the allegation in question, the declaration would remain good; and consequently that the plea, which has tendered an issue on that allegation, is bad. My brother Channell has argued that the two allegations mean the same thing, and that both may be traversed. But that does not follow. Possibly, the insertion of both may have made the declaration bad, in which case there might have been a special demurrer (a). But if an allegation may be struck out, it is immaterial, and therefore issue cannot be taken upon it. The plea, consequently, is bad.

Judgment for the plaintiff.

PEDDIE v. PRATT. Jan. 25, 1844.

Semble, that service of notice of trial on a person who called herself the housekeeper of the house in which the offices of the defendant's attorney are situate, she stating that she was authorized to receive papers (which the party serving the notice believed to be true), and promising to deliver the notice to the attorney, is sufficient.

At the trial before the under-sheriff, the plaintiff recovered a verdict for 1s. debt, and 1s. damages.

Gaselee Serjt., on a former day in this term, obtained a rule nisi to set aside the verdict, and all subsequent proceedings, upon the ground that no notice [951] of trial had been given to the defendant or his attorney. The rule was obtained upon an affidavit of a clerk to Mr. Cook, the defendant's attorney, of No. 28 St. Swithin's Lane, which positively stated that since the 9th of December, on which day the plea was delivered, no notice of trial had been received; that the deponent, upon hearing that the cause had been tried, took out a summons to stay execution; that the deponent and one Sheridan a clerk to the plaintiff's attorney attended thereon, when Sheridan informed deponent that he served the notice of trial on a female, who was standing at the door of the house No. 28 Swithin's Lane; that on another occasion deponent asked Sheridan why he had told Mr. Cook that he had served the notice on "some young man," when Sheridan answered, "Oh! I only told Mr. Cook that, just to lead him on;" and, further, upon an affidavit of the laundress to Mr. Cook, stating that, by his orders, she closed the outer door of the house between four and five in the evening; that the clerks leave the office at or before six; and that no issue or notice of trial, or any other paper in the cause, was ever left with the deponent on the 19th of December, or at any other time.

Byles Serjt. now shewed cause, upon an affidavit of Sheridan, which stated that the deponent, on the 19th of December, delivered the issue and the notice of trial to a female who called herself the housekeeper of the house No. 28 St. Swithin's Lane, in which the offices of the defendant's attorney were situate, between six and seven in the evening; that she informed him at the time that all the clerks were gone away for the evening, but that she was authorized to receive all papers addressed to the said attorney, which the deponent believed to be true; and that she promised to deliver the said issue and notice to the said attorney [952] in the morning. The learned serjeant cited *Kent v. Jones* (3 Dowl. P. C. 210).

Gaselee Serjt., in support of the rule, submitted that, even assuming Sheridan's affidavit to be true, the service would not be sufficient; and cited *Fry v. Mann* (1 Dowl. P. C. 419), *Dodd v. Drummond* (ib. 381), *Stout v. Smith* (ib. 506), *Strutton v. Hawkes* (3 Dowl. P. C. 25), and *Brown v. Wildbore* (ante, vol. i. p. 276, 1 Scott, N. R.

(a) Where a material fact is stated twice, the proper course seems to be to include both allegations in one traverse.

159, 8 Dowl. P. C. 592), where a notice of trial was left with a laundress having the care of the several offices in the house where the office of the defendant's attorney was situate, and she promised to give it to the clerk next morning: this was held an insufficient service. The latter case the learned serjeant submitted was precisely in point. [Cresswell J. In that case the party serving made the party served his agent. It did not appear there that the laundress had said, as here, that she was authorised to receive papers.] It might be inferred that she had such authority, from her promise to deliver the notice. [Cresswell J. No more than if the party had met a man in the street, and asked him to serve the notice, and he had said he would. He would be a mere agent for such party. Erskine J. That is the distinction that runs through all the cases.] The learned serjeant then went into the facts of the service, and

The court ultimately made the
Rule absolute.

[953] BARNARD GREGORY v. C. F. A. W. DUKE OF BRUNSWICK AND
H. W. VALLANCE. Jan. 25, 1844.

[S. C. 7 Scott, N. R. 972; 1 D. & L. 803; 13 L. J. C. P. 34; 8 Jur. 148; 3 C. B. 481. See *Temperton v. Russell*, [1893] 1 Q. B. 728; *Allen v. Flood*, [1898] A. C. 66; *Quinn v. Leatham*, [1901] A. C. 511; *Giblan v. National Labourers' Union*, [1903] 2 K. B. 623.]

In an action on the case for conspiring to prevent the plaintiff, who was about to perform as an actor at a theatre, from acquiring fame and profit in that performance, and for hiring persons to hoot, hiss, groan, and yell at the plaintiff during the performance, and for hooting, hissing, &c. together with such persons, it was proved at the trial that, on an occasion when the plaintiff appeared as an actor, there was a great disturbance in the theatre, consisting of hooting, &c., in which the defendants took a prominent part. The plaintiff rested his case entirely on the conspiracy. The judge left it to the jury to say whether what took place was the result of a preconcerted arrangement between the defendants and persons in other parts of the theatre: Held, a proper direction.—The plaintiff had joined issue on the plea of not guilty, and two other pleas, and demurred to a fourth, upon which judgment was given for him. The venire was as well to try the issues in fact as to assess the plaintiff damages on the issue in law. The jury having found a general verdict for the defendants, upon all the issues of fact, no damages were assessed on the issue in law: Held, that the plaintiff was not entitled to a venire de novo.

Case, for conspiring to prevent the plaintiff, who was about to use and exercise the profession or occupation of an actor at a theatre for his emolument, profit and advantage, and to perform as such actor for reward to be therefore paid to him, from acquiring fame and profit in that performance, and for hiring persons to hoot, hiss, groan, shout and yell at the plaintiff during the performance, and for hooting, &c. together with such persons, &c. (a).

Pleas, first, not guilty; secondly, that the plaintiff was not about to use or exercise the profession or occupation of an actor, for the emolument, &c. of him the plaintiff, or to perform, as such actor, for reward, &c. modo et formâ; concluding to the country.

Thirdly, as to so much of the said alleged grievances as related to the hooting, &c. by the defendants at the said plaintiff, and making a noise, outcry, uproar and [954] riot, at and against the plaintiff, and persuading, instigating, causing, procuring, leading and inducing other persons present in the said theatre, to join in the said hooting, &c., and in making such noise, &c.; that the plaintiff did not become such actor, and use or exercise the said profession or occupation of an actor for his emolument and profit, nor appeared or performed as such actor for reward to be paid to him the plaintiff, modo et formâ; concluding to the country.

There was a fourth plea, as to hooting, &c. at the plaintiff, that the plaintiff was the proprietor and publisher of the *Satirist* newspaper, wherein were constantly published indecent, obscene, lewd, filthy and disgusting articles, &c., and was therefore

(a) See the declaration set out at length, ante, p. 205, upon the argument on a demurrer to the fourth plea.

an unfit and improper person to appear before the public. This plea was held bad on demurrer (*vide ante*, p. 205).

At the trial of the cause, before Tindal C. J., at the sittings for Middlesex after last Trinity term, the following facts appeared in evidence:—The plaintiff, who was the proprietor and publisher of a weekly newspaper called the *Satirist*, had on several occasions appeared as an amateur actor on the stage. An arrangement had been entered into between him and Mr. Bunn, the then lessee of Covent Garden Theatre, that the plaintiff should appear at that theatre, in the character of Hamlet, on the 13th of February 1843. A very large audience was assembled on that evening; and the two defendants occupied one of the O. P. private stage-boxes (*b*). As soon as the plaintiff made [955] his appearance on the stage in the second scene of the tragedy, a great uproar commenced, consisting of hissing, hooting and yelling, in which both of the defendants took part; the defendant Vallance, in particular, advanced to the front of the box, and addressed the audience in a violent strain of invective against the plaintiff, describing him as a person of infamous character, and unfit to appear before the mothers, wives and daughters of England. The uproar and confusion increased to such a pitch, that the plaintiff was obliged to retire from the stage, and the performance terminated.

For the purpose of shewing that the two defendants were acting in concert with other portions of the audience, it was proved that some persons had been hired (but it was not shewn by whom) to go to the theatre in order to prevent the plaintiff from acting; and that both of the defendants, after leaving the theatre, were seen in the neighbourhood with other persons, and were heard to express great pleasure at the result.

The counsel for the defendants, in his address to the jury, read, and commented upon, the fourth plea, observing that the plaintiff, by demurring to it, had admitted the truth of the allegations contained in it. It was objected, on the part of the plaintiff, that as there was no issue in fact upon that plea, it ought not to be referred to; but the Lord Chief Justice said he could not prevent the counsel for the defendants from doing so, as the plea was on the record, and the jury were to inquire what damages the plaintiff had sustained on occasion of the premises, whereof the court had given judgment for the plaintiff, namely on the fourth plea (*vide post*, 960 (*b*)).

His lordship, in summing up the case, told the jury that two overt acts of the alleged conspiracy were stated; the first, that the defendants hired a number of [956] other persons to engage in the same design, and, by their hissing and hooting, produced the effect intended by themselves in the conspiracy; the second, that the defendants themselves joined in the hooting: that as to the law upon the subject, the public at a theatre had, undoubtedly, the right to express their free and unbiassed opinions of the merits of the performers; but that parties had no right, by a preconcerted plan, to make such a noise that an actor, without any judgment being formed as to his performance, should be driven from the stage by such a scheme; which might be concocted for an unworthy purpose; that it was unnecessary, on that occasion, to give any opinion upon the right of the public to deal with the private character of actors, as the question for their consideration was, whether or not that which took place in the theatre, was the result of a preconcerted plan and systematic design. His lordship then, after commenting upon some parts of the evidence, observed, that when it was proved that such a general tumult existed in the theatre, it behoved the jury to be cautious in identifying the conduct of the other persons in other parts of the house, with that of the persons in that box occupied by the defendants. There had been a great deal of hissing and hooting from that box; and if it could be established against the defendants, that they had so acted in consequence of a preconcerted plan to drive the plaintiff off the stage, they would, without question, be liable in that action; but that their acts were not to be connected with those of

(*b*) In theatrical language, the terms O. P. and P. S. are used to signify the right and left sides of the stage, with reference to the actor,—P. S. meaning the prompter's side, being the side on which the prompter sits, and O. P. the side opposite the prompter. The well-known O. P. riots, out of which the case of *Clifford v. Brandon*, 2 Campb. 358, arose, have no connection with this application of the term. They were so called from the endeavours on the part of the audience, to restore the old prices at Covent Garden Theatre.

persons similarly engaged in other parts of the house, unless the jury were satisfied that the whole tumult was the result of a preconcerted arrangement with the persons in the O. P. box ; and that unless such arrangement had been shewn to the satisfaction of the jury, there was no case against the defendants.

The jury returned a verdict for the defendants.

[957] Shee Serjt., in last Michaelmas term, moved for a new trial on the ground of misdirection, and that the verdict was against evidence ; and also for a venire de novo.

The learned serjeant contended that it was not necessary to establish every link of the preconcerted arrangement leading to the overt acts complained of, but that such preconcerted arrangement might be proved by the concurrence of the acts of the defendants with those of others connected together by a correspondence in point of time, and a manifest adaptation of means to effect the same object ; *East*, P. C. p. 97, 2 Stark. Ev. p. 324, 3d ed. ; that it was enough to shew that the two defendants conspired together (a) ; and that there were many cases to shew that such an action as the present, though commonly called an action for conspiracy, was in reality an action for a tort, and would lie, though only one party was guilty. He referred to *Skinner v. Gunton* (1 Wms. Saund. 228 c.), *Saville v. Roberts* (1 Ld. Raym. 379, Carth. 417), *Palk v. Duning* (1 Roll. Abr. 111, pl. 5), *Muriel v. Tracy* (6 Mod. 169), Bull. N. P. 14. [Tindal C. J. The case was not so presented at the trial : it was ultimately put as a case of conspiracy : the plaintiff distinctly undertook to prove that the defendants conspired and combined with an organised band, to drive him off the stage.]

Upon that branch of the motion which prayed for a venire de novo, he submitted that as the venire was to assess the damages for the plaintiff upon the issue in law, as well as to try the issues in fact (vide post, 960 (b)), the jury were bound to assess those damages ; and having omitted to do so, the plaintiff was entitled to a venire de novo. [Tindal C. J. [958] The jury found that the plaintiff had no cause of action. How could they assess damages for him on the issue in law ?] The learned serjeant cited *Codrington v. Lloyd* (8 A. & E. 449, 1 P. & D. 157), *Clement v. Lewis* (3 Bro. & B. 297, 7 J. B. Moore, 200), *Corner v. Shew* (4 M. & W. 163), and *Cheyne's case* (10 Co. Rep. 118).

TINDAL C. J. If I expressed myself so strongly in my observations to the jury, that they must have considered that upon this record, a verdict could by no possibility be found against one of the defendants only, I am not prepared to say that what I said was correct. But I think, that in the course I adopted, I merely followed that which had been chalked out by the plaintiff's counsel, dealing with the action as one for a conspiracy ; and, in that case, the cause ought not to go down again for trial upon the ground of misdirection. However, if the counsel on both sides will agree to be bound by a note which I will make of what I left to the jury, the rest of the court will look at it, and at my notes of the evidence, and will decide whether the rule should go upon that point.

Cur adv. vult.

COLTMAN J., on a subsequent day in that term (November 25th), delivered the opinion of the court.

The alleged misdirection consisted in this,—that the Lord Chief Justice omitted to tell the jury that either of the defendants might be found guilty, although the other were acquitted, and that, on the contrary, he told the jury, that unless there was a combination and conspiracy between the defendants to do the acts complained of, they ought to find for the defendants.

My brother Shee stated, in moving for the rule, that [959] in conducting his case, although he considered that the action was capable of being sustained against one of the defendants alone, yet, he thought it more for the interest of his client, not to advert to that view of the case, but, on the contrary, to undertake to make out a case of conspiracy against both of the defendants : and my brothers Erskine and Maule and I are of opinion that, after deliberately making this election, he is not entitled to come to the court and apply for a new trial, on the ground that the Lord Chief Justice did not make a case for the plaintiff which his counsel had purposely declined to make.

(a) A similar remark was incidentally made by the learned serjeant, as counsel for the plaintiff, at the trial, when Tindal C. J. asked him what damages would be likely to be given, if no concert on the part of the defendants with the rest of the house was proved ; upon which he admitted that no more than 1s. damages could be expected.

It may be true, in point of law, that, on the declaration as framed, one defendant might be convicted, though the other were acquitted; but whether, as a matter of fact, the plaintiff could entitle himself to a verdict against one alone, is a very different question. It is to be borne in mind that the act of hissing in a public theatre is, *prima facie*, a lawful act; and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others. Whether, on the facts capable of proof, such a case of malice could be made out against one of the defendants, as, apart from any combination between the two, would warrant the expectation of a verdict against the one alone, was for the consideration of the plaintiff's counsel: and, when he thought proper to rest his case wholly on proof of conspiracy, we think the judge was well warranted in treating the case as one in which, unless the conspiracy were established, there was no ground for saying that the plaintiff was entitled to a verdict; and it would have been unfair towards the defendants to submit it to the jury as a case against one of the defendants to the exclusion of the other, when the attention of their counsel had never been called to that view [960] of the case, nor had any opportunity given them to advert to or to answer it. The case proved was, in fact, a case of conspiracy, or it was no case at all on which the jury could properly find a verdict for the plaintiff.

As to an objection also urged, that the judge directed the jury, that, unless there were proof of a connection between the persons in what was called the O. P. box and the other persons in the theatre who joined in the disturbance, there was no case against the defendants; the observations of the judge on that subject, taken all together, do not appear to have had reference to the maintenance of the action, but to the amount of damages, which would be greatly aggravated by the circumstance of a general combination, if it had been proved (*vide ante*, 957 (b)). We think, therefore, that there is no ground for a rule on the first point.

As to the second ground on which the application for a new trial was made, we think, and the Lord Chief Justice concurs with us in thinking, that the question is so far deserving of consideration, that a rule should be granted.

A motion was also made for a *venire de novo*, on the ground that damages had not been assessed on the issue in law on which the plaintiff had obtained judgment: but we are all of opinion that the circumstance is immaterial, as the issue of not guilty has been found for the defendants; and the court is at no loss as to the judgment which they ought to pronounce on the whole record (b)¹.

Talfourd Serjt. (with whom was Wordsworth), on a former day in this term, shewed cause. There [961] was no evidence to refer the general tumult in the theatre to the defendants. The present case is very distinguishable from that of the conspiracy against Macklin, mentioned in the note to *Clifford v. Brandon* (2 Campb. 372, n. *Vide ante*, p. 217). That appears to have been a criminal information (b)² (not an indictment, as stated in the note referred to,) against Leigh and others, for a conspiracy to ruin Mr. Macklin in his profession, by making a riot in the playhouse, and preventing the performance of a play in which he was to act, and obliging the manager to come on the stage and discharge him; and evidence was given that there was a regularly organised body of persons employed for the purpose, who were supplied with money and liquor (c). Undoubtedly, there can be no justification for two persons conspiring to hiss an actor; but, without a conspiracy, parties may agree to go together to a theatre to express their indignation against some proposed representation, or at the conduct of some particular performer. The public have invariably done so.

Shee Serjt. (with whom was Badeley), on a subsequent day (January 23d), was heard in support of the rule. He referred to Lord Holt's judgment in *Ashby v.*

(b)¹ Quære the necessity for a *tam quam venire* in this case (*supra*, 957). An assessment of contingent damages appears to be indispensable in those cases only where some part of the declaration is not covered by any plea terminating in an issue to the country.

(b)² See the information in 6 Wentw. Prec. 443.

(c) The learned serjeant stated these facts from a memoir of Mr. Macklin, published in 1779.

White (d), as an authority, that in every case where a man is hindered or obstructed in the exercise or enjoyment of a right he has by law, the law gives him a remedy by action. The jury in this case were [962] misled by eloquence and prejudice. The defendants' counsel had no right to read the fourth plea to the jury; the demurrer was used as an admission on the part of the plaintiff; but it could not properly be so used; *Gould v. Oliver (a)*. [Tindal C. J. It cannot be used as evidence. *Cresswell J.* Your argument would go to the improper reception of evidence; but there is no rule upon that ground. I remember a new trial once granted to a party upon the ground that an unfair speech had been made by the advocate on the opposite side; but the precedent never was followed.]

Cur. adv. vult.

TINDAL C. J. now said: We have considered this case with great attention; and, being satisfied that the main point was properly decided, we think we ought not to send the cause down again in order to let in a subordinate point not mentioned on the former occasion, unless we are satisfied that justice requires it. And, seeing the serious nature of the charge, we think there has not been such a substantial failure of justice as would warrant us in interfering.

Rule discharged.

[963] WILKINS v. BROMHEAD AND HUTTON. Jan. 23, 1844.

[S. C. 7 Scott, N. R. 921; 13 L. J. C. P. 74; 8 Jur. 83.]

A. employed B. to build him a greenhouse for 50l. When it was completed, B. gave A. notice, and requested him to remit the price. A. remitted the amount and desired B. to keep the greenhouse till sent for. Afterwards B. (unknown to A.) deposited the greenhouse with C., telling him it was the property of A., and requesting him to keep it for A., which he agreed to do. B. having become bankrupt, his assignees took possession of the greenhouse.—Held, first, that the property in the greenhouse passed to A., there having been an appropriation of it to him by B., and an assent on his part to such appropriation; secondly, that the greenhouse was not in the possession, order, and disposition of B. as reputed owner.—Semble, that where a nonsuit only is moved for, the court will not grant a new trial. Per Maule J.

Trover, against the defendants, who were assignees of Smith and Bryant, bankrupts, for a greenhouse and materials. Pleas—not guilty, and not possessed; on both of which pleas issue was joined.

At the trial of the cause, before Coleridge J., at the last Bristol summer assizes, it appeared that the plaintiff, a gentleman residing near Cardiff, in Glamorganshire, in October 1841, employed the bankrupts, Smith and Bryant, who were carpenters at Bristol, to make him a greenhouse for the price of 50l.: it was also agreed that Smith and Bryant should put up the greenhouse on the plaintiff's premises at Cardiff, for the further sum of 14l. 14s. Smith and Bryant, having finished the woodwork, sent the sashes to a glazier of the name of Wait, to be glazed. The whole work being completed, but not permanently fixed together, Smith and Bryant, in June 1842, informed the plaintiff, by letter, that the greenhouse was ready for delivery, and requested him

(d) 8 St. Tri. 89, 14 How. St. Tri. 695, 6 Mod. 45, 1 Salk. 19, 3 Salk. 17, Lord Holt, 524, Bro. P. C. i. 45, 1st ed., i. 62, 2d ed.

As to *Ashby v. White*, see the case of *Stockdale v. Hansard*, printed by order of the House of Commons, in 1839, p. 90, 150.

For a report of *Stockdale v. Hansard*, see also 9 A. & E. 1, and 2 P. & D. 1.

(a) Ante, vol. ii. p. 208, 2 Scott, N. R. 241. A demurrer admits those facts only which are properly pleaded; *Holford and Platt's case*, 2 Roll. Rep. 22. And see *Zouch and Bamfield's case*, 1 Leon. 80; *Burton's case*, 5 Co. Rep. 69; Hob. 164, 233; *Heard v. Baskerville*, Hutton, 15; *Rex v. Bishop of Chester*, 2 Salk. 561; 3 Burr. 1509; Co. Litt. 72 a.; Com. Dig. tit. Pleader, (Q. 5), (Q. 6). The judgment for the plaintiff upon the demurrer to the fourth plea, pronounced by the court (ante, 205), before the trial of the issues, shewed that the allegations in that plea afforded no sufficient answer to that part of the declaration to which that plea was addressed, and, therefore, not being pleadable, were not properly pleaded.

to remit the 50l. "for the greenhouse" through Stuckey's Banking Company. The plaintiff remitted the 50l., and wrote to request Smith and Bryant "to keep the greenhouse, and take care of it, till he sent for it." In February 1845, pending an action against Bryant, the whole was sent by him to Wait without the knowledge [964] of the plaintiff, to secure it from an execution against Bryant. Bryant asked Wait to place the greenhouse in his warehouse, alleging that Smith and Bryant had not room for it on their premises, telling him also that it was the plaintiff's property, and requesting Wait to keep it till he sent for it, which Wait agreed to do. On the 14th of March a fiat in bankruptcy issued against Smith and Bryant, under which the defendants were appointed assignees. On the 22d of April the greenhouse was removed by Wait to the premises of the bankrupts, and was taken possession of by the messenger under the fiat.

On the 9th of May 1843 an agent of the plaintiff made a demand of the greenhouse upon the solicitor to the fiat, at the same time leaving with him a written demand, addressed to the defendants. The solicitor, on the 12th, informed the plaintiff's agent that the opinion of counsel had been taken, and that the assignees were advised not to give up the greenhouse; and he accepted a notice and indorsed a refusal, dating it on the 9th.

On the part of the defendants it was contended that there was no evidence for the jury of the plaintiff's property in the greenhouse; and *Atkinson v. Bell* (8 B. & C. 277, 2 M. & R. 292) was cited; and that even assuming that there was some evidence of property in the plaintiff, the greenhouse, at the time of the fiat, was in the possession, order, and disposition of the bankrupts, with the consent of the owner, within the 6 G. 4, c. 16, s. 72. A further point was taken, that there was no evidence of a conversion by the defendants; but it was abandoned on the argument.

The learned judge having refused to nonsuit the plaintiff, the defendants' counsel declined to address the jury, who were directed to find for the plaintiff, on both issues. A verdict was returned accordingly, damages 50l.; leave being reserved to move to enter a nonsuit, if the court should think either objection well founded.

[965] Bompas Serjt., in Michaelmas term last, obtained a rule nisi accordingly,—citing *Thackthwaite v. Cock* (3 Taunt. 487), *White v. Wilks* (5 Taunt. 176), and *Knowles v. Horsfall* (5 B. & Ald. 134).

Channell Serjt. (with whom was Butt) shewed cause. The question is, whether, on the points taken, there was any evidence which justified the judge in leaving the case to the jury. First, it is quite clear that the property in the greenhouse vested in the plaintiff: it was completely finished, and he paid the whole price for it; and there was a complete appropriation of it by the bankrupts to the plaintiff when they sent it to Wait's warehouse to be kept for him, with express notice that it belonged to him. *Atkinson v. Bell* (8 B. & C. 277, 2 Mann. & Ryl. 292) was cited at the trial for the defendants. That case, however, is very different from the present. There, the defendant, the vendee, expressly refused to accept the machines; whereas, here, not only did the plaintiff assent to receive the greenhouse, but he actually paid for it. *Mucklow v. Mangles* (1 Taunt. 318) also, does not apply. In that case there was a payment in advance, but there was no appropriation of the article by the vendor with the assent of the vendee. In *Goodall v. Skelton* (2 H. Blac. 316) there was clearly no delivery, so as to warrant the plaintiff in suing as for goods sold and delivered. Supposing this greenhouse to have been destroyed by fire whilst upon the premises of Waite, the loss would clearly have fallen on the plaintiff; *Tarling v. Baxter* (6 B. & C. 360, 9 Dowl. & Ryl. 272). *Bartram v. Payne* (3 C. & P. 175) is a strong authority for the plaintiff, both on the point of property and on that of order and disposition. It was there held that a carriage finished and paid for before the [966] bankruptcy of the maker, but suffered to remain on his premises at the request of the person for whom it was made, on account of his being about to go abroad, cannot be taken by the assignees, as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sold it to another. *Carruthers v. Payne* (5 Bingh. 270, 2 M. & P. 429) does not differ materially from the present case. There, the plaintiff ordered a chariot to be built, which was to be finished according to certain directions, and for which he paid. After it had been finished in other respects, the plaintiff ordered a front seat to be added; but the builder being slow in making this addition, the plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. The plaintiff, being afterwards dissatisfied, ordered the chariot to be sold,

and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignees seized the chariot. It was held that the plaintiff had sufficient property to maintain trover, and that the chariot did not pass to the assignees as being in the order and disposition of the bankrupt with the consent of the true owner. [Maule J. referred to *Greening v. Clark* (4 B. & Cr. 316).] That case shews, that even assuming the greenhouse to have remained the property of the bankrupts, it was not in their order and disposition. As to this point, taking the greenhouse to be the plaintiff's property, it is incumbent on the assignees to shew how it passed to them, as being in the order and disposition of the bankrupts: *Lyons v. Weldon* (9 J. R. Moore, 629). [Maule J. They must also have been the reputed owners.] It is clear the bankrupts had not the possession, order, or disposi- [967]-tion of the greenhouse after they had delivered it to Wait to be kept by him, not as their property, but as the property and on account of the plaintiff. The bankrupts neither remained the actual, nor the reputed, owners of the article. Being removed from their premises no parties dealing with them would give them credit in respect of it. The fact that the plaintiff had not seen the greenhouse, and was not aware that it had been removed from the bankrupts' premises to those of Wait, is perfectly immaterial.

Sir T. Wilde and Bompas Serjts., in support of the rule. The first question is, whether the property in the greenhouse passed to the plaintiff. There is a known distinction between the case of a sale of a specific article in existence at the time, and that of an article ordered to be made: in the former case the property passes by the contract, although a lien may remain for the price; in the latter case, until the article has been so far accepted that the buyer cannot repudiate it, the property continues in the vendor. *Mucklow v. Mangles* (1 Taunt. 318) shews that, if a person contracts with another for a chattel which is not in existence at the time of the contract, although he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. Sir James Mansfield there observes, "The only effect of the payment is, that the bankrupt was under a contract to finish the barge: that is quite a different thing from a contract of sale; and, until the barge was finished, we cannot say that it was so far Pocock's property that he could have taken it away." And Heath J. says, "A tradesman often finishes goods which he is making in pursuance of an order given by [968] one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. If the thing be in existence at the time of the order, the property of it passes by the contract; but not so, where the subject is to be made." In *Atkinson v. Bell* (8 B. & C. 277, 2 M. & R. 292), A., having a patent for certain spinning machinery, received an order from B. to have some spinning-frames made for him. A. employed C. to make the machines for B., and informed the latter that he had done so. After the machines had been completed, A. ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for B., and C. informed B. that they were ready, but he refused to accept them; and it was held that C. could not recover the price from B. in an action for goods bargained and sold, or for work and labour and materials. In that case there was a distinct appropriation so far as the vendor was concerned, though the vendee (for what reason, is not stated) refused to accept the machines. The principle deducible from the case, is to be found at the conclusion of Mr. J. Bayley's judgment, in which he says, "I cannot say that the property passed to the defendants, so as to enable the plaintiffs to recover on the counts for goods bargained and sold, or for work and labour. It is said that there was an appropriation of these specific machines by the maker, and that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although, while the goods [969] are in progress, the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing (vide supra, 967-8), still a good title is given to the party to whom they are delivered." And Holroyd J. said that the action for goods bargained and sold would not lie, "because there was no specific appropriation of the machines assented to by the

purchaser, and the property in the goods therefore remained in the maker." *Woods v. Russell* (5 B. & Ald. 942), which was explained by Bayley J. in *Atkinson v. Bell*, does not impugn the doctrine laid down in the latter case. There can be no doubt that here the bankrupts intended to appropriate the greenhouse to the plaintiff: but his assent to such appropriation was wanting. [Maule J. Suppose the bankrupts had shewn the greenhouse to the plaintiff, and he had then paid for it?] That would have made all the difference. The circumstance of the bankrupts having represented to the plaintiff that they had finished the greenhouse, and demanded the 50l., and of the plaintiff having assented to the demand and paid the money, did not vest the property in the plaintiff. Notwithstanding the payment of the price, no change of property could take place, unless there was such an acceptance by the plaintiff as would preclude him from repudiating the greenhouse when he saw it: and there was no evidence of any such acceptance. Suppose the bankrupts had sold this identical greenhouse after the remittance of the 50l., could the plaintiff have maintained trover for it? It is clear that the bankrupts might have performed their contract by sending him another greenhouse (vide supra, 967-8). Had this greenhouse been destroyed by fire whilst on the bankrupt's premises, the loss would un-[970]-questionably have been theirs. The cases that have arisen upon the statute of frauds, are most pertinent to the present inquiry. It is apprehended that delivery imports acceptance. [Maule J. But acceptance does not import delivery.] Suppose a verbal contract to deliver an article in the country, and the buyer comes to London, inspects the article and does something to it, that is an acceptance which imports delivery for many legal purposes. It is submitted that there cannot be an acceptance without some offer to deliver on the other side. Here, the plaintiff not having come for the article, the bankrupts sent it to Wait's premises; which, so far as this question is concerned, was the same as sending it to another shop of their own. [Maule J. Wait is told to keep it till the plaintiff sent for it.] But to keep in what sense? Not as delivered to the plaintiff. All that was meant was, that the greenhouse was an order which the bankrupts had executed for the plaintiff. It is clear that here has been no such delivery and acceptance as would preclude the vendee from setting up the statute of frauds, or objecting to receive the article; *Elmore v. Stone* (1 Taunt. 458), *Rugg v. Minett* (11 East, 210). Suppose a tailor to write to a customer in the country, saying that his clothes were made, and that he, the tailor, wanted money, that the customer sent the money, and then came to town and found the clothes too large, could he not return them? In *Howe v. Palmer* (3 B. & Ald. 321), where a vendee verbally agreed, at a public market, with the agent of the vendor to purchase twelve bushels of tares (then in the vendor's possession, constituting part of a larger quantity in bulk), to remain in the vendor's possession till called for, and the agent, on his return home, measured the twelve bushels and set them apart for the vendee, it was held that this did [971] not amount to an acceptance by the latter, so as to take the case out of the seventeenth section of the statute of frauds. [Cresswell J. referred to *Alexander v. Gardner* (1 New Cases, 671; 1 Scott, 630), as resembling the present case.] In that case, an invoice, and an indorsed bill of lading, of the butters had been sent to the vendees. In *Carter v. Toussaint* (5 B. & Ald. 855, 1 D. & R. 515), a horse was sold by verbal contract, but no time was fixed for the payment of the price: the horse was to remain with the vendors for twenty days without any charge to the vendee: at the expiration of that time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors: and it was held that there was no acceptance of the horse by the vendee, within the statute of frauds. [Maule J. In that case there was a sale of a chattel for more than 10l., and no memorandum in writing. Suppose the price of the horse had been under that sum? If part payment of the price will satisfy the statute of frauds, will not the payment of the whole price do so?] By merely paying for an unseen article, the party does not so conclude himself as to prevent him from repudiating it afterwards.

As to the next point, it is submitted that the possession of Wait was the possession of the bankrupts, and that up to the time when he sent the greenhouse back, it remained in the possession, or subject to the order and control, of the bankrupts, and not of the plaintiff. The greenhouse was removed, not at the desire of the plaintiff, but for the convenience of the bankrupts. It was part of their stock when sent to Wait's, and remained so until sent back. The bankrupts might have insured it while there, or brought an action of detinue to recover it. They were clearly the reputed

owners [972] of the article, for it had belonged to them; and the conversation which passed between Bryant and Wait, cannot be considered as altering the reputation; for, in the absence of any communication with the plaintiff, Wait cannot be looked upon as acting as the plaintiff's agent, but merely as the agent of the bankrupts. [Tindal C. J. Wait kept nothing else for them. How were the rest of the world to know that the property in the greenhouse remained in the bankrupts?] *Knowles v. Horsfall* (5 B. & Ald. 134) is in point. Suppose the bankrupts had demanded the greenhouse from Wait, what defence could he have had in the absence of an express assent by Wilkins to the appropriation? [Cresswell J. For this part of the argument it must be assumed that Wilkins was the true owner: and, if so, the bankrupts could not have maintained any action against Wait. Maule J. Can you say there was no evidence to go to the jury? The rule asks only for a nonsuit.] It is competent to the court to grant a new trial, should it be thought that a new trial will meet the justice of the case. *Vacher v. Cocks* (1 B. & Ad. 145).

TINDAL C. J. The motion before the court proceeds upon two distinct grounds: the first ground is, that, under the contract, no property in the greenhouse in question passed to the plaintiff; the second, admitting that the property did pass by the contract, as the greenhouse remained in the possession of the bankrupts, or of Wait, down to the time of the bankruptcy, it must be taken to be property in their order and disposition, as reputed owners, with the consent and permission of the true owner, and, consequently, that it vested in their assignees.

As to the first point, there can be no doubt but that a contract for the making of a chattel, does not [973] of itself vest the property in the chattel, when completed, in the person giving the order. But here, the question turns, not upon the original contract between the plaintiff and Smith and Bryant, but upon the circumstances which afterwards took place, viz. the payment by the plaintiff, after the greenhouse had been completed, of the stipulated price, the appropriation and setting apart by the bankrupts of the greenhouse for the plaintiff, and his assent to such appropriation. There was an appropriation on the one side, and an assent to such appropriation on the other; which, I think, was quite sufficient to pass the property to the plaintiff. It may be, that the original contract did not pass the property; but the parties may be said to have entered into a new contract. I cannot conceive why, under the circumstances of this case, the property in an article made to order should not pass upon its completion, as it would have done if it had been in existence at the time of the original contract. The objections raised upon this point were mainly founded upon *Atkinson v. Bell* (8 B. & C. 277, 2 Mann. & Ryl. 292). But, if that case be examined, it will be found not to apply. The decision there turned entirely on the absence of assent on the part of the purchasers to the appropriation of the machines by the vendor. It is said, by Bayley J., "These were Sleddon's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within *Rohde v. Thwaites* (6 B. & C. 388, 9 Dowl. & Ryl. 293), and there would have been a complete appropriation, vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt; and, therefore, no action for goods bargained and sold was maintainable." Holroyd J. observes, "I think the action will not lie for goods [974] bargained and sold, because there was no specific appropriation of the machines assented to by the purchasers, and the property in the goods therefore remained in the maker." And Littledale J. adds, "There could not be any sale in this case, unless there was an assent, by the defendants, to take the articles." Looking at the facts of this case, it seems to me that there is complete evidence of assent on the part of the plaintiff, to the appropriation made by the vendors. The plaintiff was informed by letter that the greenhouse was finished, and was requested to remit the price. He did so, at the same time requesting the vendors to keep the greenhouse for him until he sent for it. It has been argued, that the letter of the plaintiff, desiring Smith and Bryant to keep the greenhouse for him, was written before the article was seen, and that it would be hard if it were held to be such an acceptance as would preclude him from rejecting the article if it afterwards turned out defective in its construction. If a purchaser's assent to the appropriation was shewn to have been obtained by misrepresentation, it seems to me it would probably be held to be no assent at all. But that is not the case here; and although the plaintiff thought proper to assent to the appropriation without seeing the greenhouse, the assent was not the

less complete. Upon this point, therefore, I think that the property vested in the plaintiff, so as to enable him to maintain this action.

With respect to the second point, as the motion is to enter a nonsuit only, the rule ought, in strictness, to be discharged, if there was any evidence to go to the jury. But perhaps it would be too strict, under the circumstances, to hold the defendants within that precise limit. If the court saw that there was any evidence which might make any difference in the finding of the jury, it would be but just and right to allow the defendants an opportunity to try the cause again. I confess, however, [975] I cannot see any ground on which the jury could come to the conclusion that there was any reputed ownership in the bankrupts. I think, therefore, that this point also fails. Consequently, the rule must be discharged.

ERSKINE J. I also think that this rule should be discharged. With respect to the first point, I am of opinion, on the authority of the cases relied upon for the defendants, that the property in this greenhouse passed to the plaintiff. It is conceded, on all hands, that the rule laid down in *Mucklow v. Mangles* (1 Taunt. 318. Vide post, 979 (a)), is the correct one, viz. that, while the article remains unfinished, no property in it passes, notwithstanding the vendor may intend it for the purchaser, or may put his name upon it, or otherwise shew an intention to appropriate it, and that a payment of money on account makes no difference. Here, however, the greenhouse was completed, and after it was so completed the makers appropriated it to the purchaser. The latter, before paying for it, might have required to see it; but, instead of doing so, he transmitted the price. But that is not all; he also requested the bankrupts to keep the greenhouse for him, thereby assenting to the appropriation which they had made. When the latter deposited it with Wait, they gave notice that it was the plaintiff's property, and requested Wait to take care of it for him. The reason why it was held in *Atkinson v. Bell* (8 B. & C. 277, 2 Mann. & Ryl. 292) that the action for goods bargained and sold could not be maintained, was, that, although there had been an appropriation, no assent, on the part of the persons for whom the articles were made, had been shewn. The language of the judges, as read by the Lord Chief Justice, shews that to have been the only ground on which [976] the case was decided. "If," says Bayley J., "the defendants had expressed their assent, then this case would have been within *Rohde v. Thwaites* (6 B. & C. 388, 9 D. & R. 293), and there would have been a complete appropriation, vesting the property in the defendants." What was the assent in *Rohde v. Thwaites* (6 B. & C. 388, 9 D. & R. 293), which was, in that learned judge's opinion, sufficient to pass the property? There, the vendee never saw the sugars; but, having received a message from the seller that they were ready for him, he sent word back that he would take them away as soon as he could: and it was held to be such an assent that the property passed. Moreover, there is here a strong fact which did not appear in *Rohde v. Thwaites*; for the purchaser paid the price, and requested the vendors to keep the greenhouse for him. It appears to me that the property completely passed to the plaintiff, and that if the article had been accidentally destroyed while in the possession of the bankrupts or of Wait, it would have been the plaintiff's loss.

With regard to the second question—whether the greenhouse was in the possession, order, and disposition of the bankrupts within the 72nd section of the 6 G. 4, c. 16,—without deciding whether or not they could have maintained an action against Wait to recover it back, but assuming that it remained in the possession of the bankrupts, that is not enough to entitle the defendants to a nonsuit. The 72nd section does not pass to the assignees all property in the possession of the bankrupt at the time of his bankruptcy, but only "goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner." The question therefore is, whether, at the time of the bankruptcy, this greenhouse was in the possession of Smith and Bryant as reputed [977] owners. It may be admitted that, where property which has once belonged to a bankrupt, remains in his possession, after sale, without any apparent change, the circumstance of the possession continuing as before the change of property, would be evidence which would warrant the jury in coming to the conclusion that it was in his possession as reputed owner. But here, the article was made by the bankrupts; and it does not appear that they were in the habit of making articles of this description and keeping them on their premises for sale. No one dealing with the bankrupts could therefore be misled by seeing the

greenhouse on their premises after it had been finished and paid for. When it was sent to Wait's warehouse, it was with a notice that it was the property of the plaintiff, and that it was to be taken care of for him. What was there to induce any person to think that the property in it remained in the bankrupts? The fact of its removal would alone lead to the conclusion that it was the property of a third person. If it had been traced to Wait's premises, the party, on inquiry, would have learned that it was the property of the plaintiff. So far, therefore, as relates to the question of reputed ownership, there was no evidence to warrant the jury in finding that the greenhouse was in the possession of the bankrupts as reputed owners; and I think they would have been clearly wrong if they had come to such a conclusion.

MAULE J. It appears to me that the learned judge was right in declining to nonsuit the plaintiff, and also that the counsel for the defendants acted very discreetly in abstaining from going to the jury upon the questions raised at the trial; for it is impossible to suppose that any jury, unless restricted by some rule of law, could have come to any other conclusion than that which has been arrived at here. The facts are extremely clear. The [978] greenhouse was made by the bankrupts to the order of the plaintiff. When finished, the plaintiff paid for it, desiring the bankrupts to keep it till he sent for it. They afterwards delivered it to a third person, with notice that it was the property of the plaintiff, and a request that it should be kept for him. It has been contended, on the part of the defendants, either that the greenhouse in question never became the property of the plaintiff, or that the bankrupts obtained false credit by its being allowed to remain in their possession, order, and disposition as reputed owners. I do not quite agree with the Lord Chief Justice, that although the defendants have only moved for a nonsuit, if there were any thing in the case that might fairly lead a second jury to arrive at a different result, we might grant them a new trial. It seems to me that this would be to do injustice to the plaintiff, by giving a boon to the other side at his expense. The question is, whether there was evidence to go to the jury on the part of the plaintiff. As to the first point, there seems to me to have been a complete appropriation on the part of the vendors, and an assent thereto on the part of the purchaser. A good deal has been said about acceptance and the statute of frauds; but I do not think that either has anything whatever to do with this case. This is not like the case of "do et facias;" for here, payment has been made for a completed article. The clear understanding was, that the plaintiff was to have the greenhouse, and the bankrupts the 50l. That the bankrupts so understood the transaction is clear; as they treat the greenhouse as being no longer their property, but as belonging to the plaintiff. In these cases it is not necessary that the vendee should actually see the article when completed, provided there is sufficient to shew that the identical thing offered or appropriated by the one party, is accepted and assented to by the other, as made in the performance of the contract. Of [979] this there was evidence on which any jury would have found for the plaintiff (a).

As to the second point, I agree that there was evidence to go to the jury; but none that would have warranted them in saying that the greenhouse was in the possession, order, and disposition of the bankrupts as reputed owners, with the consent and permission of the true owner. It therefore seems to me that, on both grounds, this rule should be discharged.

CRESSWELL J. I am of the same opinion. The first point comes very much to this,—whether the contract was not in effect an agreement for the sale of a specific chattel; for although, in the first instance, the bankrupts contracted to build the greenhouse for the plaintiff, after the article was finished there was an appropriation of it to the plaintiff, and a clear assent on his part to such appropriation. I therefore think the property passed to the plaintiff.

As to the other point, assuming that the greenhouse was in the possession, order, and disposition of the bankrupts (which to my mind is very questionable), I think there was no evidence that it was in their possession, as reputed owners. On the contrary, the evidence went to rebut that inference. Upon the whole, it seems to me

(a) In *Goss v. Quinton*, ante, vol. iii. p. 825, it was held that a party upon whose order an article was in a course of manufacture, and for which he had paid, was entitled to take possession of it although unfinished, *tamen quære*.

that the jury were well warranted by the evidence, in giving the verdict which they returned.

Rule discharged (b).

[980] DOE DEM. PHILLIPPS v. ROE. Jan. 29, 1844.

Where the declaration against the casual ejector was intituled "In the Exchequer of Pleas," and the notice required the tenant to appear in this court, a rule for judgment was refused.

Manning Serjt. moved for judgment against the casual ejector. The declaration was intituled "In the Exchequer of Pleas;" by the notice at the foot, the tenant was required to appear "in Her Majesty's court of Common Pleas." An application had been made to the court of Exchequer; but the barons thought, that as the tenant was required to appear here, the motion for judgment should be made in this court, and, therefore, refused the rule. The learned serjeant referred to *Doe dem. Knowles v. Roe* (12 M. & W. 569), where the court of Exchequer, in the present term, granted a rule under similar circumstances—the declaration being intituled "In the Common Pleas," and the notice being to appear "in Her Majesty's court of Exchequer." So, in *Doe dem. Evans v. Roe* (9 Dowl. P. C. 999), the court of Queen's Bench granted a rule nisi for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear in the "Common Bench," instead of the "Queen's Bench," the declaration being intituled in the "Queen's Bench."

TINDAL C. J. The declaration being the commencement of the suit, it seems to me that the suit belongs more properly to that court in which the declaration is intituled. I think we ought not to interfere where there has been so much carelessness.

MAULE J. In refusing the rule in this case, the court of Exchequer appear to have dissented from the decision in *Doe dem. Evans v. Roe* (9 Dowl. P. C. 999).

Rule refused.

[981] HOOD v. BRADBURY. Jan. 20, 1844.

No costs in matters arising out of interpleader motions, are allowed until the termination of the proceedings.

Bompas Serjt. moved for costs of the day, for not proceeding to trial on an interpleader rule.

MAULE J. The rule is settled, that no costs on interpleader motions are allowed until the proceedings have terminated.

ERSKINE J. In interpleader cases at chambers I have always refused to make any interlocutory decision as to costs.

The rest of the court concurred.

Rule refused.

COW v. ELIZABETH KINNERSLEY, Executrix of Isaac Kinnersley, Deceased.
Jan. 27, 1844.

Where the defendant was an executrix, and she was willing to bring the amount claimed into court to abide the event, a commission to examine witnesses abroad was granted, although the names of none of the witnesses were given.

Channell Serjt., on a former day, on behalf of the defendant, obtained a rule nisi for a commission to examine witnesses at Bombay. The action was brought to recover

(b) The defendant Bromhead afterwards brought an action in Q. B. against his attorney, Hall, for defending the action without his authority, and he obtained a verdict. At the trial, coram Erle J., at Bristol, 1845, it was proved that the bankrupts sent the greenhouse to Wait, to prevent its being taken in execution as their property, but it did not appear on this occasion that any intimation was given to Wait that the greenhouse had become the property of Wilkins.

the moiety of passage-money agreed to be paid by the deceased for a voyage from Bombay to the Cape of Good Hope, which voyage was never performed, in consequence of the death of General Kinnersley, the defendant's husband, previous to the sailing of the ship. [982] The plaintiff claimed the moiety of the passage-money under an alleged custom.

Sir T. Wilde Serjt. shewed cause. The names of no witnesses are stated in the affidavits upon which the motion is founded, nor is it suggested that any witness can be produced to disprove the alleged custom. Although it is not requisite to give the names of all the witnesses, the names of some ought to be furnished, or some description given of them; *Dimond v. Vallance* (7 Dowl. P. C. 590), *Beresford v. Easthope* (8 Dowl. P. C. 294), *Gunter v. M'Tear* (1 M. & W. 201, *Gunter v. M'Kear*, Tyrwh. & Gr. 245, 4 Dowl. P. C. 722), *Norton v. Lord Melbourne* (3 N. C. 57, 3 Scott, 398, 5 Dowl. P. C. 181). Also, the affidavit should contain some statement to shew that a commission is actually necessary; *Baddeley v. Gilmore* (1 M. & W. 55, Tyrwh. & Gr. 369), *Carbournell v. Bessall* (5 Sim. 626).

Channell Serjt., in support of his rule. There is no such rule as to the naming the witnesses as is suggested; but if so, as this application is made on behalf of an executrix, and is clearly made *bonâ fide*, and not for delay, such rule ought not to be enforced. The defendant is willing to bring money into court. This is not like the case of an action on a contract to which the defendant was a party. [Tindal C. J. Your affidavits do not deny that such custom as that set up by the plaintiff, exists; neither do they state that you believe there are persons at Bombay who can disprove it. The court is afraid of introducing greater laxity than has hitherto prevailed. The cases all tend to shew that, at least, some witnesses must be specifically named.] It is the plaintiff's case that is founded upon a supposed custom: the defendant wishes to have an opportunity of disproving it.

[983] TINDAL C. J. The court entertain considerable doubt of the propriety of allowing this commission to go. But, considering that the defendant is an executrix, and that she is willing to pay the amount into court to abide the event, we think the rule may be made absolute upon those terms.

Rule absolute accordingly.

HILLIARD v. WEBSTER. Jan. 29, 1844.

[S. C. 7 Scott, N. R. 903; 8 Jur. 425.]

A local act, regulating the proceedings in the courts-baron of a hundred and manor, enacts, that, in case any personal action for the recovery of any debt or damages, shall be commenced and prosecuted out of the jurisdiction, and it shall appear to the judge of the court where such action shall be tried, that the debt or damages to be recovered in such action, do not amount to 40s., and the defendant in such action shall duly prove, by sufficient testimony, to be allowed by any of the judge or judges of the court where such action shall be tried, that, at the time of commencing such action, such defendant was resident within the jurisdiction, and liable to be summoned or warned in either of the said courts-baron, for such debt or damages, then and in such case, unless the judge who shall try such cause shall, in open court, certify in writing that there was a probable or reasonable cause of action for 40s. or more, or that the freehold, or title to lands or tenements, principally came in question at such trial, such plaintiff shall not recover, but be nonsuited in such action, &c.: Held, that it is not necessary to plead the statute, but that the judge is bound to receive evidence of the defendant's residence within the local jurisdiction, and, upon being satisfied as to the sufficiency of the proof of the fact, to nonsuit the plaintiff.

Assumpsit, to recover a sum of 3l. from the defendant as the maker of a promissory note. The defendant pleaded that he did not make the note.

At the trial, before the under-sheriff of Staffordshire, it appeared that the defendant resided at Chapel-en-le-Frith, within the jurisdiction of the court-baron of the hundred of High Peak; and it was submitted, on his part, that the plaintiff ought to be nonsuited, under the 33 G. 2, c. xxxi.(a). For the plaintiff, it was contended, [984] that,

(a) Intituled "An act for regulating the proceedings in personal actions in the

as that act was not specially pleaded, the defendant could not avail himself of its provisions. The under-sheriff nonsuited the plaintiff under the statute, notwithstanding his counsel chose to appear,—leave being reserved to him to move to enter a verdict for 3l., if the court should be of opinion that the act ought to have been specially pleaded.

Shée Serjt., on a former day in this term, accordingly obtained a rule nisi, on the ground that, since the new [1885] rules of pleading (H. 4 W. 4), the local act was not admissible in evidence without being specially pleaded.

Channell Serjt. now shewed cause. The question is, whether it was necessary for the defendant to plead the local act; and it is submitted that it was not. By sect. 46, the act is to be “deemed a public act, and to be judicially taken notice of as such by all judges, justices, and other persons, without specially pleading the same.” The under-sheriff was bound to take notice of the act; and, on its being proved that the defendant resided within the jurisdiction of the act, to nonsuit the plaintiff. The nonsuit is a statutable nonsuit, to which it is unnecessary to have the consent of the plaintiff. In Tidd’s Practice, 9th edit., pp. 960, 961, the course of proceeding is thus laid down: “The mode of taking advantage of these statutes is, by plea, suggestion, or motion. When there is a prohibitory clause in the act of parliament, as in Westminster, 23 G. 2, c. 27, s. 21, see *Barney v. Tubb* (2 H. Blac. 351), declaring ‘that no action for any debt under 40s., and recoverable in the court of requests, shall be brought against any person within the jurisdiction thereof, in any other court whatsoever,’ the proper mode of taking advantage of the act is by pleading it, or giving it in evidence under the general issue: and, if that mode be not adopted, the court will not, after verdict, enter a suggestion on the record that the defendant lived within the jurisdiction, or stay the proceedings; *Taylor v. Blair* (3 T. R. 452). The acts for The Tower Hamlets (23 G. 2, c. 30, s. 21), and other places, Isle of Ely (18 G. 3, c. 36), *Parker v. Elding* (1 East, 352), have the same prohibitory clause; and, though they give no form of plea, yet they may be pleaded, or the facts which bring a case within them, may be given in evidence under the general issue, to nonsuit the plaintiff, or obtain a verdict against him; *Parker v. Elding* (1 East, 352). In the London act (3 Jac. 1, c. 15), as well as in the acts for Southwark (22 G. 2, c. 47), and Middlesex (23 G. 2, c. 33), there is no such prohibitory clause; and therefore the proper mode of proceeding upon these acts is, for the defendant to apply to the court by affidavit for leave to enter a suggestion on the roll of the facts necessary to entitle

respective courts-baron of the hundred of High Peak and manor of Castleton, in the county of Derby,” which enacts, sect. 45, “that in case any personal action, for the recovery of any debt or damages, shall be commenced and prosecuted against any person or persons after the said 24th of June 1760, in any of His Majesty’s courts of record at Westminster, or elsewhere, out of the said courts-baron respectively, and it shall appear to the judge or judges of the court where such action shall be tried, that the debt or damages to be recovered by the plaintiff or plaintiffs in such action, doth not amount to the sum of 40s., and the defendant or defendants in such action shall duly prove, by sufficient testimony, to be allowed by any of the judge or judges of the court where such action shall be tried, that, at the time of commencing such action, such defendant or defendants was or were resident within the jurisdiction of either of the said courts-baron, and was or were liable to be summoned or warned in either of the said courts-baron, for such debt or damages, then and in such case, unless the judge or judges who shall try such cause, shall, in open court, certify in writing under his or their hands respectively, that there was a probable or reasonable cause of action for 40s. or more, or that the freehold or title to lands or tenements principally came in question at such trial, such plaintiff or plaintiffs shall not recover, but be nonsuited in such action, and the defendant or defendants shall be entitled to, and be allowed and recover, treble costs of suit: Provided always, that it shall and may be lawful to and for the plaintiff or plaintiffs in such action afterwards to proceed against such defendant or defendants for the recovery of such his debt or damages in such of the said courts-baron within the jurisdiction whereof the defendant or defendants is or are resident.”

By a subsequent act, 45 G. 3, c. lxi., the jurisdiction of these courts-baron, was extended to debts or damages not exceeding 5l.

him to the benefit of the acts." *Sandall v. Bennett* (2 Ad. & E. 204, 4 N. & M. 89) shews that it is unnecessary to plead the local act.

Shee Serjt., in support of his rule. It is said that this is a statutable nonsuit, which the judge may direct without the consent of the plaintiff. The substance of the forty-fifth section of the local act is, not that the plaintiff shall be nonsuited, but that he shall not recover. The addition of the words "but be nonsuited in such action" is in ease of the plaintiff, as is evident from the concluding proviso, reserving his right afterwards to sue in the court-baron. [Tindal C. J. That is only the natural consequence of a nonsuit. Maule J. Who is to judge of the sufficiency of the proof of the defendant's residence within the jurisdiction, the judge or the jury?] There is nothing to prevent the judge from leaving it to the jury. [Tindal C. J. As I read the clause, the judge is to determine it. The words are, "in case it shall appear to the judge or judges of the court where such action shall be tried, that the debt or damages to be recovered by the plaintiff or plaintiffs in such action doth not amount to the sum of 40s." &c.] The clause, however, goes on to say, "and the defendant or defendants in such action shall duly prove, by sufficient testimony to be allowed, by any of the judge or judges of the court [987] where such action shall be tried, that at the time of commencing such action such defendant or defendants was or were resident within the jurisdiction," &c. [Maule J. You contend that the words "to be allowed," &c. mean, to be held admissible. If submitted to the jury you get into this difficulty—that something must be left to them; but that it is not consistent with the plaintiff's being nonsuited.] The other side are compelled to argue that this is something different from an ordinary nonsuit. [Maule J. The statute means that the plaintiff shall be considered as not appearing.] It is submitted that the statute must be pleaded. [Maule J. It could not be pleaded before the new rules, which do not necessarily give rise to new pleas.] In some of the cases cited the local acts contain a prohibitory clause, and there the act must be pleaded; in others, suggestions are allowed to be entered after the trial. The present case seems to fall within the former class. The words "shall not recover" bring the case very near to that of *Reynolds v. Talmon* (2 Q. B. 644); in which it was held, that, where an act establishes a court of conscience, and provides that "no action or suit for any debt amounting to 40s., and recoverable by virtue of this act, shall be brought against any person in any other court whatsoever," but the act contains no express enactment that a defendant sued elsewhere for such a debt, may avail himself of the objection by plea, the proper mode of doing so is, nevertheless, by plea; and that, if the defendant omit to plead the statute in an action for a larger sum, and judgment passes against him for a sum under 40s., the court will not allow a suggestion to be entered on the record. [Tindal C. J. That act contained no exceptions.]

TINDAL C. J. It appears to me that the nonsuit directed in this case by the under-sheriff, was perfectly [988] consistent with the authority given him by the statute. The forty-fifth section is express in its terms. [His lordship read the clause.] When, therefore, it was proved that this defendant resided within the local jurisdiction, and was liable to be warned or summoned to the local court, the under-sheriff had no other course to pursue but to nonsuit the plaintiff.

It is said by the plaintiff's counsel that the act ought to have been pleaded. But it would not be possible to frame a plea embodying all the exceptions contained in the act. It is provided that the plaintiff shall be nonsuited, unless the judge shall certify that there was a probable or reasonable cause of action for 40s. or more. How could a plea negative contingencies which no one could foretell?

Another objection to the construction sought to be put upon this act on the part of the plaintiff is, that the matter is expressly referred, not to the jury, but to the judge.

ERSKINE J. For the reasons stated by my lord, I concur with him in thinking that the local act in question need not be pleaded, but that the judge is to decide upon the proof of the defendant's residence within the jurisdiction, and that, if he is satisfied with the proof of such residence, he is bound to nonsuit the plaintiff.

MAULE J. I am of the same opinion. Before the new rules there can be no doubt that this matter could not have been pleaded: and it seems to me that those rules make no difference.

CRESSWELL J. concurred.

Rule discharged.

[989] WILLIAM COOPER, surviving Executor of Richard Stringer, Deceased, v. HANNAH TAYLOR, Executrix of Jonathan Taylor, Deceased. Jan. 29, 1844.

[S. C. 7 Scott, N. R. 950; 13 L. J. C. P. 92. Referred to, *Jewsbury v. Mummery*, 1872, L. R. 8 C. P. 61.]

In assumpsit by A: against B, C., and D., as executrix and executors of E., for a debt due from E., C. and D. severally pleaded plene administravit. B. pleaded plene administravit, except as to 383l. 6s. 7d., and also except as to certain goods of the value of 481l. 13s. 6d. A. signed judgment for 1280l. 13s., to be levied—as to 865l. 0s. 1d., of the assets confessed,—and as to the residue, of assets in futuro. Under a fi. fa. the goods produced 400l. 9s. 5d. B. gave a cheque on the bankers, with whom the 383l. 6s. 7d. had been deposited; which was dishonoured, not being signed by C. and D.—Held, that B. was bound by her admission that the money was in her hands, and consequently was guilty of a devastavit to the amount of the 383l. 6s. 7d.—Semble, that B. was liable for no more than 400l. 9s. 5d. in respect of the goods.

Debt, for 865l. 0s. 1d. in the debet and detinet.

The declaration stated that the plaintiff and William Waterhouse and Elias Holt, both since deceased, executors of the last will and testament of Richard Stringer, deceased, in Trinity term, 1830, before Sir N. C. Tindal, knight, and his brethren, justices of His then Majesty's court of Common Pleas, to wit, &c., by the consideration and judgment of the said court, recovered against the defendant and Thomas William Tottie, and John Hope Shaw, as executors of Jonathan Taylor, deceased, the sum of 1249l., which in and by the said court was adjudged to the plaintiff, the said W. Waterhouse, and the said E. Holt, as executors, &c., for their damages which they had sustained by reason of the non-performance, as well by the said Jonathan as, by defendant and the said T. W. Tottie and J. H. Shaw, as executors and executrix, of certain promises, over and above their costs and charges by them about their suit in that behalf expended, and for those costs and charges 6d., and also 31l. 12s. 6d. for their costs and charges by the justices then there adjudged of increase to the said W. Waterhouse, E. Holt, and the plaintiff, [990] and with their assent, which said damages, costs, and charges in the whole amounted to 1280l. 13s., to be levied—as to the sum of 865l. 0s. 1d., part thereof, of the said goods and chattels which were of the said Jonathan Taylor, deceased, acknowledged by the said defendant to be in her hands to be administered, or of the goods and chattels which were of the said Jonathan Taylor, deceased, at the time of his death, and which, since the pleading of the said several pleas of the defendant and the said Thomas William and John Hope had come, and should thereafter come, to the hands of the said defendant and the said Thomas William and John Hope to be administered,—and, as to the residue of the said sum of 1280l. 13s., to be levied of the goods and chattels which were of the said Jonathan Taylor, deceased, at the time of his death, and which since the pleading of the said several pleas had come, or should thereafter come, to the hands of the defendant, and the said Thomas William and John Hope, as executrix and executors as aforesaid, to be administered; as by the record and proceedings thereof, remaining in the said court, more fully appeared; and that the said judgment still remained in full force and effect, not in the least reversed, annulled, set aside, or satisfied: Averment, that, at the time of the recovery of the said judgment, to wit, on the 1st of June, 1830, divers goods and chattels which were of the said Jonathan at the time of his death, of great value, to wit, of the value of 865l. 0l. 1d., had come to the hands of the defendant as executrix as aforesaid to be administered; which goods and chattels the said defendant, executrix as aforesaid, afterwards, to wit, on the day and year last aforesaid, elogned, wasted, and converted, and disposed of, to her own use; whereby, &c.

Pleas: First, that the defendant did not elogn, waste, convert, or dispose of, to her own use, the said goods and chattels which were of the said Jonathan at the [991] time of his death, and which came to the hands of the defendant to be administered, in manner and form as the plaintiff had, in his said declaration, above alleged.

Secondly, as to the sum of 400l. 9s. 5d., parcel of the sum above demanded, that, after the recovery of the said judgment in the declaration mentioned, and before the

commencement of the suit, to wit, on the 18th of November, 1830, a certain writ of execution was sued out of the said court on the said judgment, and that under and by virtue of the said writ of execution, the sum of 400*l.* 9*s.* 5*d.* was levied and raised and paid over by the sheriff, in part satisfaction and discharge of the said judgment.

The plaintiff joined issue on the first plea, and entered a *nolle prosequi* as to the 400*l.* 9*s.* 5*d.* to which the second plea was pleaded.

On the trial of the cause before Williams J., at the last assizes at Abingdon, it appeared that, in June, 1830, the plaintiff, Holt, and Waterhouse, as executors of Stringer, commenced an action in this court against the defendant, Tottie, and Shaw, as executrix and executors of Jonathan Taylor, to recover 1200*l.*, money lent to Taylor by the plaintiff and his co-executors, and interest,—to which action Tottie and Shaw pleaded *plene administravit*. The present defendant pleaded separately, “that she had fully administered all and singular the goods and chattels which were of the said Jonathan Taylor at the time of his death, and which ever came to the hands of her the said Hannah Taylor, as such executrix as aforesaid, to be administered, except the sum of 383*l.* 6*s.* 7*d.*, and also except certain goods and chattels, of the value of 481*l.* 13*s.* 6*d.*, at Leeds in the county of York; and that she the said Hannah Taylor had not, at the commencement of the said suit, or at any time since had had, any goods and chattels which were of the said Jonathan Taylor, deceased, at the time of his death, in her hands [992] to be administered, except the said sum of 383*l.* 6*s.* 7*d.*, and the said goods and chattels of the value aforesaid.” The then plaintiffs thereupon

entered a *nolle prosequi* on the plea of Tottie and Shaw, with judgment of assets in futuro against the three executors, and judgment against the present defendant for the assets confessed, with an award of a writ of inquiry to assess the damages. On the 2nd of November, 1830, the writ of inquiry was executed, and on the 11th final judgment was signed for debt, interest, and costs, 1280*l.* 13*s.*, “to be levied, as to the sum of 865*l.* 0*s.* 1*d.*, part thereof, of the said goods and chattels which were of the said Jonathan Taylor, deceased, acknowledged by the said Hannah Taylor to be in her hands, or of the goods and chattels which were of the said Jonathan Taylor, deceased, at the time of his death, and which, since the pleading of the several pleas aforesaid, had come, or should thereafter come, to the hands of the said Hannah Taylor, T. W. Tottie, and J. H. Shaw, to be administered; and, as to the residue of the said sum of 1280*l.* 13*s.*, to be levied of the goods and chattels which were of the said Jonathan Taylor, deceased, at the time of his death, and which since the pleading of the several pleas had come, or should thereafter come, to the hands of the said Hannah Taylor, T. W. Tottie, and J. H. Shaw, as executrix and executors as aforesaid.”

A writ of *fi. fa.* issued into the county of York, indorsed to levy 865*l.* 0*s.* 1*d.*; under which, certain goods and chattels of Jonathan Taylor, deceased (being the goods referred to in the defendant's plea in the former action, and therein stated as being of the value of 481*l.* 13*s.* 6*d.*), were seized and sold by the sheriff for 420*l.* The sheriff, after deducting 19*l.* 10*s.* 7*d.* for poundage and officers' fees, paid over the balance, 400*l.* 9*s.* 5*d.* to the use of the plaintiffs in the action.

The 383*l.* 6*s.* 7*d.* had been deposited with Messrs. [993] Brown & Co., bankers at Leeds, in the names of the present defendant, Tottie and Shaw, as executrix and executors of Jonathan Taylor. The defendant, on the 15th of November, gave the plaintiff a cheque upon Brown & Co. for 380*l.*; but it was dishonoured, Brown & Co. having notice from the two other executors not to pay it. In Trinity term, 1830, a suit in Chancery was instituted by one Gaunt, a simple-contract creditor of Jonathan Taylor, on behalf of himself and the other unsatisfied creditors, to obtain payment of their debts (see *Gaunt v. Taylor*, ante, vol. iii. p. 886); and by an order made in that cause on the 8th of February, 1831, the 383*l.* 6*s.* 7*d.* were directed to be paid into the bank, in the name of the accountant-general, to the credit of the cause. That money still remains there, to abide the event of this action.

A verdict was taken for the plaintiff for 464*l.* 15*s.* 7*d.*, being the difference between the assets confessed in the former action and the amount realised under the *fi. fa.*, leave being reserved to move to enter a verdict for the defendant, or to reduce the damages by the amount of the expenses incurred on the sale of the goods, in case the court should be of opinion that she was personally liable (*b*).

(*b*) This branch of the rule does not appear to have been resisted.

Talfourd Serjt., in Michaelmas term last, accordingly, obtained a rule nisi. He submitted that there was no ground for charging the defendant with a devastavit, in obeying the order of the court of Chancery; and that she was not liable for the sheriff's expenses (b).

Bompas Serjt. (with whom were Whateley and W. J. Alexander), now shewed cause. The plaintiff is clearly entitled to a verdict for 383l. 6s. 7d. It is submitted [994] that the defendant was guilty of a devastavit, in not paying over to the plaintiff the money which, by her plea on the former action, she admitted was in her hands. There is an express admission on the record that she has the money in her hands, which admission is conclusive against her; *Wheatley v. Lane* (1 Wms. Saund. 219 b. n.). In *Erving v. Peters* (3 T. R. 685), it was held, that, if an executor, to an action on a bond, plead payment, and omits to plead plene administravit, and a verdict is given against him on such plea, it operates as an admission of assets, in an action founded on that judgment, suggesting a devastavit? [Cresswell J. The plea here was clearly an admission of assets; but is it conclusive evidence of a devastavit? Suppose the bankers had failed?] The executrix has taken upon herself the hazard of that. The defence sought to be set up is, that, at the time the defendant admitted that the money was in her hands, it was a debt due from the bankers to herself and her co-executors, over which she alone had no control. That defence, however, could not have been pleaded; neither could she be allowed to give it in evidence. In *Williams on Executors*, 3d edit. p. 1563, it is said: "The executor cannot plead plene administravit to the scire fieri inquiry; because the judgment against him is conclusive that he had assets to satisfy it (see 2 Wms. Exec. 1533). Neither can he, upon the taking of the inquisition, give in evidence the want of assets (1 Wms. Saund. 219, c.). And it should, therefore, seem that the jury are bound, upon the judgment being put in evidence, together with the fi. fa. and the return, to find a devastavit, as suggested in the writ, unless the executor can shew that there were goods of the testator which might have been taken in execution, and that he shewed them to the sheriff; *Leonard v. Simpson* (2 New Cases, 176, 2 Scott, 335). Accordingly, in [995] a case where the undersheriff, on taking the inquest, directed the jury that the plaintiff was bound to give evidence of the executor's having property of the testator in his hands, and subsequently returned nulla bona testatoris, the court quashed the return, and awarded a new scire fieri inquiry; *Palmer v. Waller*" (1 M. & W. 689, 5 Dowl. P. C. 315). In delivering the judgment of the court in *Leonard v. Simpson*, Tindal C. J. says: "The short point in this case is, whether such evidence of a devastavit was given at the trial on the part of the plaintiff as, being unanswered by the defendant, entitles the plaintiff to a verdict: and we think the evidence was sufficient for that purpose. The judgment by default in the former action is conclusive upon the defendant that he has assets to satisfy the judgment. This is so thoroughly settled in the case of *Rock v. Leighton* (1 Salk. 310, 1 Ld. Raym. 590, 1 Comyns's Rep. 87), and in other cases which had preceded it, that it was admitted to be the law by the defendant's counsel in arguing the case of *Erving v. Peters* (3 T. R. 686). The fact, therefore, is conclusively established against the defendant, that he has assets of the testator in his hands; and the only question which remains is, what evidence is necessary to shew that he has wasted those assets? In reason and good sense, very little evidence ought to be necessary for that purpose. It is his duty, when called upon by notice, or by a writ of execution, either to satisfy the debt out of the moneys of the testator, or to shew the assets to the sheriff, that he may make the debt out of them: and, accordingly, very slender evidence has at all times been held to be sufficient to prove the devastavit. The issuing of a writ of fi. fa. directed to the county where the action was laid, and a return of nulla bona thereto, has, for a long time past, been deemed evidence enough. And yet, if [996] the reason of the thing be considered, the suing out and return of such writ into the county where the action is laid affords no necessary presumption that the defendant has ever heard of it: for, it is a mere fiction of law to suppose the defendant resident in the county where the venue is laid in a personal action: and, even if he be, the sheriff would as a matter, of course, return nulla bona to the writ, unless authentic information was given to him where the testator's goods were to be found, and they were exposed to his officers." Also, in *Skelton v. Hawling* (1 Wils. 258), it was held, that, if an executor or adminis-

(b) This branch of the rule does not appear to have been resisted.

trator confesses judgment, or suffers it to go against him by default, he thereby admits assets in his hands, and is estopped to say the contrary in an action on such judgment suggesting a devastavit. [Cresswell J. Your argument is, that the defendant, having admitted she had assets in her hands, must shew some application of them, which would relieve her from a devastavit; that she cannot say now, that the money was in the hands of the bankers.] *Blackmor v. Mercer* (2 Wms. Saund. 402, a.) is likewise in point. There, in an inquisition returned by the sheriff on a scire fieri inquiry, it was found that the executors had sold, eloigned, converted, and disposed of, to their own use, divers goods of the testator. The defendants came in and traversed that they sold, eloigned, &c., and the plaintiff maintained the inquisition, that they had sold, eloigned, &c., as it was found by the inquisition, and tendered an issue on it, to which the defendants demurred; and it was objected that here neither the inquisition nor the plaintiff's replication were sufficient to charge the defendants *de bonis propriis*; for, no devastavit was found by the inquisition or alleged by the plaintiff, and the defendants might have well sold, eloigned, and disposed of the testator's goods, because they had paid [997] the testator's debt to the value of the goods with their own money; and therefore, although it was a sale, eloignment, or conversion, yet it was no devastavit; wherefore there ought to have been a devastavit found or alleged, otherwise the defendants were not chargeable of their own goods: *Sed non allocatur*; for, by Hale C. J., "perhaps the defendants had not actually wasted the goods of the testator, but had them in their hands in specie, and kept them so secretly that the sheriff could not find them to levy the plaintiff's debt upon them; therefore it is reasonable that the defendants should be charged *de bonis propriis*, although there is no devastavit in the case: and for this reason it was adjudged for the plaintiff."

Channell Serjt. (with whom were Bros and Selfe), in support of the rule. This case differs, in some material respects, from those cited, inasmuch as there the executors were sole defendants, whereas here the defendant is only one of three executors. Having pleaded separately, as she might, the question is, whether her plea, or that of the two other executors, is to be acted upon. The judgment on which the action is founded is a judgment not against the defendant as a sole executrix, but against her jointly with two others. It is true that the present defendant admitted assets in her hands at the time of her plea, but only assets over which she and her co-executors had a joint control; and, after the judgment, an order was made to pay the money at the bankers' into the court of Chancery: It cannot be denied that, on the authority of the cases cited, the defendant is estopped from saying that she had not assets at the time; and there does not appear to be any distinction between assets admitted and assets found. None of the cases cited, however, carry the rule further; and it is submitted that, notwithstanding such admission of assets, there must, to [998] charge the executor personally, be some evidence of a devastavit; and that it is not, as contended on the other side, a necessary conclusion of law, from the admission of assets, that the executor has wasted them. The mere production of the judgment is not enough. [Tindal C. J. Is it not some proof, that she gives a cheque on the bankers, and the cheque is not honoured? It is the same as if she said she had goods at a draper's and none had been found there.] In *Leonard v. Simpson* (2 New Cases, 176, 2 Scott, 335), it was held, that, in debt upon a judgment by default against the defendant as executor, the production of the judgment and *testatum fi. fa.*, upon which the warrant had been returned *nulla bona testatoris*, and a levy of costs *de bonis propriis*, unanswered, were sufficient evidence of a devastavit. In the present case, however, there has been no return of *nulla bona testatoris*. Here, the executrix had but two courses to adopt, either to admit assets, or to plead *plene administravit*. She could not with truth say that she had no assets of the testator; for, the money was, to a certain extent, and in a certain sense, in her hands. [Tindal C. J. "In her hands" means "at her disposal;" and the money turns out not to have been at her disposal.] How otherwise could she have pleaded? [Maule J. Upon her plea she must be considered as having the money in her possession.] It would have been a false plea if she had denied having assets, which would have been sufficiently disproved by shewing that the three executors by their agents, the bankers, had the money in their possession. [Maule J. Suppose she had pleaded the truth,—that the 383l. 6s. 7d. had come into the hands of the three executors, and had been placed with the bankers, and that she had no other right than with the two others to call on the

bankers for it: that would [999] have been a roundabout way of pleading that she had no assets.] The question is, whether effect may not be given to the plea by treating it to amount to no more than a qualified admission of assets, which rebuts any inference of her having been guilty of a devastavit.

TINDAL C. J. I think the verdict in this case is right. The action is debt in the debet, suggesting a devastavit, against the defendant as one of the personal representatives of Jonathan Taylor, deceased; the other two not being joined. She pleads that she did not eloin, waste, convert, or dispose of, to her own use, the said goods and chattels which were of the said Jonathan at the time of his death, and which came to the hands of the defendant to be administered, in manner and form as the plaintiff had in his declaration alleged. At the trial it was shewn that, in a former action against the three, two of them pleaded plene administravit, but that the present defendant severed, and pleaded that she had moneys in hand to the amount of 383l. 6s. 7d. That plea turned out to be untrue; for, when she gave a cheque for the money, it was dishonoured, not being signed by her co-executors, in whose names, as well as her own, the money was deposited with the bankers. It appears to me that the circumstance of there being two other executors who do not join in the plea, rather increases than diminishes the weight of the objection, inasmuch as the plea tends to mislead the plaintiff, who would naturally conclude that the other two executors had done all they could to administer the effects, and that, by some means or other, this particular sum of 383l. 6s. 7d. had got into the separate hands of the defendant.

ERSKINE J. I also am of opinion that the verdict should stand for 383l. 6s. 7d. In the former action the defendant had the option of denying or admitting assets [1000] in her hands. She chose to admit assets to the amount of 865l. 0s. 1d., and it afterwards appeared that she had assets under her control only to the extent of 400l. 9s. 5d. According to all the decided cases, it is not competent to her to turn round and say she had no assets at the time. Not being in a situation to obtain the money, she must be responsible for it.

MAULE J. I also think that this verdict should be sustained to the extent of 383l. 6s. 7d. The question is, whether, the defendant having, on a former verdict and judgment, admitted that she had assets in her hands available towards payment of the plaintiff's debt (for that is the meaning of the plea, which would otherwise deceive the plaintiff), that admission is not conclusive against her. To hold that it is not so, would be to set aside an admission on record by parol evidence. The question then is, whether there is any evidence from which we can infer that, assuming she once had the money in her hands, she has so disposed of it as to render her not liable for a devastavit. Cases might possibly be put in which the non-payment of the money to the plaintiff would not be a devastavit; for instance, if it were occasioned by some accident. Nothing of that kind is suggested here. It appears that, a writ of *fi. fa.* having issued on the former judgment for a larger amount, the defendant gave a cheque for part of this sum of 383l. 6s. 7d., which cheque was not honoured. Instead of paying the money she gives a cheque, on which she might have been sued. Is not this evidence that she was called upon to pay the 383l. 6s. 7d., and omitted to do so? By giving the cheque she admitted her liability to pay the amount, which by her plea she had confessed was in her hands. All this seems to be sufficient proof that she had kept to herself money which she ought to have handed over to the plaintiff.

[1001] CRESSWELL J. I am of the same opinion. I think that the defendant is estopped by her admission in the former action from shewing that she had not assets applicable to the plaintiff's demand. She had notice of his claim, and undertook to satisfy it by giving the cheque. The verdict must be entered for the plaintiff for 383l. 6s. 7d.

Rule accordingly.

SMALLMAN v. POLLARD, ESQUIRE. Jan. 30, 1844.

[S. C. 7 Scott, N. R. 911; 1 D. & L. 901; 13 L. J. C. P. 116; 8 Jur. 246.
Commented on, *Wharton v. Naylor*, 1848, 12 Q. B. 678.]

In an action by a landlord against the sheriff, under the 8 Ann. c. 14, for removing goods taken in execution without paying the rent, the allegation of removal is

material.—Such allegation is not supported by the mere execution of a bill of sale by the sheriff.

Case, on the statute 8 Ann. c. 14, against the sheriff of the county of Gloucester, for removing goods taken in execution under a fi. fa., without first paying half a year's rent, which was in arrear to the plaintiff.

The declaration contained the usual averments, that the plaintiff gave notice to the defendant of the rent being due, and requested the defendant that he might be paid the amount before the goods taken in execution should be removed from the premises; yet the defendant wrongfully, &c. removed and carried away the said goods from the premises without paying or satisfying the plaintiff the said arrears of rent.

Plea: not guilty; together with several special pleas, upon which no question arose.

At the trial of the cause before Williams J., at the last assizes for Gloucestershire, the following facts appeared:—

The defendant, being the sheriff of the county, had seized the goods of one Jones under a fi. fa., at the suit of one Tuck, and had conveyed them to Tuck by a bill of sale, after notice from the plaintiff that a year's rent [1002] was due to him as landlord from Jones. The goods had not, in fact, been removed from the premises before the action.

It was contended, on the part of the defendant, that as the goods had not been removed, the action was not maintainable. On the part of the plaintiff it was insisted, that the conveyance was equivalent to a removal, as the sheriff had thereby put it out of his power to satisfy the rent out of the goods. A verdict was returned for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, or a verdict for himself.

Talfourd Serjt. in last Michaelmas term, obtained a rule nisi accordingly (a). He cited *Smith v. Russell* (3 Taunt. 400), *Colyer v. Speer* (2 B. & B. 67, 4 J. B. Moore, 473), *Lane v. Crockett* (7 Price, 566), *Calvert v. Joliffe* (2 B. & Ad. 418), and *Risely v. Ryle* (10 M. & W. 101, 1 Dowl. N. S. 660).

Manning Serjt. now shewed cause. The 8 Ann. c. 14, s. 1, enacts, that “no goods, &c. shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off such premises by virtue of such execution, pay to the landlord of the premises, &c. all money due for rent for the said premises, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord, &c. one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the sheriff, &c. is [1003] empowered and required, to levy and pay to the plaintiff as well the money so paid for rent as the execution money.” These words cannot be taken literally; for they would import that the liability of the goods to be taken in execution would depend upon matter ex post facto. The meaning of the enactment is, that the goods are not to be removed from the premises till the landlord's claim for a year's rent is satisfied. In this case it is said that the goods were not removed in fact. But the conveyance by the defendant to the execution creditor was tantamount to a removal. [Tindal C. J. Why so? Might not the landlord still distrain?] It is submitted that he could not, the goods being in custodia legis. If, before the statute, an execution had issued, and the sheriff had sold the goods, and the purchaser had been ready to take them away, the landlord could not have distrained them upon the pretence that they were no longer in the custody of the law. *Sir Anthony Main's case* (5 Co. Rep. 20 b.) the principle was established, that a covenantor, by disabling himself from performing his covenant, committed a breach thereof. So here, as soon as the sheriff had parted with his control over the property the act was complete, he had deprived himself of the power of satisfying the landlord, and the subsequent removal was immaterial. In *West v. Hedges* (Barnes, 211) it was expressly decided that the execution of a bill of sale amounted to a removal of goods taken under a

(a) The rule was also obtained upon another point, which it became unnecessary to consider, and upon which the court expressed no opinion.

fi. fa., and a year's rent was ordered to be paid the landlord out of the money levied by the sheriffs of London. Copies of the original affidavits and the rule, in that case, have been procured; from which it appears that a rule nisi was obtained by the landlord, calling upon the sheriffs to pay over to him a year's rent; that the goods had not been actually taken away, but had been conveyed, by bill [1004] of sale, and that the sheriffs had received the proceeds; and the court ordered them to pay one year's rent, deducting the land-tax, if the money levied was sufficient; if not, that all that was levied should be paid to the landlord (a). [Cresswell J. The bill of sale does not

(a) The official transcript was as follows:—

Amongst the records of the court of Common Pleas, in the public record-office, in the custody of the Right Honourable the Master of the Rolls, pursuant to the statute 1 & 2 Vict. c. 94, to wit, original affidavit.

In the Common Pleas.

Between John West and Mary his wife, plaintiffs; and Charles Hedges, defendant.

James Steere, of the Great Old Bailey, in the city of London, surveyor, and the said Charles Hedges, the defendant, severally make oath that the deponent Charles Hedges is tenant to the other deponent James Steere, of a house in the said Great Old Bailey, lately three houses, but converted into one by the deponent Charles Hedges, which said premises this deponent James Steere did, some years since, demise to the said deponent Hedges by three several leases for three several terms of years, neither of which said terms are yet expired, at three several yearly rents of 14l. 14s., 6l. 6s., and 5l., making together the yearly rent or sum of 26l., which said several rents are, by such respective leases, made payable quarterly, viz. at Christmas, Midsummer, Lady-day and Michaelmas, by equal portions; and both these deponents say, that there was really and justly due to the deponent Steere from the other deponent Hedges, on Midsummer-day last, the sum of 40l. and upwards, for rent in arrear for the said demised premises, subject only to a deduction of so much money as the said deponent Hedges had then paid for the land-tax charged on the same premises; and this deponent Charles Hedges, for himself saith, that on or about the 15th day of July last past, Richard Sherlock, one of the serjeants at Mace for the city of London, by virtue of some warrant from Stephen Theodore Janssen and William Whitaker, esquires, then sheriffs of the said city of London, grounded on a writ of fieri facias issued out of this honourable court against this deponent, at the suit of the said plaintiffs, John West and Mary his wife, on a certain judgment by them recovered against this deponent for 54l. 16s. 10d. damages, entered upon the said demised premises, and possessed himself of all this deponent's goods, effects and things, which were then in or upon the said demised premises or any part thereof; and the said Richard Sherlock, soon after he had so taken this deponent's said goods and effects in execution as aforesaid, caused an inventory to be made thereof, and the same to be appraised by James Astell and Richard King, who appraised the same at the sum of 24l. 5s.; and the said Richard Sherlock [on] the 18th day of the same July, sold all the said goods and effects unto one Richard Turner, for the said sum of 24l. 5s., at which the same were so appraised as aforesaid; and the said Richard Turner, in the presence of this deponent, paid unto the said Richard Sherlock the sum of 24l. 5s., as and for the price or consideration for the said goods and effects; and the said Richard Sherlock thereupon wrote and signed a receipt upon the said inventory of this deponent's said goods and effects, whereby he acknowledged to have received of the said Richard Turner the sum of 24l. 5s. in full for all the goods mentioned in the said inventory, and sold to the said Richard Turner as aforesaid; and this deponent positively saith that no part of the said sum of 24l. 5s. so paid by the said Richard Turner to the said Richard Sherlock, was the money of this deponent; and this deponent believes that the said whole sum of 24l. 5s. was the proper money of the said Richard Turner; and this deponent James Steere for himself further maketh oath, that within a day or two after the said Richard Sherlock had seized upon the goods and effects of the said other deponent Hedges, by virtue of the before mentioned execution, and before the said sale of the said goods and effects by the said Sherlock to the said Turner, he this deponent gave notice to the said Sherlock, that he this deponent was landlord of the said house or houses wherein the said Sherlock had so entered by virtue of the execution aforesaid; and that the said Hedges rented the said house or houses of this deponent, at the yearly rent of 26l., and then owed unto this deponent the sum of

[1005] appear to have been held equivalent to a removal; all that the court did, was to order the sheriff to pay over the proceeds to the landlord.] As the facts bear out the [1006] statement in the rule in *Barnes* (supra, 1003), the court will give credit to the reasons mentioned by the reporter. [Maule J. Here, the action is brought for removing the goods.] It is substantially for not paying over the proceeds to the landlord. [Erskine J. If the vendee had removed the goods, possibly the landlord might have had an action against the sheriff; as the removal would have taken place under his authority.] It is submitted that as the sheriff has put it in the power of another party to remove the goods, it is the same as if he had removed them in fact; otherwise in the case of a sale by the sheriff, there would be no point of time at which there could be said to be a removal by him, as he has no control over the vendee. [Tindal C. J. If the plaintiff had followed up the case of *West v. Hedges*, he would have applied for a rule for payment of the rent. Talfourd Serjt. The bill of sale in this case was to the execution-creditor; so that no [1007] money would actually pass to the sheriff. Maule J. It is the same as if the sheriff had received the money; he takes credit for it (a). Possibly it might have been a good cause of action that the sheriff had sold the goods and received the money, and had not paid it over to the landlord. Tindal C. J. A similar application to that in *West v. Hedges*, was made in *Henchett v. Kimpson* (2 Wils. 140); and Pratt C. J. there said—"After the sheriff has notice of rent being due to the landlord, he cannot remove the goods, until he has satisfied the landlord one year's rent;" and he adds, "the landlord shall have the like benefit of distress for one year's rent as if there had been no execution at all; unless the rent be paid, the sheriff must quit; and if he does not quit, a special action on the case lies against him after notice of the rent due; but there is a shorter way, by motion to the court, as in the present case, that the landlord may have restitution to the amount of the goods the sheriff has sold." The vendee of the sheriff

40l. and upwards for rent of the said house or houses on Midsummer-day then last past, subject only to a deduction of so much money as the said Hedges had paid for the land-tax; and this deponent then, and several times afterwards insisted that the said Sherlock should not proceed in his said execution without first paying unto this deponent one year's rent, at the rate aforesaid, after deduction of such land-tax as had been paid by the said Hedges (if any) for or in respect thereof. But the said Sherlock would not pay unto this deponent the said one year's rent or any part thereof, but nevertheless proceeded to a sale of the goods and effects so taken in execution as aforesaid; and this deponent further saith, that in the months of July or August last, he this deponent caused the like notice in writing to be given, and made the like demand of the payment of one year's rent upon the clerk who officiates at Wood Street Compter, for the secondary of the said compter, and desired him to acquaint the said secondary therewith, which he promised to do accordingly; and this deponent, on the 17th day of this instant November, demanded payment of the said 26l. for one year's rent of the said John West, one of the plaintiffs in this cause; but he refused to pay the same to this deponent.

Sworn, at Serjeants' Inn, this 22d day of November 1750. Before me,

THOMAS BIRCH { J. STEERE.
CHARLES HEDGES.

(Indorsed).—*West* against *Hedges*. Affidavit, whereon the motion founded.—J. Steere and C. Hedges.

Whereupon the following rule was drawn up; which was afterwards made absolute.

West and his Wife v. Hedges, Friday the 23d of November. Upon reading the affidavit of Walter Strickland, gent., it is ordered that the plaintiffs and Stephen Theodore Janssen, Esq., and William Whitaker, Esq., late sheriffs of London, upon notice of this rule, to be given to the plaintiffs' attorney or agent, and the secondary of Wood Street Compter, shall shew cause to this court, on Tuesday next, why they should not pay to the said James Steere, the defendant's landlord, one year's rent, deducting the land-tax, out of the money levied by virtue of the writ of fieri facias issued forth between the said parties; and that in the mean time, and until this court shall otherwise order, all things remain in the state wherein they now are.

Draper, for the said James Steere. By the court.

(a) And, no doubt, took his poundage upon the amount.

must, in all cases, have a reasonable time to remove the goods; as in the case of growing crops; *Peacock v. Purvis* (2 Bro. & B. 362, 5 J. B. Moore, 79). [Maule J. Here, the sheriff had no authority to sell, except subject to the landlord's right to distrain; the sheriff's vendee, therefore, must take them subject to that right. It rather appears that the right to distrain is paramount to the custody of the law (d).] It is clear that, at common law, goods taken in execution could not be taken as a distress. How has that been altered by the statute? [Maule J. By restricting the common law right of the execution-creditor, as many statutes have done, in favour of the landlord. If the goods are not of [1008] sufficient value to pay the rent, the sheriff need not sell; and then there is no benefit to the execution-creditor.] In such a case no doubt the sheriff may quit. [Maule J. May not the vendee do the same?] He is under no obligation to do so. In this case, although the vendee is the execution-creditor, the principle is the same as if he were a stranger. If there were several vendees, of different articles, surely their rights would not depend upon the state of the execution-debtor's account with his landlord. The words of the act make the taking wrongful ab initio; if the rent is not satisfied, the sheriff is made a wrongdoer by relation. [Tindal C. J. The act says, no goods shall be liable to be taken unless, before removal, the rent is paid. If they are wrongfully taken, perhaps they are not in custodia legis.] At any rate it does not lie in the mouth of the sheriff to say they were taken by his wrongful act. [Cresswell J. Would the declaration in this case have been good without the allegation of removal, if it had merely stated the seizing of the goods?] It is submitted that it would. It might have been a defence that the sheriff, upon ascertaining that the goods were not sufficient to satisfy the rent, had withdrawn.

TINDAL C. J. It will be unnecessary to hear my brother Manning on the second point, as the court are with the defendant upon the first.

It seems to me, that the plaintiff in this action against the sheriff, having made an express allegation of the removal of the goods, the question is whether there has been any such removal. There is no ground of complaint against the sheriff until there has been either an actual, or a constructive, removal. (His lordship read the words of 8 Ann. c. 14, s. 1.) In this enactment the payment of the rent is treated as a payment to be made, not by the sheriff, but by the execution-creditor. The [1009] statute therefore does not appear to consider the sheriff in person as having any thing to do between the judgment creditor and the landlord. The creditor may pay the money to the landlord, and then remove the goods. Here, there is an allegation that the goods were removed by the defendant, which is put in issue by the plea of not guilty. And I think that while the goods remain on the premises, they cannot be said to be removed. The case in Barnes, when explained by the affidavit and rule that have been brought before the court, certainly does not go to the extent for which it was cited as an authority. That was an application relating to the sheriff—an officer of the court, and the court ordered him to pay the money he had in his hands, to the landlord. That case was followed by *Hewlett v. Kimpson*; in which the judgment of Pratt C. J. appears to me to be strongly in point.

It would seem almost to follow from the words of the statute, that if goods are not liable to be taken in execution, but are in fact taken, they will not be considered to be in custodia legis (a). But waving that point, I think, on the plain question, whether the allegation of removal was proved, that there having been in this case a mere transfer of property, and no removal in fact, the allegation was not proved; and, therefore, that the rule must be made absolute to enter a nonsuit, or a verdict for the defendant, as the parties may arrange.

ERSKINE J. I also am of opinion that either a nonsuit or a verdict for the defendant, should be entered. The whole gist of the complaint is, that the sheriff seized and removed the goods, without paying the rent to the landlord. The true construction of the statute is given by Parke B. in *Riseley v. Ryle* (10 M. & W. 101); where he [1010] says, "The meaning of the statute is, that the sheriff shall not remove the goods unless the rent be first paid; which may be very well understood as directing

(d) Vide H. 21 H. 7, fo. 2 b., pl. 1; Co. Litt. 47 a.; *Plummer, Ex parte*, 1 Atk. 103; *Eaton v. Southby*, Willes, 131, and *Gilb. Distr.*, 3d ed. 50, 7 Mod. 251; *Wright v. Dewes*, 1 A. & E. 641. 3 N. & M. 790.

(a) Vide supra, 1007 (d).

that the sheriff shall pay the rent to the landlord before the removal of the goods, or otherwise that he shall be liable for damages." Here, there was no removal, in fact, before action brought. But it is contended that there was a constructive removal of the goods, as the bill of sale effected a transfer of the property. That does not appear, however, to be equivalent to a removal. If the execution-creditor, in pursuance of the bill of sale, had actually removed the goods, that would have been a removal by authority of the sheriff. When we come to look at the affidavit and the rule in *West v. Hedges*, that case seems to be misreported in Barnes. It was merely an application to the summary jurisdiction of the court that the sheriff might pay over the money which he had in his hands; and the court ordered accordingly. But they did not decide that the sheriff was liable to an action as for removing the goods. And except that case, no authority has been adduced to shew that the mere fact of a sale renders the sheriff liable as for a removal.

MAULE J. I also am of opinion that the plaintiff has failed to prove the allegation in the declaration, that the sheriff removed the goods in question. The case of *West v. Hedges*, which has been relied on to shew that a sale of the sheriff is equivalent to a removal, does not support that proposition. There, the sheriff had received the money, the proceeds of the sale, and was ordered to pay it over to the landlord. It was held that the landlord had as good a right to obtain the money by a summary application as he would have had by an action, if there had been a removal in fact. It is clear that, in this case, the goods have not been removed. [1011] The question therefore is, whether the allegation of removal is material. And I think it is. The object of the statute was to extend the landlord's remedy by distress. The landlord in this case, supposing the goods not to be removed, might have come upon the land and distrained. If the sheriff had said they were taken in execution, the landlord might have answered that the execution could not be enforced without paying his rent; and if it had been so enforced, such enforcing might have been the subject of a special action on the case.

CRESSWELL J. It appears to me, that if the allegation as to the removal of the goods, were struck out of the declaration, it would be bad. The declaration, as it stands, alleges a notice to the sheriff that rent was due, and that, notwithstanding such notice, he removed the goods. That allegation has not been proved. The case of *West v. Hedges* has been explained away by the affidavit and rule very properly brought forward by my brother Manning.

Rule absolute (a).

[1012] WILKINSON v. PAGE. Jan. 30, 1844.

In an action on an attorney's bill, a plea of the non-delivery of a signed bill is an issuable plea.

This was an action of assumpsit for work and labour, &c. by an attorney. The defendant, who was under terms to plead issuably, pleaded, first, non-assumpsit; secondly, payment, and, thirdly, the non-delivery of a signed bill according to statute. The plaintiff signed judgment, upon the ground that the third plea was not issuable. Erskine J., at chambers, made an order to set aside this judgment for irregularity.

Byles Serjt., on a former day in this term, obtained a rule nisi to rescind the said order.

Glover Serjt. now shewed cause, and submitted that the third plea was issuable, inasmuch as unless the plaintiff had delivered a signed bill a month before the commencement of the suit, in pursuance of the 6 & 7 Vict. c. 73, s. 37, he had no right of action. [Tindal C. J. The result of the cases is, that pleading issuably means pleading some plea upon which the parties may go to trial on the merits.]

Byles Serjt. was then called upon in support of the rule. The plea in question does not go to the merits of the case. In *Staples v. Holdsworth* (4 New Cases, 144, 5 Scott, 432) a plea of the bankruptcy of one of the plaintiffs after action brought, was held not to be an issuable plea. [Erskine J. There, the defendant set up a right of action in some other party. Here, there is no right of action unless it be in

(a) The rule was drawn up to enter a verdict for the defendant on the first issue, and to discharge the jury, by consent, as to the other issues.

[1013] the plaintiff.] In *Mackey v. Wood* (7 M. & W. 420), Alderson B. said, "The rule to be collected from the decision of this court in *Humphreys v. The Earl of Waldegrave* (6 M. & W. 622, 8 Dowl. P. C. 768), is, that a plea is an issuable plea which tenders some matter upon which, if issue be taken, the case would be decided upon the merits." [Maule J. I should have thought an issuable plea meant a plea upon which issue might readily be joined without puzzling the plaintiff. Before the new rules non-assumpsit was an issuable plea. Under that plea the defence proposed to be put upon the record by the plea in question, might have been set up. The new rules have not made such a defence non-issuable.] It is not every matter which might have been given in evidence formerly under the general issue that amounts to an issuable plea. [Maule J. Not every affirmative matter, perhaps; but this is negative matter, which goes to the right of action.] The point in question here, appears to have been decided in *Holmes v. Grant* (1 Gale, 59), and *Beck v. Mordaunt* (2 New Cases, 140, 2 Scott, 178, 4 Dowl. P. C. 112), where it was held that in an action on an attorney's bill, the defendant cannot, after being let in to plead to the merits, plead that no signed bill was delivered. [Tindal C. J. In those cases the defendants applied to set aside regular judgments, as a favour to them. Maule J. The court in those cases seem to have thought that after an affidavit of merits by the defendant they ought not to allow a plea like the one in question to be pleaded in conjunction with others. It was not decided that the plea was not issuable.] It was evidently treated as not being a plea to the merits; and the cases already cited establish that an issuable plea must be a plea to the merits. Here, the plaintiff has clearly a right of action. [Erskine J. Not necessarily. The client has a month after [1014] the delivery of the bill, to tax and pay it. Maule J. And it may be that nothing is due from him after taxation.]

Tindal C. J. It appears to me that this case is clearly distinguishable from *Staples v. Holdsworth*. That was a case in which a plea of the bankruptcy of one of several plaintiffs after action brought was put on the record after terms had been granted to the defendant; and it was held, that plea was not issuable, inasmuch as it did not go to the merits of the cause; that it was in effect only a dilatory plea, like a plea in abatement. There, the plaintiffs might have discontinued and brought a fresh action in the name of the solvent partners (a). That the decision rested upon that ground is clearly shewn by *Willis v. Hallett* (5 New Cases, 465; S. C. per nom. *Wilson v. Ailean*, 7 Scott, 474); where it was held that bankruptcy of a sole plaintiff before action, is an issuable plea. As to the cases of *Holmes v. Grant*, and *Beck v. Mordaunt*, it is clear that the point on which they turned was, not whether the plea was issuable, but whether, the defendants, having set aside a regular judgment upon an affidavit of merits, were entitled to put certain pleas on the record. But I cannot see why the defence set up in this plea should not be considered as a plea to the merits. The provisions of the statute were intended for the protection of clients. The defendant has a right to have the plaintiff's bill taxed; and it may be, as has been suggested, that nothing would be found to be due to the plaintiff.

MAULE J. I think this rule must be discharged. The question is whether the plea under consideration is an issuable plea, not whether it is one that goes to the [1015] merits of the action. I have no doubt it is an issuable plea, inasmuch as it shews that the plaintiff has no right of action. The object of the statute was, to enable a defendant to avail himself of a mode of putting the plaintiff's claim into a course of inquiry more favourable to the defendant and to the ends of justice, than could be had in an action brought before a signed bill had been delivered by the plaintiff.

The only appearance of a case in favour of my brother Byles arises from his putting together certain expressions of the judges in some cases as to the meaning of issuable pleas, and citing observations from other cases, in which it was said that a plea like the present, was not a plea to the merits. But we ought to consider what the court decided in these cases; and, the language used must be looked at—not as though the court were laying down definitions, but merely as an explanation of the grounds of their judgment. All that the court are now deciding is, that this is an issuable plea within the terms in the order. And no case has been cited inconsistent with such a decision.

I may add, however, that I think the plea goes quite sufficiently to the merits.

CRESSWELL J. concurred.

(a) Making the assignees co-plaintiffs after obtaining their assent.

ERSKINE J. I think that a plea which shews that the plaintiff has no cause of action is an issuable plea; and the plea in this case, is such a plea.

Rule discharged, with costs.

[1016] KNIGHT v. SMITH. Jan. 30, 1844.

Where a rule, for judgment as in case of a nonsuit, had been discharged upon a peremptory undertaking, and the plaintiff drew up the discharging rule, but did not serve it, and the defendant omitted to draw it up, and afterwards obtained a rule absolute for judgment as in case of a nonsuit, the court set aside the last rule.

A rule for judgment as in case of a nonsuit was discharged on the 11th of November upon a peremptory undertaking to try within a fortnight. The rule discharging the former rule was drawn up by the plaintiff's attorney on the 25th, but was not served. On the 20th of January the defendant (who had not drawn up the second rule) obtained a peremptory rule for judgment as in case of a nonsuit; whereupon

Clarke Serjt. (January 22d) obtained a rule nisi to discharge the last-mentioned rule for irregularity; *Gingell v. Bean* (ante, vol. i. p. 50, 1 Scott, N. R. 153).

Dowling Serjt. now shewed cause. In this case the plaintiff having drawn up the rule himself, it could not be drawn up a second time.

Clarke Serjt. was heard in support of the rule.

TINDAL C. J. The safer course will be, to adhere to the practice as reported by the master in *Gingell v. Bean*, namely, that if the plaintiff omits to draw up the rule for a peremptory undertaking, the defendant, if he wishes to act upon it, may draw it up within the time to which it relates. In this case the defendant has not adopted that course. The plaintiff says, in effect, "I will go to trial at a certain time, if you, the defendant, wish it." The plaintiff, however, did nothing beyond drawing up the rule, and nothing was done by the defendant; it might therefore be fairly supposed, that both [1017] parties intended to let the matter drop. It appears that the case of *Gingell v. Bean* was brought before the court upon a subsequent occasion (ante, vol. i. p. 555, 1 Scott, N. R. 390), upon a suggestion that the report of the master was erroneous; but we refused to open the discussion again, thinking the practice, as certified by one officer, to be reasonable.

ERSKINE and MAULE JJ. (Cresswell J. was at chambers) concurred.

Rule absolute.

MUNTZ v. FOSTER AND OTHERS. Jan. 30, 1844.

Where an action is brought to try the validity of a patent, the court will not, except under peculiar circumstances, order the trial to be postponed till a scire facias brought to repeal the same patent has been disposed of.

In 1832 the plaintiff obtained a patent for "an improved manufacture of metal plates for sheathing the bottoms of ships." On the 5th of May 1843 a writ of scire facias to repeal the patent, issued on the prosecution of one of the defendants; on the 25th the record thereof was carried into the court of Queen's Bench, and the cause was set down for trial at the sittings after last Trinity term, but was made a remanet. An ex parte injunction was afterwards obtained by the plaintiff against the defendants, to restrain them from infringing the patent; and a suit having been commenced to continue such injunction, an order was made by Knight-Bruce, vice-Chancellor, that the plaintiff should bring an action against the defendants to try the validity of the patent and whether the defendants had infringed the same, and should proceed in such action with all due diligence. The present action was commenced accordingly on the 21st of July; and issue having been joined therein, the cause was set down for [1018] trial, and stood No. 3 on the list of special-jury causes for Middlesex at the sittings after the present term. The trial of the scire facias in the court of Queen's Bench was also appointed for the Middlesex sittings after this term.

Channell Serjt. on a former day in this term, upon an affidavit of these facts, obtained, on the part of the defendants, a rule nisi to postpone the trial of this action until after the scire facias should be determined.

Bompas Serjt. now shewed cause. He submitted that the plaintiff had a right to go on with his action in the ordinary course, especially as it had been directed by the court of Chancery; and that if the rule were made absolute it would lead to great

injustice to the plaintiff, as there might be a motion for a new trial in the action of the sci. fa., the effect of which would probably be, to suspend the present action till the expiration of the patent, which had only two years to run. [Tindal C. J. Suppose the action were decided in the plaintiff's favour, and the sci. fa. against him, as in *Walton v. Bateman* (a), the sci. fa. would decide the whole question. The defendants, however, might certainly have applied to the court of Chancery to stay the present action.] A similar application was refused in *Haworth v. Hardcastle* (10 Bingh. 551, 4 M. & Scott, 448).

Channell Serjt. was heard in support of the rule.

TINDAL C. J. I feel great difficulty in saying, when a cause is duly in the list for trial, and has worked its way up to the top of the list, that the plaintiff is to be deprived of his common law right to try. I do not say that a case might not arise in which even justice be-tween the parties would require us to interfere. But no such case has been made out here. If the defendants had thought it expedient that the scire facias should be tried first, it might have been so stipulated when the case was before the court of Chancery.

MAULE J. When the vice-chancellor ordered this action to be tried with all due diligence, why did not the defendants object, and ask that the trial should be postponed until after the scire facias had come on?

The other judges concurring,

Rule discharged (a).

APPLEYARD v. TODD. Jan. 31, 1844.

A rule for judgment as in case of a nonsuit, was discharged with costs, where the plaintiff had withdrawn the writ of trial owing to the absence of a material witness, occasioned by the defendant's attorney.

Glover Serjt. on a former day in this term obtained a rule for judgment as in case of a nonsuit, for not proceeding to trial before the under-sheriff.

Dowling Serjt. now shewed cause, upon an affidavit stating that the plaintiff had been compelled to withdraw the writ of trial in consequence of the absence of the defendant's son (who was a material witness for the plaintiff) acting under the advice of the defendant's attorney. The learned serjeant cited *Jenkins v. Charity* (2 Dowl. P. C. 197), and *Walkins v. Giles* (4 Dowl. P. C. 14).

Glover Serjt. contended that he was at least entitled to a peremptory undertaking. Sed per curiam. Rule discharged, with costs.

[1020] HODGE v. BIRD. Jan. 31, 1844.

[S. C. 7 Scott, N. R. 993; 1 D. & L. 956; 13 L. J. C. P. 87; 8 Jur. 317.]

The 6 & 7 Vict. c. 63, repeals the 2 G. 2, c. 23, except as to "matters and things done" before the passing of the latter act.—Where an attorney's bill was taxed before the passing of the latter act; Held, (hesitante Cresswell J.) that the jurisdiction of the court as to altering the costs of taxation, was not taken away.—Under the former act, where an attorney's bill has been reduced upon taxation by a substantial sum, though less than one sixth, the client was entitled to the costs of taxation.

The plaintiff employed Mr. Smith, an attorney, to bring the present action, which after being set down for trial at the Surrey assizes, was settled. The plaintiff having obtained a judge's order for taxing Mr. Smith's bill,—he delivered a bill claiming 160l. 18s. 10d. The bill contained the two following items, amongst others—

"Journey to attend the assizes, eleven days absent, having no other cause	£23 2 0
"Paid travelling expenses to and from Guildford, and expenses at the inn, for self and witness	23 10 2"

The master, in the first instance, taxed off 26l. 13s. 10d. from the bill; but Mr. Smith having on the 20th of May last obtained an order for a review of the

(a)¹ S. C. not S. P. ante, vol. iii., p. 773, 4 Scott, N. R. 397.

(a)² Vide ante, 251.

taxation, the sum deducted was ultimately reduced to 20l. 18s. 4d., being somewhat less than one sixth of the whole bill. The deductions consisted principally of the sum of 11l. 11s. from the first of the above-mentioned items in the bill, and of 4l. 4s. 8d. from the second, inasmuch as it appeared that Mr. Smith himself did not attend the assizes, but only one of his clerks.

Channell Serjt. in last Michaelmas term obtained a rule nisi that the plaintiff should pay the costs of the taxation of the bill of costs, and also the costs of the application to the court (a).

[1021] Talfourd Serjt. now shewed cause. Even before the passing of the 6 & 7 Vict. c. 73, the court would not have granted what is now asked for under the 2 G. 2, c. 23, which directed that if more than a sixth part of an attorney's bill be taxed off, the attorney should pay the costs of taxation; but if less than a sixth were taken off the court might exercise a discretion whether the costs should be paid by the attorney or the client. The old rule under this statute used to be, that the discretion of the court was to be exercised in the same manner as the absolute power given to the master, and that where less than a sixth was taken off the attorney was to have the costs; Tidd's Prac. (page 336, 9th edit.), *Barker v. The Bishop of London* (Barnes, 147), *Mills v. Rinett* (1 A. & E. 856). But in later cases the courts have disallowed the costs of taxation to an attorney, where his bill has been reduced by nearly one sixth: *Elwood v. Pearce* (8 Bingh. 83, 1 M. & Scott, 159, 1 Dowl. P. C. 251), *Baker v. Mill* (2 C. & M. 415, 4 Tyrwh. 279, 2 Dowl. P. C. 382). And there cannot be a case more fit for such an exercise of the discretion of the court than one in which the attorney makes charges which are untrue within his own knowledge. [Maule J. That is the principle laid down in *Holderness v. Bakworth* (3 M. & W. 341).]

Moreover, since the new statute, the court has no power to entertain the present application. The taxation took place in May last, when the 2 G. 2, c. 23, was in operation. The 6 & 7 Vict. c. 73,—which received the royal assent on the 22nd of August,—by sect. 1 repeals the former act. It is true there is a saving so far as relates to any matters or things done at any time before the passing of that act; but that clause does not apply to such a case as the present. New regulations as to [1022] taxation have been established by sections 37 and 43 of the later act, and these have not been complied with in this case. [Maule J. I think the taxation of the bill was a matter or thing done before the passing of the act.]

Channell Serjt., in support of the rule. The courts have always been inclined to carry out the rule laid down in the 2 G. 2, c. 23, with certain exceptions; one of which very properly applied to charges which the attorney knew were false. But there is nothing to shew that such was the case here, though the master may have disallowed some items. [Maule J. It surely was not correct to say "self and witness," and thereby to charge double.]

The learned serjeant then proceeded to argue that the 6 & 7 Vict. did not apply to this case; but he was stopped by the court.

TINDAL C. J. It appears to me that the present motion may be maintained, notwithstanding the 6 & 7 Vict. c. 73, inasmuch as the taxation of Mr. Smith's bill, which took place under the old act, was something of which the court had hold, and was a matter or thing done, before the passing of the new act, of which the present motion is merely an incident.

The real question is, whether the attorney is entitled to the costs of the taxation. The whole of the bill amounted to 160l. 18s. 2d., from which 20l. 18s. 4d.—something short of a sixth—has been taxed off. I think there is no imputation against Mr. Smith in respect of the charges he has made. But the question is, how are we to exercise our discretion under the statute of 2 G. 2, so much having been taken off the bill? I consider the rule to have been established that the court should be governed by the consideration whether [1023] a real and substantial sum has been taken off the bill. That was the principle established in *Elwood v. Pearce*. Wherever the smallest sum has been taken off in respect of a charge made *malâ fide*, the court, in the exercise of their discretion, would not allow the costs. I do not say that such is the case here; but I think that the present application ranges itself under the principle laid down in *Elwood v. Pearce*; and that, a real and substantial sum having been taken off the bill, the attorney is not entitled to his costs.

ERSKINE J. I am of the same opinion. The present application is not made under the new statute. In a case under the former act, the court will look to the circumstances to ascertain in what manner they ought to exercise the discretion with which the statute invested them. There are two grounds which they will consider;—first, whether a sum, however small, has been wilfully and improperly inserted in the bill; if so, the court will not allow the attorney his costs. I do not think that rule would apply to the present case. Secondly, what amount has been taken off. If the amount be small, the court will not make the attorney pay the costs: but if it be very nearly one-sixth of the whole, then the court may exercise their discretion, and say that the client was justified in having the bill taxed, and that he is entitled to the costs of taxation.

MAULE J. I agree with the Lord Chief Justice, in thinking that the old act of 2 G. 2, c. 23, is still in force as respects the bill in question. The statute 6 & 7 Vict. c. 73, excepts from the repealing section, matters or things done before the passing of that act; and this bill, having been previously taxed was a "matter done" within the terms of that exception. And it would be very inconvenient if a different construction [1024] were put upon the latter act, as then, in a case like the present, there would be no remedy.

The question is, whether under the former act, an attorney who charges more than he ought to do, is the person who is entitled to the costs of the taxation. This depends upon the terms of that act. If one-sixth be taken off the whole bill, its provisions are imperative; if less be taken off, then the matter is in the discretion of the court. An attorney's bill is of that nature that it seldom happens that some small items are not taken off on a minute investigation of the charges. Where the excess is consistent with bona fides, and is small in amount, the attorney should have the costs of the taxation. But it is otherwise, where the overcharges are made mala fide. So, also, if the sum taken off be substantial. In this case the overcharge is about 20l. out of 160l. This overcharge is a substantial wrong to the client, for which he ought to have a remedy by taxing the bill, and calling upon the party by whom the wrong was done, to pay the costs of that taxation. I think, therefore, that this falls within the principle that the overcharge, though made bona fide, is excessive: and that consequently the client is entitled to the costs of the taxation. It appeared to me at one time, that there had been a misrepresentation by the attorney in charging for the attendance of himself instead of his clerk; but as it turns out that the bill was not delivered till after the order for taxation, I think no misrepresentation could have been intended. But upon the ground that there was a substantial excess in the bill, I am of opinion that the attorney must pay the costs of the taxation.

CRESWELL J. It is not necessary for me to express any opinion as to whether the discretion of the court is reserved by the new statute in a case like the present. [1025] Assuming that it is, I think this case falls within the principle of *Edward v. Pearce*, in which the amount of the bill and of the sum taxed off, were nearly in the same proportions as they are in the present case.

Rule discharged, with costs (a).

HAYWARD v. BENNETT. Jan. 25, 1844.

In an action of debt by A. against C., a surety, on a bond given under 1 & 2 Vict. c. 110, s. 8, conditioned that B., the principal debtor, should pay to A. such sum as should be recovered by A. against B. in any action brought, or thereafter to be brought, for the recovery of the debt, with costs, or should render himself to the custody of the gaoler of the court, according to the practice of such court, or within such time, and in such manner, as the said court, or any judge thereof, should direct, after judgment recovered in such action,—C. pleaded—first, that B. did render himself to the gaoler of the court according to the practice of the court and the condition of the bond—secondly, that B. surrendered himself to, and was taken by, the sheriffs of London under a ca. sa. issued by A.—thirdly, that B., having been taken under a ca. sa. at the suit of A., was brought up by habeas corpus, and committed to the custody of the marshal, and thereby was prevented from rendering—fourthly, that B. rendered himself, pursuant to an order of a judge, by whom

(a) Vide supra, p. 1020 (a).

he was committed to the custody of the keeper of the Queen's Prison :—Held, on motion to set aside the order allowing these several pleas, that C. might plead the first and fourth pleas, and also either the second or the third ; but that he must elect between the second and third.

Debt, upon a bond executed by the defendant as surety for Henry Hales, against whom an affidavit had been filed in the court of bankruptcy, under the 1 & 2 Vict. c. 110, s. 8. The condition of the bond (after reciting an affidavit which stated that Hales and one Heffer were indebted to the plaintiff in 681l. 15s. 1½d., and that they were traders, that Hales was personally served with the affidavit and notice, and that he had requested the defendant and one Thomas Cope to join him as sureties), was declared to be, that, if Hales paid unto the plaintiff, his executors, &c., such sum or sums of money as should be recovered against Hales, in any action which had been brought, or should there-[1026]—after be brought for the recovery of the said alleged debt, together with such costs as should be given in the same, or should render himself to the custody of the gaoler of the court in which such action should have been or might be brought, for recovery of the said alleged debt, according to the practice of such court, or within such time and in such manner as the said court or any judge thereof should direct, after judgment should have been recovered in such action, then the said obligation should be void, but otherwise the same should stand and remain in full force and effect.

The defendant, after setting out the condition of the bond on oyer, pleaded, under a judge's order, that, after the making of the bond and condition, and before the commencement of the suit, the plaintiff commenced an action against Heffer and Hales in the Queen's Bench, for the recovery of the alleged debt in the condition mentioned, and by the consideration and judgment of that court, recovered against them 924l. 1s. ; that, the said judgment having been so recovered, afterwards, and before any breach of the condition, and before the commencement of the suit, Hales did duly render himself in execution under the said judgment, to the custody of the gaoler of the court in which the said action was so brought as aforesaid, according to the practice of the said court, and according to the said condition.

Secondly, that, after the making of the bond, and before the commencement of the suit, the plaintiff brought an action against Heffer and Hales in the Queen's Bench, for the recovery of the alleged debt in the said condition mentioned, and, by the consideration and judgment of that court, recovered against them 924l. 1s. ; that afterwards, and before the commencement of the suit, to wit, on the 29th of October, 1842, the plaintiff sued out a writ of *capias ad satisfaciendum* against Heffer and Hales, directed to the sheriffs of London ; [1027] that afterwards, and whilst the said writ was in the hands of the sheriffs, and before the return thereof, and before any breach of the said condition, and before the commencement of the suit, and within a reasonable time in that behalf, and before the time for Hales's rendering himself to the custody of the gaoler of the said court, according to the practice of the said court and to the said condition, had expired, to wit, on the 14th of November, 1842, Hales, being within the said bailiwick of the sheriffs, surrendered himself to the said writ, and was then taken and arrested by the sheriffs under the same *, and was then kept and detained in execution in the custody of the sheriffs, under and by virtue of the said writ, at the suit of the plaintiff, for a long space of time, to wit, hitherto ; of which the plaintiff during all the time aforesaid had notice ; and that always from the time of the recovery of the said judgment until and at the time of his so being taken and arrested at the suit of the plaintiff, Hales, was ready and willing to render himself according to the said condition ; of which the plaintiff, during all the time last aforesaid, had notice.

Thirdly, as in the second plea, to the asterisk, and then as follows—that afterwards and before any breach of the said condition, and before the commencement of the suit, and whilst Hales remained in the custody of the said sheriffs in execution under the said writ, and within a reasonable time in this behalf, to wit, on, &c., Hales sued out of the court of Queen's Bench, a writ of *habeas corpus cum causa*, directed, &c., that, under and by virtue of the last-mentioned writ, the said sheriffs immediately and within a reasonable time afterwards, to wit, on, &c. and according to the practice of the said court, brought Hales before Patteson J., who then, and according to the practice of the said court, received from the sheriffs the body of Hales, and then and

before any [1028] breach of the said condition, and before the time for Hales's rendering himself according to the practice of the said court and the said condition, had expired, and before the commencement of this suit, to wit, on, &c., and according to the practice of the said court, committed Hales into the custody of the marshal, in execution, at the suit of the plaintiff, upon the said judgment, for the sum of money so recovered as aforesaid; and the said marshal then received and had and kept and detained Hales under and by virtue of the said commitment, and in execution, at the suit of the plaintiff, upon the said judgment, and according to the practice of the said court, until and after the return day of the ca. sa., for a long space of time thereafter, to wit, hitherto; of all which premises the plaintiff afterwards, and before the commencement of this suit, to wit, on, &c., had notice. After setting out the sheriff's return to the ca. sa., the plea concluded, that, from the time of the recovery of the said judgment until Hales was so taken and arrested under the ca. sa., Hales was always ready and willing to render himself to the custody of the gaoler of the said court, according to the practice of the said court and to the said condition, and afterwards and whilst he so remained in custody as aforesaid, was ready and willing to render himself, and would have rendered himself accordingly, but that he was prevented by the plaintiff from so doing, in manner aforesaid, and which last-mentioned premises the plaintiff during the respective times last aforesaid well knew.

Fourthly, that, after the making of the bond, and before the commencement of the suit, the plaintiff brought an action against Heffer and Hales in the Queen's Bench, for the recovery of the alleged debt in the said condition mentioned, and by the consideration and judgment of that court recovered against them 924l. 1s.; that afterwards, and before the commencement of this [1029] suit, to wit, on the 11th of February 1843, by an order of Coleridge J., it was ordered that Hales should be at liberty to surrender himself to the custody of the keeper of the Queen's Prison, in discharge of his sureties in the said bond in the declaration mentioned, thereby meaning the now defendant and Thomas Cope; that, thereupon, and before any breach of the said condition, and before the commencement of this suit, and according to the said condition of the said writing obligatory, and within a reasonable time in that behalf, to wit, on, &c., Hales did duly surrender himself to the custody of the said keeper of the Queen's Prison, in discharge of his said sureties accordingly, and was then duly, and according to the practice of the said court, committed by Coleridge J. to the custody of the keeper of the Queen's Prison for the said sum of money so recovered by the said judgment as aforesaid; and the keeper of the Queen's Prison then received Hales into his custody, and detained him in custody under the said commitment, and in execution on the said judgment, for a long space of time, to wit, hitherto; and that of all the premises the plaintiff afterwards, to wit, on, &c. had notice; and that the plaintiff, afterwards, and before the commencement of the suit, to wit, on, &c. assented to and adopted (vide ante, 236) such surrender and commitment and imprisonment of Hales as last aforesaid.

Bompas Serjt. moved to set aside the judge's order. The first and fourth pleas are substantially the same, and the second and third are inconsistent, and ought not to have been allowed. [Erskine J. The eighth section of the 1 & 2 Vict. c. 110 (b), makes a

(b) Which enacts, "that, if any single creditor, or any two or more creditors being partners, whose debt shall amount to 100l. or upwards, or any two creditors whose debt shall amount to 150l. or upwards, or any three or more creditors whose debt shall amount to 200l. or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in Her Majesty's courts of Bankruptcy, that the said debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to

Sir Samuel Egerton Brydges conveyed his remainder or reversion in fee-simple, immediately expectant upon the decease of the said Caroline Stephens of and in the said marsh lands unto and to the use of the Rev. Matthew Robinson and William Hougham (both since deceased), their heirs and assigns for ever, by way of mortgage; that the said Caroline Stephens died in or about the month of March 1824; that the said Matthew Robinson died in the year 1827; that the said William Hougham died in the year 1828, leaving Catharina, the wife of John Chesshyre, his heir-at-law, him surviving; that, by indentures of lease and release, bearing date respectively the 7th and 8th of April 1840, between George Morrice Taswell, of the first part, the said John Chesshyre and Catharina his wife, of the second part, and the said Thomas Bacon and Edward Thornton, of the third part, the said John Chesshyre and Catharina his wife conveyed the said marsh lands and [1036] premises unto, and to the use of, the said Thomas Bacon and Edward Thornton, their heirs, &c., subject to redemption, &c.; that Dame Isabella Ann Brydges was the widow of Sir John William Head Brydges, and derived her title through him, as his devisee for life, of his real estates; that she contended that the said marsh lands were gavelkind lands, and, as such, descended, on the decease of the said Caroline Stephens in 1824, to the said Sir Samuel Egerton Brydges and John William Head Brydges, as co-heirs in gavelkind of the said Edward Timewell Brydges; that the lessors of the plaintiff were advised that it might be material at the trial of this cause, to rely on a demise by the said John Chesshyre and Catharina his wife; and that it was believed, that the insertion of such demise in the declaration, would not vary the merits of the question tried on the former trial, and again intended to be tried in this cause, or in any manner affect or prejudice the defence to the action, upon the merits.

Bompas and Clarke Serjts. now shewed cause. No authority can be cited for allowing, at this stage of the proceedings, an amendment like the present, which goes to introduce a new cause of action; and only one instance is to be met with, of a demise being permitted to be inserted after the record was made up; *Doe v. Rumsford*(a). The reasons assigned for the amendment are not such as will induce the court to establish a precedent for such a course in future. [Tindal C. J. If the object of the amendment is to get rid of a formal objection, it would be idle to encounter the expense of another trial in the present state of the record.] By the amendment proposed, the defendant will be prejudiced; for, the lessors of the plaintiff will be enabled to abandon [1037] one demise at the trial, and so prevent the defendant from giving evidence which, though admissible as the record now stands, might not be so in its altered state. In *Doe d. Poole v. Errington* (1 M. & Rob. 343, 1 A. & E. 750, 3 N. & M. 646), in ejectment on a joint demise by two, the plaintiff was not allowed to amend under 3 & 4 W. 4, c. 42, s. 23, by substituting several demises.

Sir T. Wilde and Channell Serjts., in support of the rule. It is clear that it is in the discretion of the court to allow amendments in any stage of a cause. Cases may be cited of counts having been added, even after trial; and there is nothing in the nature of an action of ejectment, to make it an exception to the general rule. *Doe d. Poole v. Errington* is not applicable. All that was decided there was, that the court would not interfere with the discretion of the judge at nisi prius, who had refused to allow the amendment. In *Billing v. Flight* (6 Taunt. 419), where the plaintiffs had brought an action of assumpsit, for money had and received, to recover back differences paid on stock-jobbing contracts, and filed a bill of discovery, to which the defendant pleaded that the discovery was given by the 7 G. 2, c. 8, s. 2, in actions of debt, the plaintiffs were permitted to amend by changing their declaration in assumpsit into a declaration in debt, although six terms had elapsed from the commencement of the action. In *Storr v. Watson* (2 Scott, 842), after issue joined and a peremptory undertaking to try, the plaintiff was permitted to amend his declaration by substituting a count in trover for a count in case for negligence in the keeping of the plaintiff's goods. The court there said: "To compel the plaintiffs to bring another action, would only be entailing upon them an useless expense, without at all benefiting [1038] the defendant. We therefore think they ought to be allowed to turn the present count into a count in trover, upon payment to the defendant of the costs occasioned by the amendment, and the costs of the application, including the costs of the day arising from the

(a) 1 Chitt. R. 536; Ad. Eject. 3d ed. 199; and see *Doe dem. Beaumont v. Armilago*, 1 D. & R. 173, 2 Chitt. R. 302.

plaintiffs not having proceeded to trial: the defendant to be at liberty to plead *de novo*." In *Legge v. Boyd* (6 New Cases, 240, 8 Scott, 502), the plaintiff had commenced an action of trover against the collector of customs for the port of London, on the 2d of January, 1837, to recover the value of certain tobacco, the bill of entry of which the defendant had refused to sign, so as to enable the plaintiff to obtain it on payment of the lesser duty payable on wrecked goods (*b*). The time limited for bringing such an action, expired on the 10th of February. On the 13th of May, the facts were stated on both sides in a case for the opinion of the court, one of the questions in the case being, whether or not the defendant was liable in this form of action. The plaintiff suspended his proceedings to await the decision of the court of Queen's Bench in a case there pending, which involved a similar question. That court having, in June 1839, decided that an action on the case would lie for the non-feasance, the plaintiff, in the following Michaelmas term, applied for leave to amend his declaration, by adding a count in case: and the court allowed the amendment. Maule J., there says: "The plaintiff does not seek to vary the state of facts agreed to in May 1837; but to add a count in order aptly to raise the question then intended to be tried." So, here, the lessors of the plaintiff do not wish to vary the state of facts appearing on the former trial. They seek only to add a fresh demise in order that the question then raised may be fairly and properly tried. [Maule J. If the lessors of the plaintiff will undertake to admit under the amended [1039] declaration all evidence that is admissible as the record now stands, and not to abandon either demise at the trial, no difficulty will remain, and the amendment ought to be allowed.]

This was agreed to; and the rule was drawn up, by the direction of the Lord Chief Justice, as follows:—

That, on payment of the costs of and occasioned by the amendment and of the application, the declaration and other proceedings in this cause, be amended, by adding a new demise from John Chesshyre and Catherina his wife to the plaintiff, such demise to be stated on the same day as that stated in the present demise, the plaintiff's lessors, by their counsel, hereby consenting that all evidence shall be admissible on the trial of this cause as would have been admissible if such amendment had not been made.

BENTLEY v. JAMES KEIGHLEY AND ANOTHER. Jan. 27, 1844.

[S. C. 7 Scott, N. R. 987; 1 D. & L. 944; 13 L. J. C. P. 167.]

In case for an infringement of a patent, for six distinct improvements in an old machine, the defendants were allowed to plead that two parts of the invention were not, nor was either of them, a new manufacture within the statute of James. But the court refused to allow them to plead, that, as to a part, one A. B. was the first and true inventor; and that, before the grant of the patent, A. B. and others publicly used and exercised in England a part of the said invention.

Case, for an alleged infringement of a patent granted to one William Carr Thornton, for "certain improvements in machinery or apparatus for making cards for carding cotton and other fibrous substances," of which the plaintiff was assignee. The declaration, after setting out the letters patent, bearing date the 21st of December 1841, and averring that W. C. Thornton [1040] did, within six months, make, and duly enrol, a specification; that, by indenture of the 29th of November 1842, W. C. Thornton assigned the patent to one Joseph Williamson, and that Williamson, by indenture of the 1st of May 1843, assigned the same to the plaintiff,—alleged that the defendants, "to wit, on the 2d of May 1843, and on divers other days and times between that day and the commencement of the suit, and within that part of the United Kingdom of Great Britain and Ireland called England, unlawfully and unjustly, without the leave, licence, consent, or agreement of the plaintiff in writing under his hand and seal, or otherwise, for that purpose had and obtained, and against the will of the plaintiff, did make, use, exercise, and vend the said invention of the said W. C. Thornton, in breach of the said letters patent, and against the privileges so thereby granted as aforesaid; and also, to wit, on the several and respective times last aforesaid, within

(b) The goods were held not to be wrecked goods; 1 C. B. 92.

that part of the United Kingdom of Great Britain and Ireland called England, unlawfully and unjustly, without the leave, licence, consent, or agreement of the plaintiff in writing under his hand and seal, for that purpose first had and obtained, and against the will of the plaintiff, did make, use, and put in practice the said invention, in breach of the said letters patent, and against the privileges so thereby granted as aforesaid; and also, to wit, on the several and respective days and times aforesaid, within that part of the United Kingdom of Great Britain and Ireland called England, unlawfully, wrongfully, and unjustly, without the leave, licence, consent, or agreement of the plaintiff under his hand and seal, for that purpose first had and obtained, and against the will of the plaintiff, did make, use, and put in practice a part of the said invention, in breach of the said letters patent, and against the privileges so thereby granted as aforesaid; and also, to wit, on the several and respective days and times as afore-[1041]-said, in England aforesaid, wrongfully and unjustly, without the leave, licence, consent, or agreement of the plaintiff under his hand and seal for that purpose first had and obtained, and against the will of the plaintiff, did counterfeit, imitate, and resemble the said invention, in breach of the said letters patent, and against the privileges thereby granted as aforesaid; and also, to wit, on the several and respective days and times aforesaid, within England aforesaid, unlawfully and unjustly, without the leave, licence, consent, or agreement of the plaintiff in writing under his hand and seal in that behalf first had and obtained, did make and cause to be made divers additions to the said invention and subtractions from the same, whereby they did pretend themselves to be the inventors and devisors of the said invention, in breach of the said letters patent, and against the privileges so thereby granted as aforesaid: by means," &c.

Upon a summons for leave to plead several matters, the defendants sought to plead the following pleas:—

First, not guilty.

Secondly, that the said W. C. Thornton was not the true and first inventor of the alleged invention in the declaration mentioned, *mode et forma*.

Thirdly, that one Mordecai Robertshaw, at the time of making the said letters patent, was the first and true inventor of a part of the said invention, being a part thereof, for vesting the sole use and exercise of which in the said W. C. Thornton, his executors, administrators, and assigns, the said letters patent were granted as aforesaid.

Fourthly, that one James Walton, at the time of making the said letters patent, was the first and true inventor of a part of the said invention, being a part thereof, for vesting the sole use and exercise of which, in the said W. C. Thornton, his executors, &c., the said letters patent were granted as aforesaid, &c.

[1042] Fifthly, that the said alleged invention was not at the time of granting the said letters patent a new invention as to the public use and exercise thereof within that part of the United Kingdom of Great Britain and Ireland called England, within the meaning of the said letters patent.

Sixthly, that, before and at the time of making the said letters patent, to wit, on the 1st of January 1830, and on divers other days and times between that day and the time of making the said letters patent, the said Mordecai Robertshaw and others, publicly used and exercised in England aforesaid, a part of the said invention, being a part thereof for vesting the sole use and exercising of which in the said W. C. Thornton, his executors, administrators, and assigns, the said letters patent were granted.

Seventhly, a similar plea alleging a public user by James Walton and others.

Eighthly, that the said alleged invention was not nor is a new manufacture, within the meaning of the statute concerning monopolies and dispensation of penal laws, made and passed, in that behalf, in the reign of his late Majesty King James the First.

Ninthly, that divers, to wit, two parts of the said invention, being respectively parts thereof for vesting the sole use and exercise of which in the said W. C. Thornton, his executors, administrators, and assigns the said letters patent were granted, were not nor was either of them a new manufacture within the true intent and meaning of the last-mentioned statute.

Tenthly, that the said W. C. Thornton did not cause the said instrument in writing in the declaration in that behalf mentioned to be inrolled in the high court of chancery

at Westminster within six calendar months next and immediately after the date of the said letters patent, *modo et formâ*.

[1043] Eleventhly, that the said W. C. Thornton did not particularly describe and ascertain the nature of the said alleged invention, and in what manner the same was to be performed, according to the meaning of the said letters patent.

Twelfthly, that the said W. C. Thornton did not grant, bargain, sell, assign, transfer, or set over unto the said Joseph Williamson the said letters patent, or the benefits, advantages, or privileges incident to, or conferred by, the same, *modo et formâ*.

Thirteenthly, that the said Joseph Williamson was not at the time of making the said indenture in the declaration mentioned to have been made on the 1st of May 1843, between the said Joseph Williamson of the one part, and the plaintiff of the other part, possessed of the said letters patent, or the powers, privileges, or authorities thereby granted (a), *modo et formâ*.

Fourteenthly, that the said Joseph Williamson did not grant, bargain, sell, &c. unto the plaintiff the said letters patent, or the benefits, advantages, or privileges incident to, or conferred by, the same.

Coltman J. having disallowed, at chambers, the third, fourth, sixth, seventh, and ninth pleas,

Sir T. Wilde Serjt. moved for a rule nisi to add the rejected pleas. The patent is for six several improvements in Dyer's machine. The specification sets out six distinct improvements, each directed to a different object, the machine being complete with each of the improvements without the others, and claims the machine as a new combination of the whole, and seeks protection for each part. The pleas sought to be pleaded are addressed to these several parts. If the defendants were [1044] to plead merely that Thornton was not the true and first inventor of the alleged invention, they would merely put in issue his invention of the whole as a machine; and although at the trial it should be proved that certain parts were not new, a question would arise as to whether the plea was established. [Cresswell J. If put in issue, is not the plaintiff, unless he disclaims, bound to prove the novelty of the whole?] It is a new combination. [Cresswell J. If he claims six things, must he not prove the novelty of each?] The cases of *Brunton v. Hawkes* (4 B. & Ald. 541), *Hill v. Thomson* (8 Taunt. 375, 2 J. B. Moore, 424), and *Kay v. Marshall* (5 New Cases, 492. 7 Scott, 548), occurred before the new rules. [Maule J. The pleas allowed negative Thornton's being the true and first inventor of all which he claims to have invented. In order to support the issues thereon must not the plaintiff prove Thornton to have been the inventor of each of the improvements claimed? Unless each is the subject of a patent, the whole is not.] The defendants wish to add these pleas, lest they should be told hereafter that the question should have been raised in a different manner. [Maule J. It seems to me that, under the pleas allowed, the defendants may avail themselves of the defence which they seek to raise under the pleas which they wish to add to the record.] The parties may be entitled to a patent for the whole, but not for each part. This question is so doubtful that the defendants ought not to be excluded from raising it. [Tindal C. J. As to the ninth plea the rule may go; for, as to that, there may be some doubt.]

Bompas Serjt. (with whom was Spinks), now shewed cause. The proposed plea is clearly not good, for it is no defence to say that part is not a new manufacture; [1045] but if the defence sought to be set up be any defence at all, it can be raised under the eighth plea. In *Brunton v. Hawkes*, the defendant was allowed, under the general issue, to prove that the anchor which was the subject of the patent in question, was not a new invention. [Maule J. It may be true that the whole may be a new manufacture, and that part may not; but if you plead that the whole is novel you undertake to prove that the whole is new.]

TINDAL C. J. I think the defendants are fairly entitled to say that some parts of the invention are not a new manufacture, and that they ought to be allowed to plead the plea in question. I do not see that it will introduce any confusion; for, it rather points the plaintiff's attention to that which will be the subject of contest at the trial.

(a) This plea appears to be bad, as traversing merely a conclusion of law; since, if Thornton was possessed, and assigned to Williamson, the latter would necessarily be possessed.

MAULE J. The ninth plea should be allowed, unless it appears to the court that it amounts to the same as the eighth plea, already allowed. It is said that under the eighth plea you may shew that part of the invention is not a new manufacture. But the circumstance of the whole combined being new is quite consistent with the fact of each separately not being a new manufacture within the statute. I think it is by no means certain that the plea is bad, or that the matter contained in it would be admissible in evidence under the general plea already allowed. The defence may perhaps be admissible under that plea: but it would not be a convenient course; for it might give rise to an awkward question as to what the issue raised by that plea really was.

CRESSWELL J. concurred.

Rule absolute.

[1046] IN THE MATTER OF JANE WORTHINGTON WAY AND ANN
DUNCALF CAMPBELL. Jan. 31, 1844.

Upon an acknowledgment of a conveyance by a married woman, taken in a township in Pennsylvania, the court, in lieu of a notarial certificate, received a certificate of an officer describing himself as "the prothonotary and clerk of the court of Common Pleas in and for Centre County, Pennsylvania," it being sworn that there was no notary public within eighty miles of the place.

Talfourd Serjt., moved for a direction to the proper officer, to receive and inrol the certificate of acknowledgment of Mrs. Way and Mrs. Campbell, with the affidavit of verification, under the 3 & 4 W. 4, c. 74, s. 85, notwithstanding the absence of the proper notarial certificate. The acknowledgment was taken at the township of Half-moon, Centre County, Pennsylvania, in the United States. There was a certificate in due form signed by Charles Carpenter, describing himself therein as "prothonotary and clerk of the court of Common Pleas in and for Centre County, Pennsylvania, in the United States of North America." The affidavit of Gerard Ralston, a merchant in London, was produced, in which the deponent stated himself to be a native of Pennsylvania, and well acquainted with the laws and customs of that state, and alleged that the prothonotary performs the like duties that are performed by the masters here (a), and that no notary public resided within eighty miles of the place where the acknowledgment was taken and the affidavit sworn.

Per curiam. That is reasonably sufficient to satisfy us.

Fiat.

[1047] WATTS v. LYONS. Jan. 20, 1744.

[S. C. 7 Scott, N. R. 1000; 13 L. J. C. P. 91.]

In an action by A., a contributor to a newspaper, against B., who was registered as sole proprietor, the defendant's counsel, to prove that J. S. was the real proprietor, proposed on cross-examination to ask the editor whether he had not agreed with J. S. that the whole expense of editing the paper should not exceed a certain sum. The judge ruled the question to be irrelevant, and refused to allow it to be put: Held, that it was properly disallowed.

Assumpsit, for work and labour. Plea, non assumpsit.

At the trial before Cresswell J., at a sitting in Middlesex during the present term, the plaintiff claimed remuneration, at the rate of two guineas per week, in respect of articles written by him for the *Conservative Journal*, between May and October 1841. The defendant was registered at the stamp-office, as sole proprietor of the work. O'Brien, the editor, being called to prove a contract by an admission, stated that it had been proposed between the defendant and the witness that the plaintiff should have the benefit of the plaintiff's writing, and that the defendant informed him he had asked the plaintiff to do so, and that the defendant told the plaintiff he would see him

(a) The deponent does not swear to his knowledge of the duties performed by the masters.

paid, without reference to any thing between the defendant and other parties; and thereupon the plaintiff agreed to write.

For the defendant it was contended that A. Spottiswoode was the real proprietor, and that the engagement to see the plaintiff paid was a special agreement for the debt or default of another, the effect of which would be to render the defendant if liable at all, collaterally, and not primarily, responsible. The defendant's counsel proposed to ask O'Brien whether he had not agreed with Spottiswoode that the cost of editing should not exceed six guineas per week. This question was objected to as *res inter alios acta*: and the learned judge refused to allow it to be put.

A previous contract between the plaintiff and Spottiswoode, for the literary services of the former, was proved.

[1048] The learned judge told the jury, that, notwithstanding the first contract between the plaintiff and Spottiswoode, if by a new engagement with the plaintiff, the defendant took upon himself a primary liability, the plaintiff was entitled to sue him upon such new contract, although such contract was not in writing.

A verdict was found for the plaintiff, damages 10*l.* 10*s.*

Byles Serjt., now moved for a new trial, on the ground of misdirection, of the improper rejection of evidence, and that the verdict was against evidence. The question proposed to be put to O'Brien tended to prove ownership in Spottiswoode—a most important fact in the cause,—and ought to have been allowed (a)¹.

TINDAL C. J. The question was proposed to be put, not as going to the credit of the witness, but to shew ownership in Spottiswoode. The answer, if received, would have amounted, at the most, to an admission on the part of Spottiswoode; it would not have proved any act done by him. I think there is no ground for a new trial.

ERSKINE J. An answer to the proposed question could only have proved the admission of a fact by Spottiswoode, which would not have been evidence between these parties.

MAULE J. The question proposed to be asked was sought to be put with a certain view. The learned judge thought it was not admissible on the ground suggested; and it seems to have been no further pressed. If the question had been proposed to be put as being evidence generally, the learned judge would have had [1049] to consider whether it might not be admissible for some purpose. That which he did decide, I think was rightly decided.

CRESWELL J. concurred.

Rule refused.

EX PARTE HUGH ROBERTS. Jan. 31, 1844.

A Welch attorney, duly admitted an attorney of the courts at Westminster under the 11 G. 4 & 1 W. 4, c. 70, having, by the neglect of his agent, practised without a certificate before the passing of the 6 & 7 Vict. c. 73, he was, upon producing the proper document, permitted to sign the roll of attorneys.—Sembles, that since the latter act, a rule for readmission is unnecessary and improper.

This was an application on behalf of Mr. Roberts, an attorney of the court of Great Sessions in Wales, who had been duly admitted in the Queen's Bench, Common Pleas, and Exchequer, under the 11 G. 4 & 1 W. 4, c. 70. By the neglect of his agent, he was off the roll a year and a half. Before the passing of the 6 & 7 Vict. c. 73, the court of Exchequer, upon an affidavit of the circumstances, readmitted him. He was afterwards readmitted in the Queen's Bench, without giving notice.

Dowling Serjt. now moved, that Mr. Roberts might be readmitted in this court. [Tindal C. J. Being an attorney of the superior courts, he may come and sign the roll here under the twenty-seventh section of the 6 & 7 Vict. c. 73 (a)². No rule for

(a)¹ The objection that the defendant was not the party primarily liable was renewed; and it was urged, that to make the defendant even collaterally liable, an agreement in writing was necessary under the statute of frauds; but this point was not particularly noticed by the court.

(a)² Which enacts, "that every person who shall have been duly admitted an attorney of any one of the superior courts of law at Westminster, shall be entitled, upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as an attorney in any other of the

his readmission is [1050] necessary : let him come and sign the roll. The only case in which a rule is necessary, is that pointed out by sect. 25 (a)¹.] The twenty-seventh section does not apply to readmission. [Maule J. The statute when speaking of admission comprehends readmission. The party having been readmitted in the exchequer, he is an admitted attorney of that court, and entitled to practise here, upon signing the roll of this court.] In *Yates, Ex parte* (2 M. & Scott, 618), it was held, that, where an attorney has been struck off the roll of this court, merely in compliance with a rule of the court of King's Bench for striking him off the roll of that court, this court will readmit him upon his being readmitted in the King's Bench, without inquiring into the circumstances of the case.

TINDAL C. J. This is a point of considerable difficulty. I entertain great doubt whether the party can properly be admitted here by rule, without signing the roll. Let the matter stand over until next term, that it may be more fully looked into (c).

Dowling took nothing (d).

[1051] CLARK v. SMITH. Jan. 27, 1844.

A judgment signed by the plaintiff's attorney after notice that the plaintiff had released the action,—in which he had obtained a verdict for nominal damages, upon payment by the defendant to the plaintiff of a sum of money for debt and costs, considerably less than the amount of taxed costs, in the absence of the plaintiff's attorney,—was set aside without costs.

A verdict for 40s. having been obtained in an action for an assault, the plaintiff's attorney taxed his costs, and signed judgment on the 16th of November last for 78l. 5s. 6d., damages and costs.

Shee Serjt. in last Michaelmas term, obtained a rule calling upon the plaintiff and his attorney to shew cause, why the judgment should not be set aside, with costs, to be paid by the attorney. The affidavits on which the rule was granted stated, that shortly after the trial, the plaintiff, being about to proceed to Cornwall upon some mining speculation, and having been informed that it was the intention of the defendant to move for a new trial, employed a friend to propose an arrangement ; and that it was ultimately agreed that the defendant should pay to the plaintiff fifty guineas for damages and costs (a)², which sum was accordingly paid ; and that the plaintiff signed a receipt for that sum, and executed a release (b) of the action, and that the

said courts, or in any inferior court of law in England and Wales, upon signing the roll of such other court, but not otherwise ; and shall thereupon be entitled to practise as an attorney therein in like manner as if he had been sworn in and admitted an attorney of such court."

(a)¹ Which enacts, "that, if any attorney or solicitor shall neglect to procure an annual stamped certificate, authorising him to practise as such, within the time by law appointed for that purpose, then, and in such case, the said registrar shall not afterwards grant a certificate to such attorney or solicitor without the order—of the master of the rolls, in the case of a solicitor,—or, of one of the courts of Queen's Bench, Common Pleas, or Exchequer, or of one of the judges thereof, in the case of an attorney,—authorising such registrar to issue such certificate ; and it shall be lawful for the Master of the Rolls, or for such court or judge, to make such order, upon such terms and conditions as he or they shall think fit."

(c) The case was not mentioned again.

(d) See *Thompson, Ex parte*, 5 New Cases, 380, 7 Scott, 343 ; *Martin, Ex parte*, 5 M. & W. 1.

(a)² The damages being nominal, or much less than the extra-costs would amount to, the whole of the 78l. 5s. 6d. recoverable in the action, was, at the time of the arrangement between the plaintiff and the defendant, due from the defendant to the plaintiff's attorney, and no part of it was receivable by the plaintiff for his own use. This arrangement, therefore, was, upon the defendant's own shewing, neither more nor less than the sharing, by two parties, of property belonging to a third. The plaintiff's affidavit, if true, would further shew that the defendant, after agreeing with the plaintiff to cheat the attorney, had cheated the plaintiff also.

(b) Quære the necessity for a release except for the purpose of getting rid of the attorney's lien.

judgment was signed by the plaintiff's attorney after notice of the settlement of the action. The affidavit of [1052] the defendant himself stated that he had not colluded with the plaintiff in obtaining the release, or contemplated defrauding the plaintiff's attorney of his costs.

It was competent to the parties thus to settle the action, unless the parties acted collusively, and for the mere purpose of prejudicing the rights of the plaintiff's attorney: *Nelson v. Wilson* (6 Bingh. 568, 4 M. & P. 385), *Gould v. Davis* (1 Tyrwh. 380, 1 Dowl. P. C. 288, 1 C. & J. 415), and *Jordan v. Hunt* (3 Dowl. P. C. 666). A rule nisi being granted,

Bompas Serjt. now shewed cause, upon affidavits imputing collusion on the part of the defendant with intent to cheat the plaintiff's attorney of his costs. In one of the affidavits, made by the plaintiff, he stated, that, though he gave a receipt for fifty guineas, he received only 10l., and that he was induced to accede to the proposed arrangement, by a representation made to him on the part of the defendant, that his attorney would still be entitled to have recourse to the defendant for his costs.

Although the parties to an action may enter into a compromise in the absence of their attorneys, such compromise must not be effected collusively, and with the view of defeating the lien of the plaintiff's attorney. In *Toms v. Powell* (6 Esp. N. P. C. 40), it was ruled by Lord Ellenborough, that where a defendant, after the writ is sued out, pays the plaintiff the debt without paying the costs, the attorney may proceed in the action for the purpose of recovering the costs. *Swain v. Senate* (2 N. R. 99), *Graves v. Eades* (5 Taunt. 429).

Shee Serjt., in support of the rule. It has long been settled, that a plaintiff may, without consulting his attorney, compromise the action and take upon himself the payment of his attorney's costs, if there be no fraudulent [1053] conspiracy to cheat the attorney (*a*). *Chapman v. Haw* (1 Taunt. 341), *Nelson v. Wilson* (6 Bingh. 568, 4 M. & P. 385), *Gould v. Davis* (1 Tyrwh. 381, 1 C. & J. 415, 1 Dowl. P. C. 288), *Young v. Redhead* (2 Dowl. P. C. 119). In *Jordan v. Hunt* (3 Dowl. P. C. 666), Parke B. says: "It is quite competent to parties to settle actions behind the backs of the plaintiff's attorney; for, it is the client's action, and not the attorney's. It must be shewn, affirmatively, that the settlement was effected with the view of cheating the attorney of his costs. Nothing would be got by letting the case go to trial; for, the settlement after action brought, may be pleaded in bar to the further maintenance of the action, and would be a good answer to it." In the affidavits on which this rule was obtained, collusion is distinctly denied; and the affidavit filed on the part of the plaintiff, or rather of his attorney, does not negative that denial.

TINDAL C. J. In this case final judgment has been signed for the plaintiff without his authority. It may nevertheless be that the judgment ought to stand. The question is, whether we can so clearly see that the plaintiff and the defendant have fraudulently colluded, to deprive the plaintiff's attorney of his remedy against the defendant for his costs, as to justify us in permitting the attorney to retain the judgment. It is for him to make out a case of collusion. In the cases which have been referred to, the court does not appear to have lent its assistance to the plaintiff's attorney, except when it was clearly shewn that the plaintiff and defendant had colluded and conspired together to defraud the attorney. Here, the defendant expressly denies collusion; and the [1054] plaintiff's affidavit merely states that he acted under an impression that the settlement of the action would not deprive his attorney of his claim on the defendant for costs. The statement of both sides, therefore, appears to me to negative fraud. The defendant states in his affidavit that the sum paid by him was 52l. 10s. If that be so, he paid a sum nearly equal to the whole amount of damages and costs. The plaintiff states that the sum which he received was 10l. only, though he was induced to sign a receipt for 52l. 10s. These contradictory statements make it difficult to say, what was really paid and received. Had we been satisfied that the plaintiff accepted a sum of 10l. in discharge of a much larger demand, we might have arrived at a different conclusion from that to which we now come under an impression that the payment amounted to 52l. 10s. I think the plaintiff's attorney has failed to make out a case

(a) Here, the damages being nominal, there was nothing to compromise except the costs of the attorney, who was no party to the compromise; *supra*, 1051 (a).

for interference with the right of the parties to compromise the action. The judgment signed after notice of the release, must therefore be set aside.

MAULE J.(a)¹. I am of the same opinion. The plaintiff and defendant settled the action in the absence of their attorneys. The plaintiff's attorney had therefore no right to sign judgment. It lies upon him to shew why it should not be set aside. The ground upon which he seeks to sustain the judgment, is, that the settlement was the result of a fraudulent collusion between the plaintiff and defendant to deprive him of his costs. I think the affidavits, which are in some respects contradictory, leave that matter quite uncertain.

CRESSWELL J. concurred.

Rule discharged, without costs.

[1055] WEBB v. BEAVAN. Jan. 25, 1844.

[S. C. 7 Scott, N. R. 936.]

In trespass for entering a yard, the defendant was allowed to plead that he entered for the purpose of viewing a mare then in a stable in the yard, which had been recently stolen from him.

Trespass, for breaking and entering the plaintiff's yard, and taking away his mare. The defendant took out a summons for leave to plead,—first, to the whole declaration, not guilty; secondly, as to entering the yard, a justification on the ground that the defendant entered for the purpose of viewing a mare belonging to him, which had been recently stolen, and was then in a stable within the yard; thirdly, as to the same trespasses, leave and licence; fourthly, as to taking away the mare, a traverse of the mare being the plaintiff's.

Upon the hearing of the summons at chambers, the learned judge allowed the first, third, and fourth pleas, and refused to allow the second.

Talfourd Serjt. on a former day in this term obtained, on behalf of the defendant, a rule to shew cause why he should not be at liberty to plead the proposed second plea also.

Channell Serjt., *contra*. The proposed plea is clearly bad. It can only be pleaded to invite a demurrer (a)².

Talfourd Serjt., in support of the rule. The plea is sufficient. A party may enter another man's land to take his own goods which are wrongfully there; Com. Dig. tit. Trespass (D).

TINDAL C. J. The plea is, I think, arguable. It is [1056] not so clearly bad, that the defendant ought to be deprived of the power of pleading it.

Per curiam. Rule absolute (a)³.

End of Hilary Term.

(a)¹ Erskine J. was absent.

(a)² The defendant does not appear to have been under terms to plead issuably. Vide *Wilkinson v. Page*, ante, 1012.

(a)³ Trespass does not lie for the occupier of land against a party who enters to retake goods wrongfully brought into the close by the plaintiff; 2 Roll. Abr. 565, l. 54 (20 Vin. Abr. 515), citing M. 9 E. 4, fo. 35, where Littleton J., speaking of the right of a miller to abate a nuisance without bringing an action, says, "It seems to me that he may well draw out and tear away the stakes; for they were levied to his nuisance; and if he were to wait until he sued his action, his land might be overflowed, and he might lose the profit of his mill in the mean time. And, it seems to me, that the entry of the defendant into the plaintiff's land to defeat the nuisance, was lawful (congeable); for the wrong which was done, was the act and wrong of the plaintiff himself; as if a man takes my goods and brings them upon his own land, I can enter into his land and take my goods, for the entry is lawful; for they came upon his land by his own wrong. But it is otherwise if I bail goods to a man,—I cannot enter his house and take the goods; for they did not come there by wrong, but by the act of us both, &c. . . . And the law is the same if a man, by negligence, suffer his house to burn, I, who am his neighbour, may break down his house to avoid the peril

which might come to me from the burning ; for, if I suffer the house to stand, it may burn so that I cannot quench the fire afterwards. And if water runs juxta villam, and the water is stopped, every one of the town may remove the obstruction ; as otherwise all the town will be overflowed, &c. And if a man imprison me wrongfully in his house, I may break the windows and doors to go out, &c. ; for, in all these cases, the wrong is done by the plaintiff himself ; so here." So, the entry upon the plaintiff's land would appear to be lawful if the defendant's goods were brought there with the privity of the plaintiff, or, it would seem, if brought there by any person who was upon the close with the permission of the plaintiff. Vide ante, 12.

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